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DIGEST
OF THE
DECISIONS OF THE SUPREME COURT
OF
IDAHO

COVERING ALL CASES REPORTED IN VOLUMES 1 TO 24,
IDAHO REPORTS,

TOGETHER WITH

TABLE OF CASES OF ALL IDAHO DECISIONS EMBRACED IN THIS DIGEST,
SHOWING UNDER WHAT SUBJECT AND WHERE THE CASES ARE
DIGESTED, AS WELL AS THE VOLUME AND PAGE OF THE
IDAHO AND PACIFIC REPORTS WHERE
REPORTED

COMPILED BY

JOHN M. FLYNN, A.M., L.L.B.,
District Judge, Eighth Judicial District of the State of Idaho

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1914

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PREFACE.

The urgent need of an up-to-date digest is the main reason for the presentation of this volume to the profession. In compiling the digest, I have read and studied the cases and have endeavored to follow the classification system of the Century and American digests as far as possible, preserving the subdivisions of various topics in many cases where there were no points decided which should be classified under such subdivisions. Careful attention to the cross-references will be of material assistance in the use of the digest.

The table of cases is very complete, in that it shows not only where the cases are reported in the Idaho Reports and Pacific Reporter, but in addition shows, by reference to the page of this digest, where the cases are digested herein, and also gives the title or subject under which the cases are digested.

To the names of the cases in the body of the digest there have been added cumulative references, which show where these cases are reported in the Pacific Reporter and in the various series of Selected Cases. There have also been added, under the title "Editorial Notes," index references to the more important monographic notes or annotations published in the various series of Selected and Annotated Cases.

Sand Point, Idaho, July, 1914.

JOHN M. FLYNN.

DIGEST

OF

IDAHO REPORTS.

VOLUMES 1 TO 24, INCLUSIVE.

ABANDONMENT.

By townsite occupant. See Public Lands, II, (B), 5.
Of contract by purchaser, effect on agent's right to commissions. See Brokers.
Of mining claims. See Mines and Minerals, I, (B), 3, (1).
Of one of two remedies. See Election of Remedies.
Of contract. See Contracts, IV.
Of homestead. See Homestead, IV.
Abandonment of right of parent to custody of child. See Parent and Child.

ABATEMENT AND REVIVAL.

Suspension of action on notes where defendant has been subject to garnishment. See Fraudulent Conveyances, III.
Pendency of action by mortgagee to foreclose bars his action for claim and delivery. See Chattel Mortgages, IX, (B).
Effect of death on right or proceedings of appeal. See Appeal and Error, VI, XVII, (A).

A cause of action arising out of a transaction stated in the complaint or connected therewith must be set forth by answer as a counterclaim and cannot be made the basis of another suit by defendant.—Stevens v. Home Savings & Loan Assn., 5 Idaho, 741, 51 Pac. 779.

Where a mortgagor has sued to compel the satisfaction of a mortgage alleged to have been fully paid, the pendency of such suit is a ground for demurrer under R. S., 4174, to a complaint in a subsequent suit to foreclose the mortgage.—Stevens v. Home Savings and Loan Assn., 5 Idaho, 741, 51 Pac. 779.

Where a person brings an action to quiet title and alleges as one of his causes of action damages for trespass and then dismisses his cause of action for damages, he is estopped from thereafter bringing an action for such damages.—Shields v. Johnson, 12 Idaho, 329, 85 Pac. 972.

In an action by a city for a writ of mandate requiring defendant to appoint commissioners to fix water rates, a plea of another action pending, which action was instituted to procure a decree declaring the franchise of defendant forfeited and void by reason of the failure of defendant to comply with its terms and conditions, is not sufficient to justify an abatement of the action for writ

of mandate.—City of Pocatello v. Murray, 21 Idaho, 180, 120 Pac. 812.

Editorial Notes.

Abatement of one action by another pending in the same state: 84 Am. Dec. 452.

Abatement and revival, action in a sister state, whether may be pleaded in abatement: 25 Am. Dec. 195.

ABORTION.

Prosecution for homicide. See Homicide.

At common law an abortion could not be committed prior to the quickening of the foetus, but such rule does not prevail in this state.—State v. Alcorn, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

Editorial Notes.

Abortion, crime of causing: 66 Am. Dec. 82.

Death caused by and indictment and prosecution therefor: 95 Am. Dec. 783.

Necessary allegations in indictment for abortion as to means used: Ann. Cas. 1912D, 1325.

Admissibility, in prosecution for abortion, of statements (not dying declarations) made by woman before or after operation: Ann. Cas. 1913A, 531; 35 L. R. A., N. S., 1084.

ABSENTEES.

Absence of witness, party or counsel as ground for continuance. See Continuance.

Absence as affecting running of statute of limitations. See Limitation of Actions, II.

Temporary absence does not forfeit residence. See Domicile.

ABSTRACTS.

Of judgments. See Judgments.

Of title. See Abstracts of Title.

ABSTRACTS OF TITLE.

Limitation of action against abstractor. See Limitation of Actions, I, (B); II.

An abstract company, duly and regularly authorized to transact business under the laws of this state, which engages in the business of making and selling abstracts of title, thereby represents to the purchasers of such

abstracts that its employees are competent and qualified to make examinations of the records, and to furnish such abstracts and that they are expert therein, and that the purchaser of such abstract may safely rely upon the statements and representations contained in the abstract and certificate thereto. *Hillock v. Idaho Title & Trust Co.*, 22 Idaho, 440, 126 Pac. 612.

An abstract company failing to show the existence of a tax sale certificate or tax deed on an abstract is liable to the person ordering the abstract for money expended in obtaining a quitclaim deed from the tax title holder, which was necessary to remove the cloud from the title.—*Hillock v. Idaho Title etc. Co.*, 24 Idaho, 242, 133 Pac. 119.

An abstract company cannot escape liability for damage caused by its failure to show the existence of a tax deed by claiming that the deed was invalid.—*Hillock v. Idaho Title etc. Co.*, 24 Idaho, 242, 133 Pac. 119.

Where an abstract company is employed to prepare an abstract of title to certain real estate and a mistake is made by it in the preparation of such abstract and the person for whom it is made is damaged thereby, the abstract company is liable for all legal damages sustained by such person.—*Hillock v. Idaho Title etc. Co.*, 24 Idaho, 242, 133 Pac. 119.

Editorial Notes.

Liability of abstractor of title on account of abstract made by him: 12 Ann. Cas. 410; Ann. Cas. 1912B, 840.

Liability of title abstractor: 12 L. R. A., N. S., 449; 26 L. R. A., N. S., 1207; 42 L. R. A., N. S., 176.

ACCEPTANCE.

Of contracts. See Contracts, I (B).

ACCESSORIES.

See Criminal Law, III; Homicide, VI.

Indictment against. See Indictment and Information.

ACCORD AND SATISFACTION.

Where a check is given as a partial payment in accordance with a compromise agreement, the fact that the person giving such check incorporates therein language releasing the payor for all claims and damages will not operate to release the promisor from complying with the compromise agreement, unless it clearly appears that it was the intention of both parties that such check should be in full payment of all claims and demands whatsoever.—*Heath v. Potlatch Lumber Co.*, 18 Idaho, 42, 108 Pac. 343.

Editorial Notes.

Accord and satisfaction, payment of a less sum than due, when enforceable as: 64 Am. Dec. 138; 28 Am. Rep. 293; 20 L. R. A. 785.

ACCOUNT.

See Account, Action on; Account Stated.

Accounting between partners. See Partnership, VII.

Action by assignee. See Assignments.

Right of court to send action at law involving long account to referee. See Reference.

ACCOUNT, ACTION ON.

See Account; Account Stated.

By assignee. See Assignments.

Failure to furnish account. See Pleading, IX.

In an action for a balance of account on a general account of labor done, money paid and goods sold, it is not necessary to set forth in the complaint the amount of each separate item; the account constitutes but one cause of action and the statement of the general balance due is sufficient.—*Mills v. Glennon*, 2 Idaho, 105, 6 Pac. 116.

In a suit on an account, the complaint failed to state any amount to be due to plaintiff, but alleged by way of recital "that the amount alleged to be due to plaintiff is on account of board furnished at the instance and request of defendant during the years 1898 and 1899." Held, demurrable.—*Holton v. Sandpoint Lumber Co.*, 7 Idaho, 573, 64 Pac. 889.

ACCOUNT STATED.

See Account; Account, Action on.

As removing bar of limitations. See Limitation of Actions, III.

Where a party sends by mail a statement of account to another, with whom he had dealings, which is received, but not replied to within a reasonable time, the acquiescence of the party is taken as an admission that the account is correctly stated; and what is a reasonable time in this connection is a question for the jury to determine, under all the circumstances of the case, considering the nature of the business, the distance of the parties from each other, and the means of communication between them.—*Lewis v. Utah Constr. Co.*, 10 Idaho, 214, 77 Pac. 336.

An account stated cannot be impeached or contradicted except by averring and proving fraud or mistake; and where there is no averment of fraud or mistake, or proof to support the same, the account stated becomes a contract as to the amount due, and an action may be maintained thereon without proving the original items entering into such account.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

Where the owners of a railroad right of way authorize contractors to put a crew of men to work upon such right of way, and agree to pay such contractors the amount actually expended in labor and material, and in addition thereto twenty per cent and a certain sum for the use of the tools used in such work, and the contractors present a bill to the railway company for such labor, which is audited and approved by such company, it becomes an account stated, to secure and support which a lien may be filed upon the property for which said labor was performed.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

In an action by an attorney for services rendered, held, that the evidence does not show an account stated.—*Gunn v. Perseverance Min. etc. Co.*, 23 Idaho, 418, 130 Pac. 458.

An account stated is a document, a writing which exhibits the state of account between the parties, and the balance owed one to the other, and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but on the balance agreed to by the parties; but the account, in order to constitute a contract, should appear to be something more than a mere memorandum. It should show upon its face that it was intended to be a final settlement up to date, and this should be expressed with clearness and certainty.—*Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929.

Editorial Notes.

Accounts stated, definition and elements of: 62 Am. Dec. 85.

Liability upon where the transaction is not between merchants: 34 Am. Rep. 439.

Necessity that account stated include all items of accounts of both parties: 20 Ann. Cas. 626.

What constitutes an account stated: 27 L. R. A. 911.

Effect of retaining statement of account to render it an account stated: 29 L. R. A., N. S., 334.

Conclusiveness of stated account containing mathematical error: 23 L. R. A., N. S., 787.

ACKNOWLEDGMENT.

I. NATURE AND NECESSITY.

II. TAKING AND CERTIFICATE.

III. OPERATION AND EFFECT.

IV. PLEADING AND EVIDENCE.

And filing of plat. See Dedication.

Effect of recording unacknowledged instrument. See Mortgages, III, (B).

I. NATURE AND NECESSITY.

The record of a written instrument which is not by law entitled to be recorded because not acknowledged or proved imparts no constructive notice to anyone.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

II. TAKING AND CERTIFICATE.

A mortgage bore the signature of a married woman by her mark but the mark was not witnessed as required by R. S. 16, which provides that "signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." The woman acknowledged the instrument in due form. Held, that the notary's certificate of acknowledgment thereto was a sufficient witnessing of the signature, whether he had seen her sign the instrument or not.—*First Nat. Bk. of Hailey v. Glenn*, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

Under R. S. 2960, prescribing the form of certificates of acknowledgment by married women, a substantial compliance with the statute is all that is required.—*Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764; *Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211; *Jaechel*

v. Pease, 6 Idaho, 131, 53 Pac. 399; *Curtis v. Bunnell etc. Co.*, 6 Idaho, 298, 55 Pac. 659.

Where the acknowledgment of a married woman to a deed or other instrument is correctly made, but defectively certified, such certificate may be reformed by judgment of the district court under R. S. 2971.—*Bunnell etc. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767.

Where the certificate of acknowledgment of a married woman was not made in compliance with Revised Statutes, 2960, prior to the amendment thereof, and it appears that the acknowledgment was in fact taken in conformity with the statute and that the facts actually existed which would have enabled the notary to attach a proper certificate of acknowledgment, the court will decree a correction of the certificate to conform to the statute.—*Booth Mercantile Co. v. Murphy*, 14 Idaho, 212, 93 Pac. 777.

Editorial Notes.

Acknowledgment, amending and perfecting certificates of: 52 Am. Dec. 519.

Validity of acknowledgment by telephone: Ann. Cas. 1912C, 330.

III. OPERATION AND EFFECT.

Under R. S. 2956, 2960, an acknowledgment of a married woman to a mortgage on community property or on the separate property of the wife is void where the certificate shows that the husband's acknowledgment was taken separate and apart from the wife, but not that the wife acknowledged separate and apart from the husband.—*Co-operative etc. Assn. v. Green*, 5 Idaho, 660, 51 Pac. 770.

The verity of the certificate of the officer taking the acknowledgment of an instrument can only be overcome by evidence which establishes its falsity to the satisfaction of the court beyond a reasonable doubt. *Christensen v. Hollingsworth* (on rehearing), 6 Idaho, 94, 53 Pac. 271.

Where the evidence shows that in a conveyance of community property occupied as a residence, the wife did not appear before the acknowledging officer and that such officer did not make her acquainted with the contents of the instrument without the hearing of her husband, the conveyance is not valid under R. S. 2956.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

Where a notary explains to a married woman the nature and contents of a mortgage on real estate which she has signed, as well as its purpose and effect, and she tells the notary that it is all right with her if it is with her husband and that whatever her husband says or does is all right with her, and the husband has already signed the mortgage, the notary is justified in attaching his certificate of the wife's acknowledgment thereto.—*First Nat. Bk. of Hailey v. Glenn*, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

An officer cannot take and certify an acknowledgment of any person to an instrument whose name does not appear on the instrument.—*First Nat. Bk. of Hailey v. Glenn*, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

Under R. S. 2960, providing the form of acknowledgment to be made by a married woman to an instrument affecting title to real property in which she has any interest, a woman who acknowledges an instrument to which her name is subscribed thereby adopts and acknowledges the signature as her own.—First Nat. Bk. of Hailey v. Glenn, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

Editorial Notes.

When acknowledgment fatally defective and when not: 41 Am. Dec. 168.

IV. PLEADING AND EVIDENCE.

An officer who takes an acknowledgment to a written instrument is competent to testify to sustain his certificate thereof.—Northwestern etc. Bank v. Rauch, 5 Idaho, 752, 51 Pac. 764.

In a suit by a subsequent mortgagee with notice attacking a prior mortgage on the ground that the certificate of acknowledgment thereto of a married woman was false, the woman testified that she signed the mortgage freely and voluntarily and without any coercion on the part of her husband. The mortgage was drawn by her husband, was regular on its face and the certificate of acknowledgment was in due form. The husband's testimony tended to show that his wife was not present when the acknowledgment was taken, but was contradicted by other evidence. Held, insufficient to impair the validity of the certificate.—Gray v. Law, 6 Idaho, 559, 96 Am. St. Rep. 280, 57 Pac. 435.

On foreclosure of a mortgage, the notary who took the acknowledgment thereof cannot give testimony impeaching or tending to impeach his certificate of acknowledgment.—First Nat. Bk. of Hailey v. Glenn, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

Editorial Notes.

Conclusiveness of certificate of acknowledgment: 1 Am. Dec. 81.

Proof of acknowledgment of execution of instrument by evidence other than certificate: Ann. Cas. 1912A, 1098.

Impeachment of certificate of acknowledgment: 41 L. R. A., N. S., 1161.

ACQUIESCENCE.

In boundary line fixed by mistake. See Adverse Possession; also, Boundaries, II.

In irregularity in conduct of judicial sale. See Judicial Sales.

ACTION.

I. GROUNDS AND CONDITIONS PRECEDENT.

II. NATURE AND FORM.

III. JOINDER, SPLITTING, CONSOLIDATION AND SEVERANCE.

IV. COMMENCEMENT. PROSECUTION AND TERMINATION.

Rights of contracting parties to recover where another has a beneficial and resulting interest. See Contracts, II, (B).

Right of purchaser of chattel to sue on warranty after assigning chattel. See Sales, VI.

Right of consignee to maintain action against carrier. See Carriers, II.

For causing death. See Death.

By assignee of account where assignor retains interest therein. See Assignments.

I. GROUNDS AND CONDITIONS PRECEDENT.

Grounds for and right to damages. See Damages.

Action by party beneficially interested in bond. See Bonds.

II. NATURE AND FORM.

Under our practice, as established by the statute, equitable defenses may be set up in suits at law, and vice versa.—Wa Ching v. Constantine, 1 Idaho, 266; First Nat. Bk. of Hailey v. Bews, 3 Idaho, 486, 31 Pac. 816.

Legal and equitable relief may be sought in the same action and by the same complaint, but the grounds therefor must be distinctly and separately stated.—Wa Ching v. Constantine, 1 Idaho, 266.

In an action upon an official bond for a breach of duty, an allegation that the defendant unlawfully converted money to his own use does not change the action into one of tort.—Alvord v. United States, 1 Idaho, 585.

In order to apply the doctrine of election of remedies, the party must actually have at command two inconsistent remedies, and therefore an action erroneously brought in assumpsit and dismissed before defendant has answered will not bar an action in tort.—Elliot v. Collins, 6 Idaho, 266, 55 Pac. 301.

Under constitution, article 5, section 1, prohibiting distinctions between actions at law and suits in equity and providing that there shall be but one form of action, the rules of law or rules of equity are not thereby abolished.—Dewey v. Schreiber Imp. Co., 12 Idaho, 280, 85 Pac. 921.

Where a trustee in bankruptcy sues for the value of property belonging to the bankrupt estate that has been wrongfully converted, he may waive the tort and sue in assumpsit, as in such case the trustee is the legal representative of the bankrupt and of his estate, and a waiver of the tort by the trustee is a waiver on the part of the estate, and effectually protects the tort-feasor from a subsequent action for the tort.—Dittmore v. Cable Milling Co., 16 Idaho, 298, 133 Am. St. Rep. 98, 101 Pac. 593.

Under R. C., 3801, when the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.—State v. Wall, 18 Idaho, 300, 109 Pac. 724; State v. Cambridge Club, Youngblood et al., 18 Idaho, 307, 109 Pac. 726.

An action by a land owner within an irrigation district against the district for damages on account of failure to supply water to which he was entitled is an action in tort, and not on contract.—Snake River Valley Irr. Dist. v. Stevens, 18 Idaho, 541, 110 Pac. 1033.

The action in this case was for breach of contract to supply the plaintiff with water

sufficient for the irrigation of his crops, and was not one for injury or damages to growing crops.—*Rios v. Azcuenaga*, 19 Idaho, 739, 115 Pac. 922.

Constitution, article 5, section 1, and R. C. 4020, abolish the distinctions between actions at law and suits in equity and provide that there shall be but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs. R. C. 4168 provides that the complaint in all actions must contain a statement of the facts constituting the cause of action in ordinary and concise language. Held, that plaintiff need only state his cause of action in ordinary and concise language without regard to the ancient forms of pleadings, and that he can be sent out of court only when upon his alleged facts he is not entitled to any relief either at law or in equity.—*Bates v. Capital State Bank*, 21 Idaho, 141, 121 Pac. 561.

The representative character of an executor or administrator and his legal authority to represent the estate for which he is suing go to the capacity of the plaintiff to maintain the action, rather than the sufficiency of the facts to constitute a cause of action.—*Anthes v. Anthes*, 21 Idaho, 305, 121 Pac. 553.

Defendant irrigation company by contract agreed to deliver certain water to plaintiff at a certain time, which time was to be determined by written notice. The water was not delivered and plaintiff sued for damages. Held, that the action was on contract and not in tort.—*Hanes v. Idaho Irr. Co.*, 21 Idaho, 512, 122 Pac. 859.

Where a complaint alleges a cause of action for the recovery of the value of personal property sold and delivered, and the evidence shows a tortious taking and conversion, the action is one of assumpsit upon contract of sale and promise; and, if demand is made for the property, and the property is not delivered to the seller, and the answer admits that the defendant had purchased personal property of plaintiff and paid for it, and alleges payment for all the property bought and purchased of the plaintiff, recovery may be had for the value of the property proven to have been tortiously taken.—*Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929.

Editorial Notes.

Action against physician for malpractice as based on contract or tort: Ann. Cas. 1912D, 866.

Waiving tort and suing in assumpsit: Ann. Cas. 1913D, 228.

Suit for statutory penalty as a civil or criminal prosecution: See note, 27 L. R. A., N. S., 739.

III. JOINDER, SPLITTING, CONSOLIDATION AND SEVERANCE.

See Landlord and Tenant.

Pleading separate causes of action and defenses. See Pleading, II, III.

A cause of action arising on an express contract for the payment of a fixed and specified salary may be united in the same action with a cause of action for the same services

on an implied contract to pay the reasonable value of such services.—*Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Idaho, 61, 108 Pac. 536.

Where a number of persons, at different times and without concerted action or collusion, go upon a tract of land and each takes severally a part thereof and erects improvements thereon, and one of such persons individually and on his own account removes certain improvements from the land, a cause of action for such removal against such defendant cannot be joined with an action against all the defendants for restitution of the entire premises.—*White v. Whitcomb*, 13 Idaho, 490, 90 Pac. 1080.

Under R. C. 4169, several causes of action, all arising out of the same transaction, may be united in the same action, and allegations showing separate items of damages growing out of the same facts may be alleged as a part of the same cause of action.—*Unfried v. Libert*, 20 Idaho, 708, 119 Pac. 885.

Editorial Notes.

Joinder and splitting of claims for injury to person and property arising out of single tort: Ann. Cas. 1912D, 256; 50 L. R. A. 161; 36 L. R. A., N. S., 240.

Joinder of causes of action accruing to plaintiff individually and in representative capacity: Ann. Cas. 1912E, 1258.

Consolidation of: 58 Am. Dec. 508.

Different classes of cases susceptible of consolidation: Ann. Cas. 1913E, 1053.

Right to sue on separate items of account for goods sold on stated periods of credit: 13 L. R. A., N. S., 529.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

An action is commenced when the complaint is placed in the hands of the clerk, or deposited in his office with directions to file the same.—*Gold Hunter Min. etc. Co. v. Holleman*, 3 Idaho, 99, 27 Pac. 413.

Editorial Notes.

Actions, commencement of, what is: 15 Am. Dec. 344.

ADJOINING LAND OWNERS.

See Boundaries; Easements; Fences; Party-walls; Mines and Minerals; Waters and Watercourses.

Mistake as to fence marking boundary, acquiescence and payment of taxes. See Adverse Possession.

Establishment and acquiescence in boundary line. See Boundaries.

Agreement as to use of stairway as revocable license. See Easements.

ADMISSIONS.

Failure to reply as admission of account stated. See Account Stated.

Of defendant in criminal cases. See Criminal Law, X, (F).

ADVERSE CLAIM.

See Mines and Minerals.

Statute authorizing suit to determine does not abolish action of ejectment. See Ejectment.

ADVERSE POSSESSION.

I. NATURE AND REQUISITES.

II. OPERATION AND EFFECT.

III. PLEADING, EVIDENCE, TRIAL AND REVIEW.

See Limitation of Actions.

Adverse possession of railroad right of way. See Public Lands, II, (H).

Of mining claim. See Mines and Minerals, I, (B), 4.

Adverse possession as between cotenants. See Tenants in Common.

As against infant. See Infants.

I. NATURE AND REQUISITES.

Under R. S. 4043, adverse possession of land cannot be established unless it be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all taxes, state, county or municipal, which have been levied and assessed upon such land according to law.—*Green v. Christie*, 4 Idaho, 438, 40 Pac. 54.

Prior to Laws 1881, page 29, adverse possession could be established without proving payment of taxes.—*Brose v. Boise City Ry. etc. Co.*, 5 Idaho, 694, 51 Pac. 753.

R. S. 4043, provides that land shall be deemed occupied by adverse possession where it has been protected by a substantial inclosure and occupied and claimed for five years continuously, and the party in possession, his predecessors or grantors, have paid all taxes levied or assessed thereon. Held, that when the purchaser of land inclosed by a fence is in possession of and exercises control over a small tract within the inclosure but not within the description of the deeds conveying the inclosed land, and it appears that such small tract has not been assessed for taxation and that such possession and control were exclusive and adverse to all persons for a period of fourteen years, such purchaser will have title by adverse possession.—*Urquide v. Flanagan*, 7 Idaho, 163, 61 Pac. 514.

Where a city erected a fire-engine house on its own lot and on a small fraction of an adjoining lot and maintained such house there for twenty years, and in the meantime assessed for taxation and collected city taxes and charges on the whole of the adjoining lot, including the portion covered by its building, it is estopped from claiming title to such fractional part of the adjoining lot by adverse possession.—*Hesse v. Strode*, 10 Idaho, 250, 77 Pac. 634.

A claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass title to the subject thereof, is a claim under color of title.—*Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784; *Little v. Crawford*, 13 Idaho, 146, 88 Pac. 974.

One who purchases a tract of land and pays the purchase price and enters into the possession thereof, believing he has title, whether he receives a good deed of conveyance, an imperfect one, or no deed at all, nevertheless

enters into a possession adversely to the vendor and all the rest of the world, and while the entry is made with the permission of the owner it is from that moment adverse to him.—*Fountain v. Lewiston Nat. Bank*, 11 Idaho, 451, 83 Pac. 505.

Where the agreed purchase price of land was paid and the purchaser took possession under written instruments which both vendor and vendee at the time thought sufficient to pass both the legal and equitable title, the possession so taken and maintained is adverse to the vendor, though the written instruments did not operate to transfer title but were in law merely a mortgage of the land.—*Fountain v. Lewiston Nat. Bank*, 11 Idaho, 451, 83 Pac. 505.

Where a subsequent purchaser of land in good faith records his deed prior to the recording of an antecedent deed of which he had no knowledge or notice, the holder of such antecedent deed cannot claim that the subsequent purchaser is estopped to claim the land by reason of the fact that improvements have been made thereon, where such subsequent purchaser neither said nor did anything to mislead or deceive or induce the making of such improvements.—*Froman v. Madden*, 13 Idaho, 138, 88 Pac. 894.

An express trust, as well as an implied one, is repudiated by adverse possession and the statute of limitations begins to run from the time of such repudiation.—*Coe v. Sloan*, 16 Idaho, 49, 100 Pac. 354.

C. died intestate in 1875, owning community property, leaving a widow and two minor children. There were no community debts. Laws of 1875, page 636, provided that in such cases an undivided one-half interest descends to the widow and the other undivided one-half interest to the minor children. Held, that the widow could not legally convey the entire title to such property, but a deed from her purporting to convey the entire title would give the grantee color of title under which he might obtain title by adverse possession.—*Coe v. Sloan*, 16 Idaho, 49, 100 Pac. 354.

Where one enters into the possession of a tract of land and incloses the same, erecting a fence between such tract and the land of an adjoining owner, and continues to maintain such fence and occupy and use the land up to the fence for a period of 40 years, with the knowledge and acquiescence of the successive owners of the adjoining land, such occupancy will amount to adverse possession, even though the division fence was erected through mistake as to the true boundary line.—*Bayhouse v. Urquides*, 17 Idaho, 286, 105 Pac. 1066.

Where a fence has constituted a monument between the lots of coterminous owners, and has so existed for forty years, such monument establishes the true boundary line between the adjoining premises, and likewise controls the description in the assessment, where such assessment has been made by lot numbers, and the requirement as to the payment of taxes is satisfied by the payment of taxes on the lot with which the disputed tract is inclosed and of which it is a part.—*Bayhouse v. Urquides*, 17 Idaho, 286, 105 Pac. 1066.

In an action to recover land, the defendant may admit title in the United States either with or without claim on his part of the right to procure title from the United States, and it is sufficient if he has such possession as is required by our statute and claims title adversely to the plaintiff and all others except the United States.—*Northern Pac. Ry. Co. v. Pyle*, 19 Idaho, 3, 112 Pac. 678.

The pendency of a homestead contest in the land department of the United States does not suspend the running of the statute of limitations.—*Northern Pac. Ry. Co. v. Pyle*, 19 Idaho, 3, 112 Pac. 678.

Under act of Congress, July 2, 1864, chapter 217 (13 Stat. 365), the Northern Pacific Railroad Company was granted certain lands along its right of way. Its line was definitely fixed in 1882, and in 1896 the Northern Pacific Railway Company succeeded to all its rights and property through foreclosure proceedings. Defendants settled on a tract included within said land grant in March, 1902, and in August, 1902, applied for a patent which was refused by the land department. While the contest was pending between the company and defendants with reference to such patent, defendants lived on the lands continuously for more than five years, paying all taxes thereon. Held, that defendants acquired title by adverse possession.—*Northern Pac. Ry. Co. v. Pyle*, 19 Idaho, 3, 112 Pac. 678.

Where one claims title to real property by adverse possession under R. C. 4043, and has paid taxes thereon for the full period required by the statute, it is immaterial that some of the taxes during that time had also been paid by the holder of the legal title.—*Cramer v. Walker*, 23 Idaho, 495, 130 Pac. 1002.

Under the territorial statute of 1875 (Laws 1874-75, p. 479), "the ownership of or claim to or right of possession to any land within the territory" was defined to be "real estate," and "the claim by or possession of any person, firm, corporation, association, or company to any land" was taxable, and, under that condition of the statute where a controversy subsequently and after the issuance of patent from the government arises between the holder of the legal title and one claiming by adverse possession, the claimant by adverse possession may show that he occupied the land adversely and paid taxes thereon prior to the issuance of patent from the government.—*Cramer v. Walker*, 23 Idaho, 495, 130 Pac. 1002.

No title can be acquired in public streets by adverse possession.—*Hansen v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

Editorial Notes.

Of public property: 76 Am. St. Rep. 479.

Of lands devoted to a public use: 87 Am. St. Rep. 775; 92 Am. St. Rep. 844.

Continuity of, necessity and requisites of: 13 Am. Dec. 185.

Tacking successive possessions: 13 Am. Dec. 331.

Color of title sufficient to sustain, what amounts to: 14 Am. Dec. 580; 88 Am. St. Rep. 701.

Color of title, whether necessary to: 14 Am. Dec. 764.

By husband against wife, or wife against husband: 18 Am. St. Rep. 113.

Mistake or ignorance, possession taken and held through: 24 Am. St. Rep. 388.

What essential to: 28 Am. St. Rep. 158; 88 Am. St. Rep. 701.

By tenant against his landlord: 89 Am. St. Rep. 87; 53 L. R. A. 941.

By one tenant in common, creation of prescriptive title by: 109 Am. St. Rep. 609.

Inclosure of land as essential to adverse possession: Ann. Cas. 1913A, 750.

Possession by mistake of one intending to claim only to true boundary as adverse possession: 15 Ann. Cas. 827; 33 L. R. A., N. S., 923.

Sufficiency of unrecorded deed to give color title: 1 Ann. Cas. 761.

II. OPERATION AND EFFECT.

Where one in possession of real estate conveyed the same by quitclaim deed to plaintiff, and plaintiff took possession thereof under claim and color of title and held open, notorious and adverse possession under such claim of title, made valuable improvements, and paid all taxes assessed against said property for a period of more than five years, he secured title thereto by adverse possession.—*Little v. Crawford*, 13 Idaho, 146, 88 Pac. 974.

Where defendant settled upon, inclosed and occupied a town lot, and continued to occupy and possess the same from 1881 until the commencement of an action to quiet title in 1910, and paid the taxes levied and assessed against the property from 1881 down to the time of the commencement of the action, and the holder of the legal title did not pay any taxes until June, 1889, defendant acquired title by adverse possession and the payment of taxes for a continuous period of five years prior to the payment of any taxes by the holder of the legal title matured defendant's title; and the question of priority of payment of taxes thereafter or the right of either party to have the property thereafter assessed in his name and to pay the taxes thereon does not arise, and is immaterial for the purposes of determining the rights of the parties under their respective claims of ownership and adverse possession.—*Cramer v. Walker*, 23 Idaho, 495, 130 Pac. 1002.

Where one claims title to property by adverse possession under R. C. 4043, it is not necessary that the five years' continuous, exclusive, adverse possession and payment of taxes should have been immediately preceding the commencement of the action, or at any special or particular time, but it is sufficient if the party claiming such title can establish any continuous five year period subsequent to the acquisition of the legal title by the adverse party, during which he has complied with the statute in maintaining his open, notorious, continuous, adverse possession and payment of taxes for such period.—*Cramer v. Walker*, 23 Idaho, 495, 130 Pac. 1002.

Editorial Notes.

Of part of a parcel of land, when extends to the whole: 12 Am. Dec. 357.

Entry by owner which will terminate: 83 Am. Dec. 497.

Possession of part as possession of the whole: 125 Am. St. Rep. 302.

Possession by mistake of one intending to claim only to true boundary as adverse possession: Ann. Cas. 1912A, 450.

Acquisition of title to part of building by adverse possession: 12 Ann. Cas. 870.

III. PLEADING, EVIDENCE, TRIAL AND REVIEW.

Extent of easement for ditch acquired by adverse possession determined by extent of use and occupation and not by calls of unrecorded deed. See Easements.

On October 18, 1889, M. delivered to defendant bank a warranty deed to premises covered by a post due mortgage of M. in favor of the bank, the consideration being the amount due with interest. At the same time the bank gave M. a written option to repurchase, the option expiring June 18, 1890. On March 28, 1890, in consideration of the further sum of more than \$1,700, M. executed a release of the option contract, all the parties believing that the conveyance and release transferred the legal and equitable title to the bank. The bank and its successors in interest thereupon, with full knowledge and consent of M., entered into the sole, exclusive and open possession of the premises and continued therein for more than ten years without objection from M. Held, that under R. S. 4036, 4037, an action by the heirs of M. to redeem was barred.—*Fountain v. Lewiston Nat. Bank*, 11 Idaho, 451, 83 Pac. 505.

Where a person has been for more than five years in adverse, open and notorious possession of unpatented mining property claiming the right of possession under a deed purporting to convey title to the property, an action to recover possession thereof is barred by R. S. 4036.—*Bradley v. Johnson*, 11 Idaho, 689, 83 Pac. 927.

Under R. S. 4043, prescribing the requisites of adverse possession, a person seeking to establish his right and title to real estate by adverse possession must prove and the court find, that he has paid all the taxes levied and assessed against the property for five years continuously, or that the property was exempt from taxation or has never been assessed.—*Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

Evidence in an action to recover an interest in certain real estate held to support a finding that defendants acquired title thereto by adverse possession.—*Coe v. Sloan*, 16 Idaho, 49, 100 Pac. 354.

Where one seeks to procure title to another person's land under the rule of long acquiescence or adverse possession, he must establish his right by clear and satisfactory evidence.—*Brown v. Brown*, 18 Idaho, 345, 110 Pac. 269.

Evidence held sufficient to support a finding that the defendant did not acquire title to the real estate in controversy by adverse possession.—*De Puy v. Peebles*, 24 Idaho, 550, 135 Pac. 264.

AFFIDAVITS.

See Acknowledgment; Attachment and Garnishment, III, (B); Continuance; Chattel Mortgages; Depositions.

Of good faith. See Chattel Mortgages, I.

For publication of summons. See Process.

AGENCY.

See Principal and Agent.

AGGRESSOR.

See Assault and Battery.

AGRICULTURE.

Priority as between mortgagee of crops and laborers' lien claimants. See Chattel Mortgages, III. Chattel mortgage on crops. See Chattel Mortgages.

The crop lien given by Laws of 1903, page 94, takes precedence over all other liens affecting the crop.—*Beckstead v. Griffith*, 11 Idaho, 738, 83 Pac. 764.

Under Laws of 1903, page 94, giving a crop lien for labor thereon, one who performs labor in producing an agricultural crop is entitled to a lien thereon no matter what the work, labor or services may have been, so long as it is shown that the work was for a useful purpose, the charges reasonable, and that he has not been paid.—*Beckstead v. Griffith*, 11 Idaho, 738, 83 Pac. 764.

A complaint alleging that between specified dates, at the special instance and request of defendant, plaintiff rendered and performed labor and services and assistance to said defendant in harvesting said crop of hay grown on such ranch during the year 1904 to an amount and value of a specified sum, which said services were then and now are reasonably worth the said sum, and that under the terms and conditions of such employment and on or about a specified date, the defendant and plaintiff had a settlement and the balance then found to be due to the plaintiff was determined, ascertained and agreed upon and found to be the said specified sum, which said sum defendant agreed and promised to pay, substantially complies with Laws of 1899, page 151, chapter 2, section 7, and chapter 3, section 1, and Laws of 1903, page 94, prescribing the contents of a notice of lien, and giving a crop lien to persons performing labor in securing crops.—*Beckstead v. Griffith*, 11 Idaho, 738, 83 Pac. 764.

A complaint which alleges that plaintiff and his assignors performed labor and rendered services in the production of seven stacks of hay on a ranch, describing it, is not subject to a general demurrer, even though the lien includes other hay raised on the same premises but harvested and stacked by others under a different contract.—*Beckstead v. Griffith*, 11 Idaho, 738, 83 Pac. 764.

ALIENS.

Application of Chinese to practice medicine. See Physicians and Surgeons.

Constitutionality of law prohibiting employment. See Constitutional Law, X.

Escheat proceedings. See *Escheat*.

Rights in mining property. See *Mines and Minerals*, I, (B), 2.

Under the treaty of the United States with China, citizens of the Chinese Empire residing either permanently or temporarily in the United States are granted the same rights, privileges, immunities, and exemptions as are enjoyed by citizens and subjects of the most favored nation.—*Lee v. Boise Development Co.*, 21 Idaho, 461, 122 Pac. 851.

At common law an alien had no inheritable blood and could not succeed to real property by descent or inheritance and could not therefore claim through an intestate.—*Connolly v. Reed*, 22 Idaho, 29, 125 Pac. 213.

An allegation by a nonresident alien who seeks to establish her right of succession to the estate of a decedent within this state, alleging that C. by fraudulent misrepresentation procured the distribution of the estate to himself and others, is not a sufficient allegation to show any wrong or injury to the alien claimant who failed and neglected to appear and claim the right of succession within the five-year period granted to such claimants, where it is not alleged and does not appear that the fraud had anything to do with or resulted in preventing or depriving the nonresident alien claimant from setting up or asserting her claim to the property within the statutory time.—*Connolly v. Reed*, 22 Idaho, 29, 125 Pac. 213.

The commencement of an action by a nonresident alien in the federal court in and for the district of Idaho, which action is subsequently dismissed by the court, does not stop the running of the statute in the state courts. *Connolly v. Reed*, 22 Idaho, 29, 125 Pac. 213.

A demand made through an attorney or agent upon an administrator for possession of the property of the estate which he represents, or a request made by an attorney of the judge of the probate court that he be notified if any further proceedings are to be taken in the estate, is not an appearance or claim within the purview and meaning of R. C. 5715 sufficient to stop the running of the statute limiting the time within which such claim of the right of succession shall be made by a nonresident alien.—*Connolly v. Reed*, 22 Idaho, 29, 125 Pac. 213.

C. died intestate leaving an estate within the state of Idaho, and a cousin of the decedent made application for letters of administration and represented that he and three other cousins were the next of kin and entitled to succeed to the estate, and letters of administration were granted, and the estate was administered upon and final account was rendered and approved and distribution ordered and made to the four cousins who claimed as next of kin to be entitled to succession, and thereafter and more than five years subsequent to the death of the decedent M., a citizen and resident of Galway, Ireland, of the kingdom of Great Britain, filed a petition in the probate court alleging that she was the half-sister of the decedent and entitled to the estate. Held, that her failure to appear and claim her right to succession within the five-year period granted by statute

bars her right and claim, and the court had no jurisdiction to grant her any relief.—*Connolly v. Reed*, 22 Idaho, 29, 125 Pac. 213.

R. C. 5715 is not a recognition or an extension of any previously existing right which a nonresident alien had of succeeding by inheritance to the estate of a deceased person, but is rather the grant of a right which did not previously exist.—*Connolly v. Reed*, 22 Idaho, 29, 125 Pac. 213.

Editorial Notes.

Rights of aliens to receive or transmit inheritance: 12 Am. St. Rep. 93.

Right of alien with respect to inheritance of real property as affected by treaty with foreign country: Ann. Cas. 1912A, 1100.

Succession to rights of homesteader before perfection of title: Ann. Cas. 1912C, 698.

Power of aliens to hold lands: 14 Am. Dec. 97.

Right of alien to take estate as tenant by curtesy: 7 Ann. Cas. 504.

ALIMONY.

See *Divorce*, V.

ALTERATION OF INSTRUMENTS.

Effect on right to specific performance of original agreement. See *Specific Performance*, II.

Alteration of note as release of surety. See *Principal and Surety*; *Bail and Recognizance*.

Alteration of injunction bond. See *Injunction*, VIII.

Erasures and interlineations appearing in an obligation at the time of its signing cannot affect the liability of the subscribing parties.—*People v. Bugbee*, 1 Idaho, 88.

Under R. S. 6030, a party offering in evidence a note showing on its face that it has been altered must show that such alteration was made before it came into his hands, or it will not be admissible.—*Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949.

Editorial Notes.

Alteration of instruments, burden of explaining apparent: 37 Am. Rep. 260.

What is and effect of alteration of instruments: 10 Am. Dec. 267.

Effect of alteration of instruments: 17 Am. St. Rep. 97.

Effect of unauthorized alteration of instruments: 86 Am. St. Rep. 80.

Effect of material alteration of receipt on its admissibility in evidence: Ann. Cas. 1913C, 277.

Alteration of date of negotiable instrument as material alteration: Ann. Cas. 1913D, 725.

Necessity that defendant plead specially alteration of instrument on which suit is brought: Ann. Cas. 1913E, 252.

Material alteration of note as affecting mortgage security: Ann. Cas. 1913E, 317.

Alteration of deed after delivery: 32 L. R. A., N. S., 284.

AMENDMENT.

Of pleading. See Pleading.

Of return. See Attachment and Garnishment, IX.

ANIMALS.

- I. MARKS AND BRANDS.
- II. AGISTMENT, CARE AND KEEPING.
- III. CONTAGIOUS AND INFECTIOUS DISEASES.
- IV. INJURING OR KILLING ANIMALS.
- V. ESTRAYS.
- VI. PERSONAL INJURIES.
- VII. TRESPASSING ANIMALS.
- VIII. TWO-MILE LIMIT LAW.

Bounties for killing wild animals. See Bounties. Larceny of. See Larceny.

Lease of livestock. See Landlord and Tenant.

Mortgage of lessee of sheep, priority over lessor's interest. See Chattel Mortgages.

Conversion by mortgagees. See Chattel Mortgages, IV.

Consent of mortgagee to sale. See Chattel Mortgages, VII.

Quarantine and inspection laws as interference with interstate commerce. See Commerce.

Warranty in sale of stallion. See Sales, VI.

I. MARKS AND BRANDS.

Under R. S. 1179, making recorded brands prima facie evidence of ownership of the person whose brand or mark it may be, oral proof of an unrecorded brand may be given in evidence to show the ownership of animals alleged to have been stolen.—*State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186.

Under Laws of 1905, page 352, sections 5, 14, known as the livestock and branding law, parol evidence is not admissible to prove ownership of a stock brand.—*State v. Dunn*, 13 Idaho, 9, 88 Pac. 235.

Under Laws of 1905, page 352, no ownership can be acquired in a stock brand except by compliance with the provisions of said statute.—*State v. Dunn*, 13 Idaho, 9, 88 Pac. 235.

Where a stock brand has been recorded in compliance with the Laws of 1905, page 352, known as the livestock and branding act, the production of the original certificate issued by the state recorder, or a certified copy of the record, constitutes prima facie evidence of the ownership of the brand and of the right of possession of the animals on which such brand is found.—*State v. Dunn*, 13 Idaho, 9, 88 Pac. 235.

Editorial Notes.

Brands on animals as evidence of ownership: Ann. Cas. 1913E, 133; 12 Ann. Cas. 414.

II. AGISTMENT, CARE AND KEEPING.

In an action of claim and delivery for cattle, defendant pleaded a claim of lien for the care and keeping thereof, denominating his plea as a "counterclaim." Held, that such defense was proper though it was a misnomer to call it a counterclaim.—*Black-*

foot Stock Co. v. Delamue, 3 Idaho, 291, 29 Pac. 97.

In an action of claim and delivery for cattle, where neither the ownership nor value of the property is put in issue, but defendant claims a lien thereon for the care and keeping thereof under a contract with plaintiff, a verdict "that defendant recover of and from the plaintiff the sum of \$679 for keeping and care of the cattle mentioned in the complaint and that defendant have a lien on said cattle until said amount is paid" is sufficient after judgment.—*Blackfoot Stock Co. v. Delamue*, 3 Idaho, 291, 29 Pac. 97.

In an action to recover possession of certain sheep, the evidence showed that a number of plaintiff's sheep strayed into the band of defendants. Within a few days defendants notified plaintiff of this fact, and requested him to remove them. This the plaintiff neglected to do and the defendants herded and cared for such sheep during the ensuing winter. Held, that defendants were entitled to a lien on the sheep for keeping them.—*Thiessen v. Riggs*, 5 Idaho, 21, 46 Pac. 829.

R. C. 3446, giving a lien on personal property for services rendered thereon, is intended to apply to cases where a party takes the possession of personal property, such, for example, as livestock, and agrees to graze, feed or pasture the stock for a period of time, and assumes the exclusive care of and responsibility for the property, and furnishes or procures the feed or pasture therefor, whether it be from his private inclosure or on the public domain.—*Mendilie v. Snell*, 22 Idaho, 663, 127 Pac. 550.

Editorial Notes.

Implied contract to pay rent for use of another's land for grazing cattle: Ann. Cas. 1912C, 447.

III. CONTAGIOUS AND INFECTIOUS DISEASES.

Laws of 1897, page 115, sections 4 and 6 (amending Laws 1895, p. 125, sec. 14), declaring it unlawful to bring sheep into this state without first having them "dipped," as provided in said acts, are repugnant to the federal constitution, article 4, section 2, providing that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."—*State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 39 L. R. A. 365, 51 Pac. 456.

Act of March 13, 1899, sections 1, 2, providing that whenever the governor of the state has reason to believe that any infectious disease of sheep has become epidemic in certain localities in any other state, he must thereupon designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as he may deem proper, is not void as a delegation of legislative power to the executive.—*State v. Rasmussen*, 7 Idaho, 1, 97 Am. St. Rep. 234, 52 L. R. A. 78, 59 Pac. 933.

Under act of March 3, 1899, prohibiting the bringing in of sheep from infected districts of other states in violation of quarantine

regulations, prosecution therefor may be begun in any county, where the sheep are found.—*State v. Rasmussen*, 7 Idaho, 1, 97 Am. St. Rep. 234, 52 L. R. A. 78, 59 Pac. 933.

Act of March 13, 1899, sections 1, 2, establishing quarantine against sheep coming from infected districts in other states, is not in conflict with United States constitution, article 4, section 2, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.—*State v. Rasmussen*, 7 Idaho, 1, 97 Am. St. Rep. 234, 53 L. R. A. 78, 59 Pac. 933.

Under Laws of 1899, page 452, making the act of driving infected sheep into the state unlawful, the intent to violate the law is not an essential ingredient of the crime.—*State v. Simpson* (3 cases), 8 Idaho, 698, 70 Pac. 1030; *State v. Keller*, 8 Idaho, 699, 70 Pac. 1051.

R. S., section 6886, provides that the owner of sheep infected with scab who fails to keep the same from contact with other sheep, or moves or drives the same where other sheep are liable to range or be driven without first obtaining a written permission of the sheep commissioner, as provided by R. S. 1221, is guilty of a misdemeanor. R. S. 1221 provides, *inter alia*, that the sheep commissioner must not give permission to move any sheep so infected across any range where healthy sheep are accustomed to range. Laws of 1901, page 151, section 21, provides that the owners or persons having control of infected sheep shall report the fact to the deputy sheep inspector in writing or be guilty of a misdemeanor. Laws of 1901, page 151, section 23, provides that in any action or proceeding, civil or criminal, arising under this act, all persons having any interest in sheep or controlling the same, and concerning which said action or proceeding is had, shall be deemed the owner of said sheep, and shall be liable, jointly and severally, for such violation. Held, that a complaint alleging that defendant wrongfully and negligently permitted his sheep infected with scab, and not in charge of a herder, to run on the public highway and mix with the sheep of the plaintiff to plaintiff's damage in a specified sum is sufficient without alleging that defendant knew or had reason to believe that his sheep had the scab or any infectious disease.—*North and Douglas v. Woodland*, 12 Idaho, 50, 85 Pac. 215.

Where scabby sheep are being fed or held near a highway through which other sheep are permitted to pass, it is negligence on the part of the owner of the scabby sheep not to have a herder in charge thereof.—*North and Douglas v. Woodland*, 12 Idaho, 50, 6 L. R. A., N. S., 921, 85 Pac. 215.

In an action for damages arising from the infection of plaintiff's sheep by contact with defendant's scabby sheep, evidence to show that defendant knew at the time of the intermingling of the sheep that his sheep were scabby, and that he had known it for some time prior thereto, is admissible.—*North and Douglas v. Woodland*, 12 Idaho, 50, 6 L. R. A., N. S., 921, 85 Pac. 215.

Laws of 1905, page 39, an act for the suppression of contagious and infectious diseases among livestock, repealing certain pro-

visions of Laws of 1901, page 142, continues in force certain provisions of the latter act relative to the authority and duties of the state sheep inspector and though the office of state sheep inspector is abolished, it imposes his duties on the state veterinary surgeon and his assistants.—*Noble v. Bragaw*, 12 Idaho, 265, 85 Pac. 903.

Laws of 1905, page 39, section 39, repeals such parts of Laws of 1901, page 142, as created the office of sheep inspector and deputy sheep inspectors, and further declares that its provisions should not be construed as repealing any provision of Laws of 1901, page 142, not inconsistent or in conflict with the act of 1905, and then declares that the remaining provisions of the two acts should be construed together for the purpose of carrying out the objects sought by each of the acts, to wit, the suppression and eradication of infectious diseases among livestock of the state. Held, that such rule of construction announces the legislative intent and correctly states the rule always applied by the courts to statutes bearing on the same subject.—*Noble v. Bragaw*, 12 Idaho, 265, 85 Pac. 903.

Editorial Notes.

Power of the states to provide for the inspection and to regulate the importation of animals: 93 Am. St. Rep. 77.

Quarantine of animals, regulations which the state may enforce concerning: 97 Am. St. Rep. 242.

Validity and construction of statutory regulations as to infected animals: 26 L. R. A. 638.

IV. INJURING OR KILLING ANIMALS.

Injuries to animals on or near railroad track. See *Railroads*, X. (H).

In a prosecution for maliciously killing, wounding or maiming dogs, the state must either show that the defendant entertained malice against the owner of the dogs, or that the killing, wounding or maiming was characterized by such wanton and reckless disregard of the rights of property in others as to raise the presumption of malice from the manner of the commission of the act.—*State v. Churchill*, 15 Idaho, 645, 19 L. R. A., N. S., 835, 98 Pac. 853.

In a criminal prosecution for maliciously killing or wounding dogs the evidence of experts as to the habits and traits of the particular breed of dogs to the effect that they would not in fact harm or injure domestic animals is inadmissible, where the evidence as to the occurrence is direct and not circumstantial, unless it appears that the defendant at the time had knowledge of such habits and traits.—*State v. Churchill*, 15 Idaho, 645, 19 L. R. A., N. S., 835, 98 Pac. 853.

The rule applicable in civil actions for damages, allowing the introduction of evidence showing the pedigree, traits, habits and reputation of the particular dog killed, is not applicable in a criminal prosecution for maliciously killing dogs, unless knowledge of such facts is brought home to the defendant.—*State v. Churchill*, 15 Idaho, 645, 19 L. R. A., N. S., 835, 98 Pac. 853.

Where defendant had knowledge of the traits and habits of the particular breed of dogs, and that such dog would not in fact kill or maim a domestic animal, if in fact the dog was at the time harassing, worrying and annoying gravid animals in such a manner as would likely cause his pecuniary loss, he will be justified in using such force as is necessary to eject the dogs from the premises and cause a cessation of the injuries.—*State v. Churchill*, 15 Idaho, 645, 19 L. R. A., N. S., 835, 98 Pac. 853.

Where it clearly appears that the defendant was not acquainted with the owner of the dogs, and did not in fact know who was their owner, and in wounding and killing the dogs was not actuated by malice or a wanton or reckless spirit, but acted solely through a desire to remove the dogs from his premises, and to prevent their worrying, annoying and terrorizing his livestock, he cannot be held criminally liable for malicious mischief.—*State v. Churchill*, 15 Idaho, 645, 19 L. R. A., N. S., 835, 98 Pac. 853.

In a prosecution under R. S. 7153, for the malicious killing, maiming or wounding of a dog, malice is the gist of the action and must be established to the satisfaction of the jury beyond a reasonable doubt in order to justify a conviction.—*State v. Churchill*, 15 Idaho, 645, 19 L. R. A., N. S., 835, 98 Pac. 853.

Editorial Notes

Wounding of animals, whether an indictable offense: 72 Am. Dec. 357.

Right to kill dogs: 15 L. R. A. 249; 40 L. R. A. 510.

V. ESTRAYS.

Noncompliance with the estray law, R. C. 1299, makes the possession by the person who takes up an estray wrongful, renders him liable to the owner as for conversion, and leaves him without protection for any expenses which he may have incurred in the care of the animal while in his possession.—*Havird v. Lung*, 19 Idaho, 790, 115 Pac. 930.

By compliance with the estray law of 1905 (Laws 1905, p. 366), now found in substance in R. C. 1299, the purchaser of an animal regularly sold as an estray acquires an absolute title, regardless of lapse of time.—*Havird v. Lung*, 19 Idaho, 790, 115 Pac. 930.

R. C. 1219 provides that, where the owner of trespassing sheep is unknown to the party injured, such party may at his option treat the trespassing animals as estrays; but under the estray laws no damages can be collected, such laws providing only for the disposition of the estray and the collection of the necessary costs and expense incurred in taking up and disposing of the animal.—*Cleveland v. Wallace*, 23 Idaho, 570, 131 Pac. 10.

Editorial Notes.

Estrays, general features and constitutionality of statutes respecting: 8 Am. St. Rep. 271.

Summary proceedings to impound and sell animals: 90 Am. St. Rep. 211.

When animal is "estrays" or "at large": 9 Ann. Cas. 284.

VI. PERSONAL INJURIES.

Where a person takes a dog to a racetrack, and is in control of such dog at and near the track, and suffers or permits such dog to go upon the racetrack and interfere with the riders in such race, and an injury results therefrom to a rider, the owner or person in control of such dog is guilty of negligence and is liable for the damages thereby sustained.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

Where domestic animals injure any person or property while wrongfully in the place where the injury is done, the owner is liable, although he had no notice that such animal was accustomed to do such wrong or mischief.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

Where a dog invades and trespasses upon the legal rights of a person and injures person or property, and such invasion and trespass is the result of the negligence of the owner, the owner of such dog is liable for the damages done.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

Editorial Notes.

Dogs, liability of owners of for vicious acts of: 10 Am. Rep. 270; 36 Am. Rep. 752.

Liability of owners for injuries inflicted by vicious animals: 50 Am. Rep. 605; 16 Am. St. Rep. 631.

Liability for injuries by and to animals: 16 Am. St. Rep. 631; 36 Am. St. Rep. 831.

Liability of owner of dog for injuries resulting from dog barking at horse or other animal: Ann. Cas. 1912D, 996.

Knowledge of owner as to viciousness of animal: 1 Ann. Cas. 205; 4 Ann. Cas. 127; 20 Ann. Cas. 72.

VII. TRESPASSING ANIMALS.

Statutes relating to taking up of trespassing hogs as deprivation of property without due process of law. See Constitutional Law.

Trespassing sheep as estrays. See ante, V.

The common-law rule that every man must confine his own cattle to his own land does not obtain in this state.—*Johnson v. Oregon Short Line Ry. Co.*, 7 Idaho, 355, 53 L. R. A. 744, 63 Pac. 112.

R. S. 1320 provides that any person having any inclosure in conformity with chapter 1 of this title is deemed to possess a lawful inclosure, and if any horses, etc., hogs or sheep break into such inclosure, the party injured has a lien for the damages done. R. S. 1300 provides that a lawful fence must not be less than four and one-half feet high, and the bottom board, rail or wire must not be more than twenty inches above the ground. Held, that it is not the duty of the land owner to fence against sheep, since a wire fence constructed in accordance with R. S. 1300

would not be sufficient to turn the sheep.—*Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459.

A complaint alleging that defendants on or about March 17, 1905, willfully, knowingly and unlawfully drove their flock of 2,500 sheep on plaintiff's lands, and ever since that date and up to March 22, 1905, continuously herded, held, pastured and grazed said sheep on said lands against the will and consent of plaintiff and over his objections and protest and refused to drive them away until they had fed and pastured to the sheep all the grass and feed thereon, followed by the usual allegations of the character and amount of damages sustained, states a cause of action for trespass independent of R. S. 1210, 1211, the two-mile limit law.—*Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384.

While it is lawful in this state for livestock, with certain exceptions, to run at large and graze upon any of the uninclosed lands of the state, nevertheless one who willfully and deliberately drives his stock upon the lands of another, whether inclosed or not, and holds, herds and grazes them upon such lands over the protests and objections of the owner, is liable in damages for the trespass.—*Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384.

Where trespassing dogs are chasing, worrying and frightening hogs and cattle, the owner of the premises in attempting to remove and eject the dogs therefrom has a right to act upon appearances, and, if there is apparent impending danger to his livestock, he is justified in the use of such force in ejecting the dogs as a reasonably prudent man would use under like circumstances in defense and protection of his property.—*State v. Churchill*, 15 Idaho, 645, 19 L. R. A., N. S., 835, 98 Pac. 853.

R. C. 3925 provides that, when jurisdiction is conferred upon a court or judicial officer, all means necessary to carry the statute into effect are also given, and that in the exercise of that jurisdiction, if the course of proceedings is not specifically pointed out by the statute, the court may adopt any suitable process or mode of proceeding which may appear most conformable to the spirit of the law, and in pursuance of the authority of this statute and the right of action conferred by R. C. 1217 and 1218, it is proper for a justice's court to proceed under R. C. 1294 and 1296, in a case where it is charged that the owner of trespassing sheep is unknown to the plaintiff, and that he is unable to ascertain the name of the owner, and the animals are taken into the possession of the plaintiff in the action, and subsequently delivered to the officer who levies upon them under the execution issued by the justice.—*Cleveland v. Wallace*, 23 Idaho, 570, 131 Pac. 10.

It is not necessary in this state to fence against sheep, and so in an action under R. C. 1294, for the recovery of damages for the trespass of sheep in violation of the provisions of R. C. 1217 and 1218, it is unnecessary to appoint appraisers therein provided for.—*Cleveland v. Wallace*, 23 Idaho, 570, 131 Pac. 10.

Editorial Notes.

In highways, duty to fence against animals: 8 Am. Dec. 125.

R. C. 4230 authorizes the prosecution of an action against a defendant whose name is unknown, and allows the plaintiff to proceed against a defendant without giving his true name, where he has been unable to ascertain the true name, and R. C. 1294 of the general trespass law recognizes the same principle, and authorizes a proceeding for the assessment of damages against the trespassing animals, and provides that the amount assessed shall not be a personal judgment against the owner of the animal, but can only bind the property itself.—*Cleveland v. Wallace*, 23 Idaho, 570, 131 Pac. 10.

Where in an action of claim and delivery by the owner of trespassing hogs taken up by defendant under R. C. 1279-1281, the evidence shows the trespass, and that defendant was damaged thereby, defendant is entitled to a lien on the hogs for the amount of damages shown.—*Fall Creek Sheep Co. v. Walton* (on rehearing), 24 Idaho, 760, 136 Pac. 438.

Editorial Notes.

Trespasses of animals, liability for: 49 Am. Dec. 248.

Trespassing animals, liability of owners of: 28 Am. Rep. 569; 22 L. R. A. 55.

Right to damages against owner of fowls who permits them to trespass on another's land: Ann. Cas. 1913C, 757.

Right to kill trespassing animals: Ann. Cas. 1913C, 970.

Right to kill trespassing animals: 1 Ann. Cas. 193; 16 Ann. Cas. 951.

VIII. TWO-MILE LIMIT LAW.

R. S. 1210, 1211, making it unlawful to herd or graze sheep within two miles of an inhabited dwelling and making the owner of sheep so herded or grazed liable in damages to the injured party, is a valid exercise of the police power of the state and not unconstitutional.—*Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 45 L. R. A. 785, 65 Pac. 709; *Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995; *Wallington v. Bown*, 9 Idaho, 740, 2 Ann. Cas. 720, 76 Pac. 318; *Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459; *Walker v. Bacon*, 11 Idaho, 127, 114 Am. St. Rep. 262, 81 Pac. 155.

In an action under R. S. 1210, 1211, prohibiting the grazing and herding of sheep within two miles of inhabited dwellings, plaintiff testified that defendant's sheep destroyed the grass on his own land, damaging him in the sum of fifty dollars; that by reason of the grass being destroyed on the public domain, in the vicinity and within two miles of his dwelling, he was often compelled to go from two to five miles to look after his cattle, to his injury in the sum of \$50; that he was compelled to pay \$60 for hay, which he would not have been compelled to pay but for the destruction of said grasses by defendant's sheep. Held, that a verdict for plaintiff for \$100 was supported by the evidence.—*Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995.

R. S. 1210, 1211, prohibiting the grazing and herding of sheep within two miles of inhabited dwellings, do not deprive sheep owners of equal protection under the law or deprive them of property without due process of law

in violation of the fourteenth amendment of the federal constitution.—*Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995.

R. S. 1210, prohibiting the herding and grazing of sheep on possessory claims or within two miles of the dwelling-house of the owner of such claim, does not prohibit the driving of sheep from one place to another, though the sheep are driven within the two-mile limit.—*Phipps v. Grover*, 9 Idaho, 415, 75 Pac. 64.

Where sheep are grazed or herded on the public domain within two miles of an inhabited dwelling in violation of R. S. 1210, 1211, the actual damage sustained by the settler by reason of the destruction of the grasses within the two-mile limit is a proper element of damages.—*Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459.

In an action for damages under the two-mile limit law, R. S. 1210, 1211, a contention that plaintiff was guilty of contributory negligence in failing to post notices of the two-mile limit line around his residence is without merit.—*Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459.

In an action for damages sustained by reason of the herding and grazing of sheep on plaintiff's lands and for the consequent injury and damage to his growing crops, the measure of damages is the value of the crops at the time of their destruction.—*Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1006.

Under Const., article 5, section 20, district courts have concurrent original jurisdiction with justice courts in actions presented under R. S. 1210, 1211, for the unlawful herding and grazing of sheep within two miles of an inhabited dwelling.—*Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1006.

Where plaintiff is the absolute owner in fee simple of the lands on which his dwelling-house is situated, he may maintain an action for trespass of sheep within two miles of his dwelling-house under R. S. 1210, 1211, the provisions of said sections not being limited to possessory claims and dwellings thereon.—*Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1006.

In an action for damages under the two-mile limit law, R. S. 1210, 1211, it was competent to show that plaintiff's cattle did not graze on the range after the sheep had grazed thereon and also to ask a witness why they did not and would not.—*Roseborough v. Whittington*, 15 Idaho, 100, 96 Pac. 437.

It was not error to refuse an instruction to the effect that the owner of sheep could legally herd or graze his sheep on the public domain within two miles of his own residence, even though such herding and grazing was within two miles of another's dwelling-house in contravention of R. S. 1210, 1211, prohibiting such herding or grazing.—*Roseborough v. Whittington*, 15 Idaho, 100, 96 Pac. 437.

Under the "two-mile limit law," R. S. 1210, 1211, only actual damages can be recovered.—*Roseborough v. Whittington*, 15 Idaho, 100, 96 Pac. 437.

Under R. C. 1217 and 1218, known as the "two-mile limit law," a right of action is

given against any person owning or having in his charge any sheep that are allowed to herd or graze within two miles of a dwelling-house; and, where the owner thereof is not known or cannot be ascertained, the person who has sustained damages by reason of the trespass may proceed against the property under R. C. 1274 and 1296 of the general trespass law of the state.—*Cleveland v. Wallace*, 23 Idaho, 570, 131 Pac. 10.

APPEAL AND ERROR.

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I. NATURE AND FORM OF REMEDY.

A common-law action cannot be re-examined in the supreme court on appeal but must be

brought up by writ of error.—*United States v. Gilson*, 1 Idaho, 364.

A writ of error is the proper mode of bringing before the supreme court, for review, actions at law; and suits in chancery must be brought up by appeal.—*United States v. Gilson*, 1 Idaho, 364.

A writ of error will lie to review a void judgment.—*People v. Lindsay*, 1 Idaho, 394.

An order overruling a motion for a stay of proceedings under a void judgment may be appealed from or brought to the supreme court for review by writ of error; and such appeal brings under review the whole record in the case.—*Alexander v. Leland*, 1 Idaho, 425.

No appeal will lie from the judgment of the district court upon an appeal to the district court from an order made by the board of county commissioners, the remedy being by writ of error.—*Rupert v. Commissioners Alturas County*, 2 Idaho, 19, 2 Pac. 718; *Van Camp v. Commissioners Custer County*, 2 Idaho, 29, 2 Pac. 721.

The right to appeal is statutory, unknown to the common law, and it cannot be extended by courts to cases not within the statute.—*General Custer Min. Co. v. Van Camp*, 2 Idaho, 40, 3 Pac. 22.

Const., article 5, section 9, giving the supreme court jurisdiction to review on appeal any decision of the district courts, or the judges thereof, does not authorize a direct appeal from every decision of the district courts or judges thereof.—*Maple v. Williams*, 15 Idaho, 642, 98 Pac. 848.

Where an order dismissing an appeal without prejudice is made, a new appeal may be perfected as soon as the order of dismissal is made, without waiting for the filing of the remittitur.—*Jackson v. Barrett*, 12 Idaho, 465, 86 Pac. 270.

Editorial Notes.

Writs of error, their scope and effect: 91 Am. Dec. 193.

Constitutionality of statutes abridging right of appeal: Ann. Cas. 1912B, 274.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

Objection for want of jurisdiction to hear an appeal may be taken at any time.—*Toole v. French*, 3 Idaho, 1, 25 Pac. 1091; *Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755.

Under R. S. 4178, providing that on failure to object by demurrer or answer objections must be deemed waived, excepting only the objection to jurisdiction, the question of jurisdiction may be raised for the first time on appeal.—*Aram v. Edwards*, 9 Idaho, 333, 74 Pac. 961.

III. DECISIONS REVIEWABLE.

Review of interlocutory, supplemental and collateral question. See post, XVI, (B).

Nature, extent and scope of review. See post, XVI.

(A) COURTS AND OTHER TRIBUNALS SUBJECT TO REVIEW.

An appeal will not lie from the decision of the state board of land commissioners in a

land contest had before such board.—*Pierson v. State Board of Land Commrs.*, 14 Idaho, 159, 93 Pac. 775.

Neither Const., article 5, section 13, nor section 20 confers any absolute and unqualified right of appeal from an order or judgment of a probate court, but, on the contrary, grants the discretion to the legislature to confer or withhold the right of appeal in any and all matters coming before the probate court.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

Editorial Notes.

Appealable judgments or orders in probate or administration proceedings: Ann. Cas. 1913C, 850.

(B) NATURE OF SUBJECT MATTER AND CHARACTER OF PARTIES.

An appeal may be taken from the final judgment of the district court in a proceeding for a writ of review or certiorari to review a judgment of a justice's court.—*Nordyke & Marmon Co. v. McConkey*, 7 Idaho, 562, 64 Pac. 893.

Editorial Notes.

Right to appeal from order granting or refusing writ of assistance: Ann. Cas. 1913D, 1129.

(C) AMOUNT OR VALUE IN CONTROVERSY.

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Editorial Notes.

Amount in controversy for purposes of appeal from judgment in consolidated action: 15 Ann. Cas. 492.

(D) FINALITY OF DETERMINATION.

An order to strike out part of a pleading is an interlocutory, nonappealable order.—*Graham v. Linehan*, 1 Idaho, 780; *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

Where the record shows no final order or judgment from which an appeal could be taken, the appeal will be dismissed.—*Adams v. McPherson*, 3 Idaho, 117, 27 Pac. 577; *Thiessen v. Riggs*, 5 Idaho, 21, 46 Pac. 829.

An order refusing to retax costs, made after the rendition and entry of final judgment, can be reviewed only on appeal from the order.—*Emery v. Langley*, 1 Idaho, 694.

A judgment of nonsuit is a final judgment from which an appeal will lie.—*Lalande v. McDonald*, 2 Idaho, 307, 13 Pac. 347.

An appeal lies from an order overruling a motion for a new trial.—*Schultz v. Keeler*, 2 Idaho, 333, 13 Pac. 481.

The "special order made after final judgment" from which an appeal may be taken under R. S. 4807, means the special or particular order applied for after final judgment, and not every order that may be made by the court in the hearing to determine whether the order applied for shall be granted.—*Connell v. Warren*, 3 Idaho, 117, 27 Pac. 730.

An order made by the district court, refusing to dismiss an appeal from an order of the

probate court refusing to quash a writ of execution is an interlocutory order made in the proceeding to obtain an order to quash or vacate a writ of execution, and is not a "special order after final judgment" within the meaning of R. S. 4807, providing from what orders appeals may be taken.—*Connell v. Warren*, 3 Idaho, 117, 27 Pac. 730.

A motion to change attorneys in a pending suit under R. S. 3999 is a special proceeding and a judgment rendered on such motion is a final judgment from which an appeal may be taken under R. S. 4807, subdivision 1.—*Curtis v. Richards*, 4 Idaho, 434, 95 Am. St. Rep. 134, 40 Pac. 57.

A judgment purporting to settle the law applicable to a pending controversy but not determining the facts involved, is not a final judgment from which an appeal will lie.—*Potter v. Talkington*, 5 Idaho, 317, 49 Pac. 14.

Under Const., article 5, section 9, providing that the supreme court shall have jurisdiction to review on appeal any decision of the district courts, and R. S. 4807, giving the right to an appeal from a final judgment in an action or special proceeding, an appeal will lie from the final decision of the district court on behalf of either party to an action brought under R. S. 7459, to remove a public officer.—*Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680; *Tannahill v. Black*, 7 Idaho, 290, 62 Pac. 1116; *Tannahill v. Johnson*, 7 Idaho, 291, 62 Pac. 1116.

Under Const., article 5, section 9, giving the supreme court jurisdiction to review upon appeal any decision of the district courts or the judges thereof, and R. S. 4807, subdivision 1, providing that an appeal may be taken to the supreme court from a final judgment in a special proceeding, an appeal will lie from an order or judgment confirming a receiver's sale.—*First Nat. Bank v. Bunting & Co.*, 7 Idaho, 387, 63 Pac. 694.

Under R. S. 4807, subdivision 3, providing that an appeal may be taken from any special order made after final judgment, an order after final judgment refusing to release attached property is appealable.—*Coe v. Cleg-horn*, 10 Idaho, 162, 77 Pac. 331.

An order refusing to set aside a judgment is an appealable order.—*Oliver v. Kootenai County*, 13 Idaho, 281, 90 Pac. 107.

In a bank receivership case, the state petitioned to have a certain claim and lien established as a prior and preferred lien claim. The court determined that the state could not recover except as to cash on hand in the bank at the time it suspended business. Held, that such determination was a final order or judgment and hence appealable.—*State v. Bruce*, 17 Idaho, 1, 134 Am. St. Rep. 245, 102 Pac. 831.

R. C. 4807, subdivision 3, provides that an appeal may be taken to the supreme court from a district court from "any special order made after final judgment." Held, to authorize an appeal from an order made after final judgment vacating and setting aside such judgment.—*Shumake v. Shumake*, 17 Idaho, 649, 107 Pac. 42.

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Where a final decree has been entered in a foreclosure suit awarding judgment and attorney's fees in favor of the creditor, and thereafter the judgment is satisfied of record by the judgment creditor in the manner provided by statute, and the court, on motion of the attorney who procured the judgment, vacates and sets aside the satisfaction of judgment and enters an order or judgment adjudging the attorney to be the equitable assignee of the judgment in the amount of fees still due him, and ordering an execution to issue out of the original action in favor of the attorney, such a judgment or order is a "final judgment" within the purview and meaning of R. C. 4807, subdivision 1, and an appeal may be prosecuted therefrom within one year from the entry of such judgment.—*Dahlstrom v. Featherstone*, 18 Idaho, 179, 110 Pac. 243.

An order granting an amendment to a judgment is an order made after final judgment and hence is appealable under R. C. 4807, subdivision 3.—*McElroy v. Whitney*, 24 Idaho, 210, 133 Pac. 118.

Editorial Notes.

Order made on motion to dissolve temporary injunction as final or interlocutory: Ann. Cas. 1912C, 898.

Right to appeal from order relating to bill of particulars: Ann. Cas. 1913C, 826.

What is final judgment where judgment of trial court is reversed on appeal but is subsequently affirmed: Ann. Cas. 1913C, 250.

Right to appeal from decree for costs only: 1 L. E. A., N. S., 1083.

(E) NATURE, SCOPE, AND EFFECT OF DECISION.

An order overruling a demurrer to the complaint is not an appealable order.—*Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134.

An order adopting the report of a referee is not an appealable order.—*Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134.

An order denying a motion to discharge a receiver is not an appealable order.—*Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134.

No appeal lies from an order refusing to vacate or set aside an appealable order.—*State v. Griffin*, 4 Idaho, 459, 40 Pac. 60.

The statute permitting an appeal from a final judgment "or any specific part thereof" does not contemplate an appeal from "a part" of a money judgment for a definite sum.—*Hampton v. Board of Commrs. of Logan County*, 4 Idaho, 646, 43 Pac. 324.

An order vacating a judgment and reinstating an intervenor's complaint and answer is an order granting a new trial to all intents and purposes, and as such is appealable.—*Thum v. Pyke*, 6 Idaho, 359, 55 Pac. 864.

Const., article 5, section 9, providing that the supreme court shall have jurisdiction to review upon appeal any decision of the district courts or the judges thereof, authorizes

an appeal from a judgment of the district court removing a county officer.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

An order quashing and dismissing the information in a proceeding under R. S. 7459 to remove county commissioners is not appealable.—*Mahoney v. Elliot*, 8 Idaho, 356, 69 Pac. 108.

Under R. S. 4802, providing that any aggrieved party may appeal, plaintiff may appeal from a judgment giving him only part of what he claims in his complaint.—*Phillips v. Salmon River Min. Co.*, 9 Idaho, 149, 72 Pac. 886.

Where a party appeals from an order made after final judgment striking out a portion of the amount claimed in the cost bill, the fact that the judgment is paid and satisfied will not preclude an appeal from such order, since he could in no event recover less than the judgment collected.—*Bechtel v. Evans*, 10 Idaho, 147, 77 Pac. 212.

Under Const., article 5, section 9, giving the supreme court jurisdiction to review, upon appeal, any decision of the district court, or the judges thereof, an order granting or refusing a motion for the appointment of a receiver is a decision, and such decision is appealable.—*Chemung Min. Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619.

Under R. S. 4807, subdivision 3, an order dissolving a temporary injunction is appealable.—*Dougal v. Eby*, 11 Idaho, 789, 85 Pac. 102.

Under R. S. 4807, subdivision 3, specifying the orders from which an appeal will lie, an order quashing a summons is not an appealable order.—*Maple v. Williams*, 15 Idaho, 642, 98 Pac. 848.

Const., article 5, section 9, giving the supreme court jurisdiction to review an appeal and decision of the district court or judges thereof, does not mean that an appeal may be taken directly from any order or decision that a district court can make.—*Utah Assn. of Credit Men v. Budge*, 16 Idaho, 751, 102 Pac. 390.

Where the court grants a temporary restraining order against the maintenance of a dam and subsequently modifies the order so as to permit defendants to maintain the dam and consequently flood plaintiff's land for twenty-five days, an appeal lies from such order.—*La Veine v. Stack-Gibbs Lbr. Co.*, 17 Idaho, 51, 134 Am. St. Rep. 253, 104 Pac. 666.

Editorial Notes.

What judgments and orders may be appealed from: 20 Am. St. Rep. 173.

Satisfied judgments, when appeals may be prosecuted therefrom: 45 Am. St. Rep. 271.

(F) MODE OF RENDITION, FORM AND ENTRY OF JUDGMENT OR ORDER.

An appeal lies from the judgment of a district judge at chambers.—*People v. Lindsay*, 1 Idaho, 394.

A judgment by default entered by the clerk of the district court in vacation is a final

judgment, from which an appeal will lie.—*Hardiman v. South Chariot M. Co.*, 1 Idaho, 704.

An order for judgment is not a final judgment from which an appeal can be taken.—*Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755; *Ah Kle v. McLean*, 3 Idaho, 70, 26 Pac. 937; *Hodgins v. Harris*, 4 Idaho, 517, 43 Pac. 72.

An entry on the minutes of the court, "At this day, on motion of defendant's counsel, the court ordered this cause dismissed at plaintiff's costs taxed at \$3.40, held, not a final judgment from which an appeal can be taken.—*Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755.

The rule that a judgment by consent will not be disturbed on appeal does not apply to a judgment on a usurious contract entered by stipulation where the usury statute, R. S. 1266, has not been conformed with in such judgment.—*Ocobock v. Nixon*, 6 Idaho, 552, 57 Pac. 309.

A minute order denying the relief prayed for in the complaint is not a judgment from which an appeal can be taken, under R. S. 4807.—*Bissing v. Bissing*, 19 Idaho, 777, 115 Pac. 827.

IV. RIGHT OF REVIEW.

Parties to appeals. See post, VI.

(A) PERSONS ENTITLED.

Right of one appellant to base appeal on transcript prepared for and paid for by coappellant. See post, X, (C), 6.

Right of receiver to appeal without order of court. See *Banks and Banking*, II.

Right of prosecuting attorney to appeal from judgment in action to recover road poll tax. See *District and Prosecuting Attorneys*.

A writ of error may be sued out under the statute, though not at common law, by one or more of several defendants, without joining their codefendants in the writ.—*Alexander v. Leland*, 1 Idaho, 425.

No one can sue out and maintain a writ of error unless he is a party or privy to the record, or is prejudiced by the judgment.—*Van Camp v. Commissioners of Custer County*, 2 Idaho, 29, 2 Pac. 721.

Where the board of county commissioners on application of a mining company reduces the assessment on its property, the company has a vested right in the order or decision of the board, subject only to a reversal or modification, by competent authority, in the mode prescribed by law; and the company is therefore such a party to the proceedings as to entitle it to a writ of error to review the judgment of the district court on an appeal from such order of the board of county commissioners.—*Van Camp v. Commrs. of Custer County*, 2 Idaho, 29, 2 Pac. 721.

One who was not a party to a suit at the time of the issue of a writ of assistance therein may appeal from an order denying his motion to set aside the writ.—*Mills v. Smiley*, 9 Idaho, 317, 76 Pac. 783.

Under R. S. 4802, providing that "any party aggrieved may appeal," any person having

an interest in the subject matter of the judgment, whose rights are affected thereby, may appeal though he is not named as a party to the action or in the title to the judgment entered therein.—*Washington County Abstract Co. v. Stewart*, 9 Idaho, 376, 74 Pac. 955.

Where a motion for a new trial is made on behalf of only one of several defendants and is denied, such defendant is the only one entitled to appeal from the order denying the motion, the other defendants not being aggrieved thereby.—*Johnston v. Bronson*, 19 Idaho, 449, 114 Pac. 5.

(B) ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT.

Waiver of objections. See post, V, (B).

Payment of costs by county not a bar to an appeal. See Counties, VI.

Though the rule is that matters decided by the district court on appeal from the orders of the board of county commissioners can only be brought to the supreme court for review by writ of error, yet where the attorneys for the respondent stipulate that an appeal from such a judgment and the appeal from the order overruling a new trial should be considered as one case in the supreme court, and that one brief should be prepared for both appeals, and both be argued at the same time as one case, they waive their right to have the appeal dismissed.—*Nez Perce County v. Latah County*, 3 Idaho, 413, 31 Pac. 800.

Where defendants' attorneys stipulated that judgment may be entered and the judgment entered varies from that specified in the stipulation, defendants are not estopped to appeal therefrom.—*Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893.

Editorial Notes.

Waiver of right of appeal: 13 Am. Dec. 546.

Validity and enforceability of stipulation waiving right to appeal: 19 Ann. Cas. 1056.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) ISSUES AND QUESTIONS IN LOWER COURT.

A party cannot avail himself of a defense for the first time in the appellate court.—*Smith v. Sterling*, 1 Idaho, 128.

Where the pleadings do not aver an account stated or a final settlement, that question cannot be raised for the first time on appeal.—*Taylor v. Hall*, 8 Idaho, 757, 71 Pac. 116.

A question not raised in the trial court will not be considered on appeal.—*Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608.

Where a policy of fire insurance contains the provision that "no suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity . . . unless commenced within twelve months next after the fire," an objection to the maintaining of the suit, because not com-

menced within the time fixed by the policy, cannot be raised and urged as error, when such objection is made in this court for the first time.—*Marysville Merc. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

Editorial Notes.

Stipulation by counsel as conferring jurisdiction on appellate court to pass on question not raised below: Ann. Cas. 1912A, 1037.

(B) OBJECTIONS AND MOTIONS AND RULINGS THEREON.

Necessity of exceptions. See post, V, (C).

Necessity, form and requisites of bill of exceptions. See post, X, (C).

Objections for want of jurisdiction. See ante, II.

If a cause is tried upon the theory that the answer denies the allegations of the complaint, the plaintiff will not be permitted to object to the sufficiency of the denials for the first time in the appellate court.—*Toulouse v. Burkett*, 2 Idaho, 288, 13 Pac. 172; *Work Bros. v. Kinney*, 7 Idaho, 460, 63 Pac. 596.

Error to which the attention of the trial court was not directed will not be considered on appeal.—*First Nat. Bk. v. Sampson*, 7 Idaho, 564, 64 Pac. 890; *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503.

Where a court fails to find upon a question, that question cannot be considered for the first time on appeal, unless the finding is necessary to enable the court to render judgment.—*Gamble v. Dunwell*, 1 Idaho, 268.

The admission of a sheriff's deed in evidence, without first showing a valid judgment, is not erroneous where no objection was made.—*Leland v. Isenbeck*, 1 Idaho, 460.

Where a party shows no right to recover, objections to the complaint or other pleading may be taken for the first time on appeal.—*Gorman v. Commrs. Boise County*, 1 Idaho, 655.

Where a party has acquiesced in the form of a verdict by failing to move for its correction, or for a new trial, he cannot object to it on appeal.—*Fox v. West*, 1 Idaho, 782.

An objection that an answer does not contain facts sufficient to constitute a defense may be made in the supreme court for the first time.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

Objections to the admissibility of evidence cannot be made for the first time in the appellate court.—*Darby v. Heagerty*, 2 Idaho, 282, 13 Pac. 85.

On an appeal from a judgment of nonsuit, the respondent is confined to the grounds stated therefor in his motion in the district court.—*Bellevue Water Co. v. City of Bellevue*, 3 Idaho, 739, 35 Pac. 693.

One who tries a case before a jury without objection cannot predicate error on the fact that the action was in equity and not in law, and hence should have been tried by the court without a jury.—*Bernier v. Anderson*, 8 Idaho, 675, 70 Pac. 1027.

Where neither the pleadings nor the evidence shows that a receipt in full was considered by the parties as a final settlement of

their accounts, a contention that the person signing such receipt is precluded from questioning its accuracy cannot be made for the first time on appeal.—*Taylor v. Hall*, 8 Idaho, 757, 71 Pac. 116.

Where a complaint contains defects which make it subject to special demurrer, and no demurrer is interposed or objection made to the sufficiency of the complaint, the complaint will not be held insufficient on appeal.—*Murry v. Nixon*, 10 Idaho, 608, 79 Pac. 643.

Where the transcript fails to identify the papers used by the trial court on the hearing of a motion to dismiss the appeal from the probate court, the supreme court will not pass on the action of the trial court on such motion.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

Where the defendant fails to demur to the complaint or an alleged cause of action, and thereafter seeks to raise the question of the sufficiency of the complaint to support a judgment, the court will not consider any uncertainty or ambiguity it may contain which might have been raised by special demurrer, but will examine the pleading for the purpose of determining whether or not there is a total lack of material allegations necessary to state any cause of action.—*West v. Johnson*, 15 Idaho, 681, 99 Pac. 709.

Where the question of the total insufficiency of a complaint or alleged cause of action is raised for the first time on appeal, the court will only examine the pleading for the purpose of ascertaining whether there is any allegation whatever that would support or justify the judgment, but will not consider the specific character of the allegation, the manner of making the same, the language in which it is couched, nor its uncertainty or indefiniteness, but before a judgment will be reversed on that ground, it must appear that there is a total lack of material averments.—*West v. Johnson*, 15 Idaho, 681, 99 Pac. 709.

Where an appeal is taken from the decision of the district court, dismissing an appeal from the probate court, on the ground that the appeal was not perfected within thirty days after the rendition of the judgment in the probate court, and the transcript fails to show that the appeal was perfected by filing the required undertaking on appeal within the thirty days, the order of the court will be sustained.—*Watt v. Decker*, 16 Idaho, 184, 101 Pac. 253.

The question as to whether or not several lots or tracts or parcels of land have been sold together under one bid, instead of separately, as required by R. C. 4484, is a question properly to be presented to the court from which the execution issued and on a motion to set aside the sale for the irregularity. It cannot be raised for the first time on appeal either in the same or a collateral proceeding.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

Under R. C. 4225, providing that no variance between the allegations and the proof is deemed to be material, unless it has actually misled the adverse party to his prejudice, whenever there is such variance it is the duty of the adverse party to make seasonable ob-

jection on that ground, and if objection is not made it cannot be raised for the first time on appeal.—*Johnson v. Gary*, 18 Idaho, 623, 111 Pac. 855.

R. C. 4225, 4226, empower the district court to afford relief to a defendant who during the trial or at the conclusion thereof contends that he has been misled by the allegations of the complaint, and such relief should be sought in that court, and the question cannot be raised for the first time on appeal.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

Where upon foreclosure of a mortgage upon property of an irrigation or canal company, the mortgagee has full opportunity to contest an order made by the trial judge in the case allowing such receiver's certificates as a prior lien to the mortgage, and fails to object or show any reason why such receiver's certificates should not be allowed, and the record fails to disclose that the appellant took any steps to contest such certificates as prior liens, and in no way put their priority in issue, this court will not disturb the finding of the trial court in allowing such receiver's certificates as prior liens against such property.—*Hewitt v. Great Western etc. Co.*, 20 Idaho, 235, 118 Pac. 296.

It cannot be urged for the first time on appeal that the findings and judgment should be reversed because there is a variance between the evidence and the allegations of the complaint, in that the allegations of the complaint contain two causes of action.—*First Nat. Bank v. American Falls etc. Co.*, 20 Idaho, 368, 118 Pac. 668.

A party to an action will not be permitted to stand by and neglect or refuse to raise seasonable objections to mere defects in pleadings or proceedings, and thereafter take advantage of such defects on appeal.—*Nobach v. Scott*, 20 Idaho, 558, 119 Pac. 295.

Alleged misconduct of an attorney will not be reviewed, where no objection was made or exception taken at the trial, and the matter was not called to the trial court's attention.—*McDonald v. Challis*, 22 Idaho, 749, 128 Pac. 570.

Where an instruction is given to a jury by the court, and it is admitted that such instruction is correct and is not excepted to at the time of the giving of such instruction, and counsel for one of the parties requests an instruction which is contradictory to the instruction given by the court, such party cannot claim in this court, for the first time, that the giving of the two instructions was error.—*Wheeler v. Gilmore etc. R. R. Co., Ltd.*, 23 Idaho, 479, 130 Pac. 801.

Where a bill of exceptions is signed and settled by the trial judge, and the record does not show that any objections were made at the time of the settlement that such bill of exceptions had not been served, this court will presume that such service was made, where it appears that the respective parties agreed thereafter that the bill of exceptions was correct as engrossed, and that the same was allowed and agreed to by the respective counsel, and the respondent is estopped from raising objections for the first time in this

court that the bill of exceptions was not served.—*First Nat. Bank of American Falls v. Shaw*, 24 Idaho, 134, 132 Pac. 802.

Where a motion for a nonsuit is made at the conclusion of plaintiff's evidence, and certain grounds are assigned in such motion, and the motion is sustained, and an appeal is taken from the order and judgment of the court upon said motion, this court will not consider errors, assigned by counsel in their brief, which were not included in the motion for a nonsuit.—*Tritthart v. Tritthart*, 24 Idaho, 186, 133 Pac. 121.

Editorial Notes.

Necessity for objection in addition to exception in order to save giving of instruction for review: *Ann. Cas.* 1912B, 1231.

Filing of other pleading as waiver of objection to overruling of demurrer: *Ann. Cas.* 1913B, 388.

(C) EXCEPTIONS.

Nature, form and contents of bill of exceptions and settlement and filing thereof. See *Exceptions, Bill of*.

Necessity of bill of exceptions or statement of case. See post, X, (C).

Contents, making and settlement of case or bill of exceptions. See post, X, (D).

Necessity of exception to order on motion for new trial. See post, V, (D).

Where a demurrer to the complaint is overruled, and the ruling is not saved by bill of exceptions, the supreme court will not review such ruling.—*Fox v. West*, 1 Idaho, 782; *Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107; *Guthrie v. Fisher*, 2 Idaho, 111, 6 Pac. 111; *Purdum v. Taylor*, 2 Idaho, 167, 9 Pac. 607; *Berry v. Alturas County*, 2 Idaho, 296, 13 Pac. 233.

Where a party desires to have a decision or order of the district court reviewed on appeal, he must except thereto when the ruling or decision is made, and he must also preserve and bring up such exception by a bill of exceptions or statement.—*People v. Hunt*, 1 Idaho, 433; *Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107.

Where a party seeks to reverse a judgment, he must except to the ruling of the trial court and assign the error in the supreme court on appeal.—*Lamkin v. Sterling*, 1 Idaho, 120; *Smith v. Sterling*, 1 Idaho, 128.

Where a complaint is so radically defective that it discloses no cause of action and will not support a judgment, the appellant may assign error in the decision of the trial court, though he has not excepted thereto.—*Lamkin v. Sterling*, 1 Idaho, 120.

Where a complaint, though defective and demurrable, is sufficient to support a judgment, and defendant fails to except to such judgment, he loses his rights on appeal and cannot reverse the judgment however patent the error.—*Lamkin v. Sterling*, 1 Idaho, 120.

Where no exceptions are taken in the court below to an order of that court denying a motion to open a default and set aside a judgment, an appeal from such order will

be dismissed.—*Goodman v. Minear Min. etc. Co.*, 1 Idaho, 131.

Where the statement on motion for a new trial fails to show any exceptions taken to the rulings of the court during the trial, the statement becomes useless on an appeal from the judgment.—*Forsythe v. Richardson*, 1 Idaho, 459.

Exceptions must be taken to the action of the court in overruling exceptions to a referee's report and preserved in the record, or they will be deemed to have been waived.—*Taylor v. Peterson*, 1 Idaho, 513.

An instruction not excepted to is not properly a part of the record and cannot be reviewed upon an appeal.—*Emery v. Langley*, 1 Idaho, 694.

An order to strike out a part of a pleading is an interlocutory, nonappealable order, and to be reviewed on appeal should be incorporated into a bill of exceptions, and made part of the record.—*Graham v. Linehan*, 1 Idaho, 780.

The term "adverse party" in civil practice act, section 201, has the same signification as to matters deemed excepted to as the term "aggrieved party" in civil practice act, section 436.—*Fox v. West*, 1 Idaho, 782.

Under R. S. 4427, providing, inter alia, that an order or decision made upon a contested motion is deemed to have been excepted to, an order striking out portions of a cost bill and directing that costs be retaxed need not be incorporated in a bill of exceptions.—*Thiessen v. Riggs*, 5 Idaho, 487, 51 Pac. 107.

Where the ruling of the trial court in excluding testimony is complained of, the record on appeal must show that exception was taken to such ruling at the time it was made, and it is not sufficient merely to allege such ruling as error in the specification of errors relied on.—*First Nat. Bank v. Bews*, 5 Idaho, 678, 51 Pac. 777.

Under R. S. 4427, providing, inter alia, that an order sustaining or overruling a demurrer is deemed to have been excepted to and such exception need not be embodied in a bill of exceptions, but the same, appearing in the record or files, may be reviewed on appeal as though settled in such bill of exceptions, an order overruling a demurrer need not be embodied in the bill of exceptions or statement.—*Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

Under R. S. 4427 an order striking out a portion of a pleading is deemed excepted to, and, appearing in the record or files, may be reviewed upon appeal as though settled in a bill of exceptions.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

Where the trial court or judge thereof refuses to consider affidavits or other papers, or evidence offered on the part of either plaintiff or defendant, exception to such ruling must be saved and the rejected affidavits or evidence must be incorporated in the bill of exceptions or certified to by the judge as having been presented and rejected in order to be considered on appeal.—*Dougal v. Eby*, 11 Idaho, 789, 85 Pac. 102.

(D) MOTIONS FOR NEW TRIAL.

Nature and scope of remedy of new trial, grounds therefor, and proceedings to procure. See *New Trial*.

Time for taking appeal. See post, VII, (A), 3.

Necessity of bill of exceptions as to matters deemed excepted to. See post, X, (O), 2.

What record must show. See post, X, (A, E), 5.

Where no motion for a new trial was made in the trial court, or where there is no statement properly made on such motion, the appellate court will only examine the judgment-roll, and if this be regular, the judgment will be affirmed.—*Purdy v. Steel*, 1 Idaho, 216.

Exception must be taken to an order overruling a motion for a new trial and preserved in the record or they will not be reviewed on appeal.—*Taylor v. Peterson*, 1 Idaho, 513.

Under R. S. 4427, declaring what orders and decisions are deemed excepted to, no formal exception is required to an order denying a new trial.—*Hattabaugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831.

To entitle an appellant to have the supreme court review the sufficiency of the evidence on an appeal from an order overruling a motion for a new trial, it must appear that the appellant assigned as a ground for granting such new trial that the evidence was insufficient to justify the verdict or decision, or that the verdict or decision was against the evidence and the law; and not that the evidence is insufficient to justify the judgment, and that the judgment is against the evidence and the law.—*Caldwell v. Wells*, 16 Idaho, 459, 101 Pac. 812.

On appeal merely from an order denying a new trial and not from the judgment, an objection to the rulings on evidence will not be considered when not included in the specifications of error in the motion for new trial.—*Burrow v. Idaho & W. N. R.*, 24 Idaho, 652, 135 Pac. 838.

(E) CASES AND QUESTIONS RESERVED OR CERTIFIED.

(No paragraphs.)

VI. PARTIES.

Who are adverse parties necessary to serve with notice of appeal. See post, VII, (D), 4.

Persons entitled to appeal. See ante, IV, (A).

Right of one appellant to base appeal on transcript prepared for and paid for by coappellant. See post, X, (O), 6.

Where a party to an action dies after the rendition of judgment and before the filing and serving of the notice of appeal, the authority of the deceased's attorney to act ceases, and any subsequent action of the attorney before substitution will not bind the representatives of the deceased or any other party in interest.—*Coffin v. Edgington*, 2 Idaho, 627, 23 Pac. 80.

After judgment was rendered, and before notice of appeal was filed or served, one of the defendants died. No substitution was made. Held, that all the proceedings on the appeal were null and void as to the representatives of the deceased defendant.—*Coffin v. Edgington*, 2 Idaho, 627, 23 Pac. 80.

Where an action is begun against an unincorporated joint stock company, some of the members of which are not served and do not appear and judgment is rendered against all defendants and the appearing defendants appeal and reverse the judgment, such appeal will inure to the benefit of the nonappearing defendants and the judgment reversed as to them.—*Spotswood v. Dernham*, 12 Idaho, 400, 85 Pac. 1108.

Where a party to an action dies before an appeal is taken, the attorney who represented such party has no power or authority to prosecute an appeal until a substitution of a legal representative is had, and an appeal prosecuted in the name of such deceased party without substitution will be dismissed for want of jurisdiction in the appellate court to consider the same.—*McCornick v. Shaughnessy*, 19 Idaho, 465, 34 L. R. A., N. S., 1188, 114 Pac. 22.

Where a party to an action dies after judgment, the agency and authority of his attorney is at once terminated, and the attorney must obtain his employment and authority from a legal representative of the estate of such deceased person before he can prosecute an appeal in the case.—*McCornick v. Shaughnessy*, 19 Idaho, 465, 34 L. R. A., N. S., 1188, 114 Pac. 22.

Editorial Notes.

Party, who may appeal as an interested or injured: 119 Am. St. Rep. 740.

Persons not parties or privy to judgment below as proper party defendant to writ of error: 5 Ann. Cas. 630.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.**(A) TIME OF TAKING PROCEEDINGS.**

Time of filing undertaking. See post, VII, (O), 4.

Time to serve notice of appeal. See post, VII, (D), 3.

Time for settlement of reporter's transcript. See post, X, (O), 6.

Time for settlement of bill of exceptions or statement. See post, X, (D), 3.

Time for taking appeal from decision of district court reversing order of commissioner establishing private roads. See *Private Roads*.

Removal of cause to federal court as tolling time for appeal. See *Removal of Causes*.

1. In General.

Where an appeal is not taken within the time prescribed by statute, the court acquires no jurisdiction to hear it.—*Rosenbaum v. Small*, 4 Idaho, 423, 40 Pac. 54.

Editorial Notes.

Waiver of right to notice of judgment, etc., required to set statute of limitations running against right to appeal: Ann. Cas. 1913B, 439.

Validity of statute validating appeal taken after time to appeal has elapsed: Ann. Cas. 1913D, 1261.

Computation of time for appeal or writ of error as affected by motion for new trial or rehearing: 3 Ann. Cas. 630.

2. Premature Appeal.

An appeal, perfected before the entry of judgment, is premature and will be dismissed.—*Vollmer v. Nez Perce County*, 7 Idaho, 302, 62 Pac. 925.

An order denying a new trial was not filed by the clerk until three days after it was made, on which date an appeal from the order was perfected. On motion to dismiss the appeal as prematurely taken, the affidavit of the district deputy clerk was filed in which it was stated that the order was not filed until a month later, at which time it was indorsed as filed at the time the appeal was perfected. Held, that the supreme court would consider the order to have been filed as of the date of the indorsement and hence that the appeal was not prematurely taken.—*Zienke v. Northern Pac. R. Co.*, 7 Idaho, 746, 65 Pac. 431.

3. Limitations Applicable to Particular Proceedings—Motions for New Trial.

Power of court to extend time. See post, VII, (A), 8.

An appeal from an order granting or refusing a new trial must be taken within thirty days from the time the order is made and filed with the clerk.—*Hyde v. Harkness*, 1 Idaho, 623.

Under R. S. 4807, an appeal from an order granting a new trial must be taken within sixty days after the order is made and entered on the minutes of the court or filed with the clerk.—*Arthur v. Mounce*, 4 Idaho, 487, 42 Pac. 509.

Where an appeal from an order denying a new trial was not taken within sixty days after the entry of the order as required by R. S. 4807, subdivision 3, the appeal will be dismissed.—*Trull v. Modern Woodmen of A.*, 12 Idaho, 318, 10 Ann. Cas. 53, 85 Pac. 1081.

Where the notice of intention to move for a new trial was not served and filed within ten days after verdict as required by R. S. 4441, an appeal from an order denying a new trial will be dismissed.—*Fox v. Rogers*, 6 Idaho, 710, 59 Pac. 538.

4. — Judgments.

Under R. S. 4807, an exception to the decision or verdict on the ground that it is not sustained by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39; *Brady v. Lanehan*, 5 Idaho, 732, 51 Pac. 761; *Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645; *Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228.

Under R. S. 4807, specifying the time within which appeals may be taken, an appeal from a final judgment of the district court, taken more than one year after entry thereof, will be dismissed.—*Robson v. Colson*, 9 Idaho, 215, 72 Pac. 951; *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67; *Cartier v. Buck*, 9 Idaho, 571, 75 Pac. 612.

Upon an appeal from a judgment taken within sixty days after the rendition thereof,

the court may review the verdict of the jury and the evidence on which such verdict is based.—*Ainslie v. Idaho World Printing Co.*, 1 Idaho, 641.

On an appeal not taken within sixty days after rendition of judgment, the overruling of defendant's motion for a nonsuit cannot be considered.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

An exception to the verdict on the ground of the insufficiency of the evidence to justify it cannot be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment.—*Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697.

An exception "that the verdict is against law, as applied to the facts proven in the case," cannot be reviewed on an appeal from the judgment taken more than sixty days after the rendition thereof.—*Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697.

Under R. S. 4807, as amended by Laws 1899, page 273, providing that an appeal from a judgment rendered on an appeal from an order, decision or action of the board of county commissioners, must be taken within ninety days after entry of judgment and that an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on appeal from the judgment unless the appeal be taken within sixty days from entry thereof, the evidence in such an appeal perfected eighty-eight days after entry of judgment cannot be reviewed.—*Mahoney v. Board of County Commrs.*, 8 Idaho, 375, 69 Pac. 108.

Under R. S. 4807, subdivision 3, providing that an appeal may be taken from the district court to the supreme court within sixty days after the interlocutory judgment is made and entered, an appeal in a partition case from an interlocutory decree directing that on the coming in of the referee's report final judgment be entered, etc., must be taken within sixty days or it will be dismissed.—*Richardson v. Ruddy*, 10 Idaho, 151, 77 Pac. 972.

Where the appeal from the judgment was not taken within sixty days after the rendition of the judgment, and no valid appeal has been taken from the order denying a motion for a new trial, the appellate court is without authority to examine the evidence for the purpose of determining its sufficiency to support the verdict or for any other purpose except to determine whether or not errors of law were committed by the court in the course of the trial.—*Trull v. Modern Woodmen of A.*, 12 Idaho, 318, 10 Ann. Cas. 53, 85 Pac. 1081.

All errors properly saved and assigned in a statement of the case may be reviewed on appeal from the judgment, although the appeal be taken more than sixty days after the rendition of such judgment.—*Steve v. Bonners Ferry Lumber Co.* (on rehearing), 13 Idaho, 384, 92 Pac. 363.

Under R. S. 4807, an exception to the decision on the ground that it is not supported by the evidence cannot be reviewed on appeal from the judgment, unless such appeal is

taken within sixty days from the rendition of the judgment.—*White v. Whitcomb*, 13 Idaho, 490, 90 Pac. 1080.

Judgment was filed February 18, 1905, notice of appeal was served and filed April 17, 1905, and an undertaking on appeal was filed April 19, 1905. Held, that the appeal was taken within sixty days as required by R. S. 4808.—*Finney v. American Bonding Co.*, 13 Idaho, 534, 90 Pac. 859.

Where an order is made dissolving an injunction and sustaining a demurrer to the complaint and thereafter the court enters a judgment of dismissal for failure to amend, an appeal from the judgment taken within one year from the date of its entry but more than sixty days from the date of the order dissolving the injunction will be considered on its merits, but the court will not review the order dissolving the injunction.—*Neustadter Bros. v. Doust*, 13 Idaho, 617, 92 Pac. 978.

R. C. 4807, subdivision 1, providing that unless the appeal from the judgment is taken within sixty days, an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed, does not apply to an appeal from a judgment rendered on an appeal from an inferior court or tribunal.—*Walker v. Elmore County*, 16 Idaho, 696, 102 Pac. 389; reversing *Mahoney v. Board of County Commrs.*, 8 Idaho, 375, 69 Pac. 108.

An appeal from a judgment taken more than one year after the entry of such judgment will be dismissed on motion.—*Smith v. American Falls etc. Co.*, 15 Idaho, 89, 95 Pac. 1059.

Where a foreclosure decree has been satisfied and thereafter the court sets aside the satisfaction and adjudges the plaintiff's attorney to be the equitable assignee of the judgment in the amount still due him and orders execution to issue, such order is a final judgment from which an appeal lies within one year.—*Dahlstrom v. Featherstone*, 18 Idaho, 179, 110 Pac. 243.

Where an appeal from a final judgment is not taken within sixty days after rendition thereof, the sufficiency of the evidence to sustain the findings of the court cannot be reviewed under the express provisions of R. C. 4807, subdivision 1.—*Haas v. Teters*, 19 Idaho, 182, 113 Pac. 96.

5. — Orders After Final Judgment.

An order recited the fact that the cause came on for hearing on the demurrer which was sustained and that, plaintiff failing to plead further, the cause was dismissed, that the plaintiff then filed herein a motion to set aside said judgment of dismissal, that "said motion is overruled and the said action dismissed." No judgment of dismissal had been entered. Held, that said order was not a judgment, but simply an order made after final judgment, hence an appeal therefrom would be governed by R. S. 4807, subdivision 3.—*Oliver v. Kootenai County*, 13 Idaho, 281, 90 Pac. 107.

An appeal from an order overruling a motion to set aside a judgment must be taken

within sixty days after the order is made and entered or filed with the clerk under R. S. 4807, subdivision 3.—*Oliver v. Kootenai County*, 13 Idaho, 281, 90 Pac. 107.

Under R. S. 4807, subdivision 3, an appeal from an order taxing costs not taken within sixty days after the entry of the order will be dismissed.—*Campbell v. First Nat. Bank*, 13 Idaho, 95, 88 Pac. 639.

Under R. S. 4807, an appeal from an order after judgment must be taken within sixty days after the order is made and entered in the minutes of the court or filed with the clerk.—*Balfour v. Eves*, 4 Idaho, 488, 42 Pac. 508.

6. Extension of Time.

Extension of time to prepare or serve bill of exceptions. See *Exceptions, Bill of*.

The court cannot extend the time provided by statute within which to appeal from an order granting or refusing a new trial.—*Hyde v. Harkness*, 1 Idaho, 623.

Under R. S. 4807, subdivision 3, providing that an appeal from an order granting or refusing a new trial must be taken within sixty days after the order is made on the minutes of the court or filed with the clerk, the taking of such an appeal is a jurisdictional question and the court has no power to extend the time or cure any defect in taking the appeal.—*Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645.

Failure to comply with the statutes or rules of court in taking an appeal cannot be cured by stipulation.—*Fenny v. Nez Perce County*, 4 Idaho, 642, 43 Pac. 570.

(B) PETITION OR PRAYER, ALLOWANCE, AND CERTIFICATE OR AFFIDAVIT.

Right of receiver to appeal without order of court. See *Banks and Banking, II*.

Certification of record or transcript. See post, *X, (G)*.

(C) PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

Liability on undertakings. See post, *XVIII*.

What record must show as to undertaking. See post, *X, (A, B)*, 4.

Right of one appellant to base appeal on transcript prepared and paid for by coappellant. See post, *X, (C)*, 6.

Supersedeas or stay of proceedings. See post, *IX*.

1. Payment of Fees.

Payment of fees for reporter's transcript of evidence. See post, *X, (C)*, 6.

Prior to act of March 12, 1897, the clerk of the district court could not be compelled to certify a transcript on appeal unless the legal fees for copying and certifying such transcript should be tendered to him and this would be true though one of the parties had prepared the transcript.—*Potter v. Talkington*, 5 Idaho, 317, 49 Pac. 14.

2. Necessity of Undertaking.

On an appeal from a judgment of the district court, which has been entered on appeal from an order, decision or action of a board of county commissioners, an undertaking

must be given in accordance with R. S. 4807-4809, or the appeal will be dismissed.—*Foresman v. Board of Commrs.*, 11 Idaho, 11, 80 Pac. 1131.

R. C. 4935, which provides: "In any civil action or proceeding wherein the state or the people of the state, is a party plaintiff, or any state officer, in his official capacity, or on behalf of the state, or any county, or city, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state or the people thereof, or any officer thereof, or of any county, or city; but on complying with the other provisions of this code, the state, or the people thereof, or any state officer acting in his official capacity, or any county or city, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code"—applies to villages organized under the laws of this state governing the organization of cities and villages.—*Trueman v. Village of St. Maries*, 21 Idaho, 632, 123 Pac. 508.

3. Form, Requisites and Sufficiency of Undertaking.

An undertaking on an appeal from a judgment and from an order refusing a new trial, which does not specify to which appeal it relates, is void for uncertainty, and the appeals will be dismissed.—*Mathison v. Leland*, 1 Idaho, 712; *McCoy v. Oldham*, 1 Idaho, 465; *Eddy v. Van Ness*, 2 Idaho, 101, 6 Pac. 115; *Motherwell v. Taylor*, 2 Idaho, 148, 9 Pac. 417; *Cronin v. Bear Creek Mining Co.*, 3 Idaho, 438, 32 Pac. 53; *Schiller v. Small*, 4 Idaho, 422, 40 Pac. 53; *Peters v. Small*, 4 Idaho, 422, 40 Pac. 53; *Hoskins v. Wooden*, 4 Idaho, 292, 38 Pac. 933; *Weil v. Sutter*, 4 Idaho, 748, 44 Pac. 555; *Kelly v. Leachman*, 5 Idaho, 521, 51 Pac. 407; *Baker v. Oregon R. & N. Co.*, 8 Idaho, 36, 66 Pac. 806; *Thum v. Bailey*, 12 Idaho, 510, 86 Pac. 279.

An undertaking on appeal from a judgment in the sum required by law upon a single appeal does not make effectual an appeal from an order refusing a new trial, although taken at the same time and by the same notice.—*McCoy v. Oldham*, 1 Idaho, 465.

Where two appeals are taken, one from the judgment and the other from an order refusing a new trial, there should be two undertakings in order to render both appeals effectual.—*Mathison v. Leland*, 1 Idaho, 712.

An undertaking on appeal under R. S. 4809, intended to apply to more than one appeal, must designate or specify each of such appeals, and will not be construed to apply to appeals not mentioned therein.—*Sebree v. Smith*, 2 Idaho, 357, 16 Pac. 477; *Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697.

The affidavit attached to an appeal bond, containing the justification of the sureties under R. S. 4934, is no part of the undertaking.—*Miller v. Pine Min. Co.*, 3 Idaho, 603, 32 Pac. 207.

An undertaking on appeal which specifically recites that the appeal is from the judgment and from the order overruling the motion for a new trial, and obligates the sureties to pay

all damages and costs which may be awarded against the appellants on said appeals or on a dismissal thereof, is sufficient.—*Vane v. Towle*, 5 Idaho, 471, 50 Pac. 1004.

On an appeal from a judgment and from an order sustaining a demurrer to defendant's amended answer, an undertaking "that said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof," is insufficient.—*Wallace v. McKinlay*, 6 Idaho, 95, 53 Pac. 104.

Where a notice of appeal stated that the appeal was from the judgment and the whole thereof, while the undertaking on appeal recited that the same is given upon an appeal from a judgment against defendant for costs in the sum of \$388, the undertaking does not conform to the notice and the appeal will be dismissed.—*Walker v. McGinness*, 9 Idaho, 162, 72 Pac. 885.

R. S. 4821, provides that the papers on appeal must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal in due form has been properly filed or a stipulation of the parties waiving the undertaking. The transcript on appeal contained a stipulation signed by the attorneys for plaintiff and defendant, plaintiff's attorneys describing themselves as attorneys for plaintiff and for certain defendants who had been made parties in the original defendant's cross-complaint. Such transcript mentioned the undertaking on appeal. The undertaking entitled in the name of the original parties was "Whereas the defendant in the above-entitled action has appealed to the supreme court from a judgment and decree made and entered against the said plaintiff and in favor of the said defendant in said action in February 23, 1903, for the sum of etc. and from the whole thereof," etc. Held, that the undertaking was sufficient in form and substance.—*Idaho Comstock etc. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975.

A notice of appeal was "from that certain order and decision sustaining defendant's demurrers to amended complaint and from the judgment of dismissal of the district court and the whole thereof, dated," etc. The appeal bond was conditioned for the payment of \$300 under the statutory penalties and obligations. Held, that that part of the notice relating to appeal from the order will be treated as surplusage, and as the appeal is from the judgment, it will not be dismissed for ambiguity in the appeal bond.—*Abrams v. White*, 11 Idaho, 497, 83 Pac. 602.

An undertaking on appeal conditioned that the appellants "will pay all damages and costs which may be awarded against them on appeal not exceeding \$300," is insufficient under R. S. 4809, which requires an undertaking "to the effect that appellant will pay all damages and costs which may be awarded against him on an appeal or on a dismissal thereof."—*Jackson v. Barrett*, 12 Idaho, 465, 86 Pac. 270.

Under R. C. 4809, where one appeal is taken from the judgment and another from the order overruling a motion for new trial, only one undertaking of \$300 for damages and costs is required to be filed, and such under-

taking should refer to both appeals.—Nobach v. Scott, 20 Idaho, 558, 119 Pac. 295.

An undertaking on appeal from a judgment is sufficient where it is to the effect that the appellant will pay all damages and costs which may be awarded against the appellant on the appeal or on a dismissal thereof, not exceeding \$300.—Havlick v. Davidson, 15 Idaho, 787, 100 Pac. 91.

4. Time of Filing Undertaking.

Where an undertaking on appeal is not filed within five days after the filing and service of the notice of appeal, the appeal will be dismissed on motion.—Schissler v. Crooks, 1 Idaho, 369; Brown v. Hanley, 3 Idaho, 219, 28 Pac. 425.

Under civil practice act, section 438, if an undertaking on appeal is filed before the notice of appeal is served, the appeal is not effectual for any purpose, and it must be dismissed.—People v. Hunt, 1 Idaho, 371; Clark v. Lowenberg, 1 Idaho, 654.

Under R. S. 4808, requiring an undertaking on appeal to be filed within five days after the service of notice of appeal, the supreme court has no jurisdiction or authority to permit an undertaking on appeal to be filed after the five days have expired.—Brown v. Hanley, 3 Idaho, 219, 28 Pac. 425.

An undertaking on appeal from an order denying a new trial was executed on the same day the order was made. The order was not filed by the clerk until three days later, after which the notice of appeal was served and filed and at the same time the undertaking was filed. Held, that the undertaking was sufficient, as it would be deemed to have been executed at the time of its delivery to the clerk.—Zienke v. Northern Pac. Ry. Co., 7 Idaho, 746, 65 Pac. 431.

Under R. S. 4808, prescribing the method of taking an appeal to the supreme court, an undertaking on appeal filed prior to the service of notice of appeal is insufficient.—Wilson v. Bartlett, 7 Idaho, 269, 62 Pac. 415.

Under R. S. 4808, requiring the undertaking on appeal to be filed within five days after service of the notice of appeal, it is not sufficient that the undertaking be forwarded by mail to the proper clerk within five days, but it must be placed in the hands of the clerk within that time.—Cole v. Fox, 13 Idaho, 123, 88 Pac. 561.

The provisions of the statute permitting certain papers to be served by mail do not apply to the filing of undertakings on appeal. Cole v. Fox, 13 Idaho, 123, 88 Pac. 561.

Where an undertaking is not filed within five days after service of notice of appeal as required by R. S. 4808, the appeal will be dismissed on motion.—West v. Dygert, 13 Idaho, 641, 92 Pac. 753.

Where the notice of appeal is served on the 12th day of October, 1909, and the undertaking on appeal was not filed until the 22d day of October, 1909, the appeal will be dismissed on motion.—Haas v. Teters, 17 Idaho, 550, 106 Pac. 305.

The appellate court is not authorized to extend the time for filing an undertaking on

appeal.—West v. Dygert, 13 Idaho, 641, 92 Pac. 753.

5. Defects, Objections, Amendment and Waiver, Affecting Undertaking.

Where an undertaking on appeal is void, the filing of a new and sufficient undertaking at the hearing of the motion to dismiss the appeal will not avail the appellant.—Motherwell v. Taylor, 2 Idaho, 148, 9 Pac. 417.

Under R. S. 4842, where exception to the sufficiency of sureties on an appeal bond is made, they or other sureties must appear and justify within five days after the service of the notice excepting to the sureties, and upon notice to the adverse party; and an appearance twelve days after the notice excepting to the sureties and without notice to the adverse party is ineffectual.—Davelin v. Post Falls Woolen Mills, 4 Idaho, 735, 44 Pac. 554.

A void bond on appeal cannot be amended. Kelly v. Leachman, 5 Idaho, 521, 51 Pac. 407.

Where no undertaking on appeal is given in the trial court, the fact that an undertaking is given in the supreme court as provided by R. S. 4822 does not waive the provisions of R. S. 4808, requiring the filing of such undertaking.—Village of Hailey v. Riley, 13 Idaho, 749, 92 Pac. 756.

A stipulation extending the time for filing briefs, entered into after the time for filing the undertaking on appeal has expired, is not a waiver of the filing of said undertaking.—Village of Hailey v. Riley, 13 Idaho, 749, 92 Pac. 756.

Under R. C. 4809, the undertaking on appeal must be in writing, and, if it be insufficient or defective in any respect, such insufficiency or defect must be deemed waived, unless the respondent, within twenty days after the filing of such undertaking, shall file and serve upon the appellant or his attorney a notice in writing, pointing out specifically the defects or insufficiencies of such undertaking, and no such insufficiency or defect shall be subsequently urged against the undertaking.—King v. Seebeck, 20 Idaho, 223, 118 Pac. 292.

Under R. C. 4809, as amended by Laws 1907, page 134, one who desires to take advantage of or raise a question as to the sufficiency of an undertaking on appeal, must within twenty days after the filing thereof file and serve a written notice pointing out the defect or insufficiency of such undertaking, and unless he does so such objections are waived.—Martin v. Wilson (on rehearing), 24 Idaho, 353, 134 Pac. 532.

(D) NOTICE OF APPEAL.

Scope and contents of record as to notice. See post, X, (A, B), 3.

1. Form and Sufficiency.

A notice of appeal need not be directed to the clerk of the trial court.—Westheimer v. Thompson, 3 Idaho, 560, 32 Pac. 205.

After a dismissal of a case as to plaintiffs, there remained for disposition the issues made between defendants by their cross-complaints,

and the court ordered judgment of dismissal thereon. The notice of appeal stated that certain of the defendants appeal to the supreme court from the "decree of dismissal of cross-complaint therein, made and entered in the district court on April 21, 1900, in favor of the plaintiffs and against the said defendants in this action, and from the whole thereof." Held, that though the notice was defective in form, the substantial rights of respondents were not affected, and hence such defect would be disregarded under R. S. 4231. *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

An attorney duly admitted to practice in the district court in which an action is tried may legally sign the notice of appeal and take all steps necessary to perfect an appeal to the supreme court, since the case is in the trial court until the appeal is perfected.—*Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

Under R. S. 4924, which provides that an affidavit, notice or other paper without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligently refers to such act or proceeding, a notice of appeal by plaintiff in the name of the original parties to the action is sufficient where it appears that new parties were brought in by defendant's cross-complaint and that plaintiff's attorneys appeared for such new parties and admitted service of the notice on behalf of plaintiff and such new parties.—*Idaho Comstock etc. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975.

2. Service and Filing—In General.

The filing of the notice of appeal and the service of a copy thereof are jurisdictional facts, and go to the right of appeal.—*Slocum v. Slocum*, 1 Idaho, 589.

An appeal to the supreme court cannot be taken except by filing the notice thereof with the clerk, and serving a copy thereof upon the adverse party or his attorney.—*Slocum v. Slocum*, 1 Idaho, 589.

An affidavit in proof of the constructive service of papers on an attorney authorized by Code of Civil Procedure, section 685, must state that all the conditions of the statute authorizing such service have been substantially complied with or it will be disregarded. *Warner v. Teachenor*, 2 Idaho, 38, 2 Pac. 717.

Code of Civil Procedure, section 685, which provided that service of papers may be made by leaving the same in the office of an attorney in a conspicuous place, etc., is in derogation of the common law and must be strictly construed.—*Warner v. Teachenor*, 2 Idaho, 38, 2 Pac. 717.

Where a foreign corporation has no resident attorney on whom a notice of appeal may be served, it is sufficient to serve such notice by mail on the company's nonresident attorney and personally on the duly appointed resident agent of the corporation, on whom process might be legally served.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 102.

It is not necessary to serve notice of appeal on attorneys who have ceased to be attorneys

in the case.—*Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

Under R. S. 4808, requiring the notice of appeal to be served on the adverse party, and R. S. 4889, subdivision 2, providing that notices and other papers may be served on a party, if his residence be not known, by putting the same, inclosed in an envelope, into the postoffice, directed to such party, a notice of appeal must be served on a defaulting defendant either personally or in the manner specified by R. S. 4889.—*Titiman v. Alamance Mining Co.*, 9 Idaho, 240, 74 Pac. 529.

Under R. S. 4808, providing the manner of taking an appeal, an appeal is not taken until the notice thereof is filed and served, both of which acts must be within the statutory time. *Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645.

Where the same counsel is attorney for three defendants, and only one of them appeals, the notice of the appeal need not be served upon the nonappealing defendants or their counsel.—*Weeter Lumber Co. v. Fales*, 20 Idaho, 255, Ann. Cas. 1913A, 403, 118 Pac. 289.

Editorial Notes.

Parties entitled to notice of appeal: 13 Ann. Cas. 181.

3. — Time.

The service of the copy of the notice of appeal must be contemporaneous with, or after the filing of the notice; hence, the service upon the adverse party before the filing of the notice is not sufficient service.—*Slocum v. Slocum*, 1 Idaho, 589.

The order of serving and filing a notice of appeal is immaterial if both are done within the prescribed sixty days.—*Arthur v. Mounce*, 4 Idaho, 487, 42 Pac. 509.

Editorial Notes.

Time for filing notice of appeal: 9 Ann. Cas. 731.

4. — Adverse Parties.

Heirs as adverse parties entitled to notice of appeal. See *Executors and Administrators*, VIII.

An appeal will be dismissed on motion where all the adverse parties are not served with notice thereof.—*Jones v. Quantrell*, 2 Idaho, 153, 9 Pac. 418.

One of two defendants appeared generally in the action; the other appeared specially and moved to quash the summons, after which joint judgment was rendered against both and the one who appeared specially appealed. Held, that the other defendant was an adverse party to the appeal and should be served with notice thereof.—*Jones v. Quantrell*, 2 Idaho, 153, 9 Pac. 418.

Notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants or interveners.—*Coffin v. Edginton*, 2 Idaho, 627, 23 Pac. 80.

Where a several judgment was entered against defendant and two other persons, who failed to appeal or answer, such other persons

are not "adverse parties" within the meaning of R. S. 4808, requiring the notice of appeal to be served on all adverse parties, and defendant need not serve his codefendants with notice of appeal because they have no interest in conflict with the reversal of the judgment against defendant.—*Aulbach v. Dahler*, 4 Idaho, 522, 43 Pac. 192.

In an appeal by one of two defendants from a joint judgment against both defendants, the defendant not joining in the appeal is an adverse party, and should be served with notice of the appeal.—*Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Idaho, 104, 53 Pac. 271.

Under R. S. 4808, requiring the notice of appeal to be served on the adverse party or his attorney, such notice of appeal must be served on defendants who are in default.—*Titiman v. Alamance Mining Co.*, 9 Idaho, 240, 74 Pac. 529; *Baker v. Drew*, 9 Idaho, 276, 74 Pac. 1130.

Where a writ of assistance issues in favor of the purchaser of premises sold under a mortgage foreclosure judgment and neither the purchaser nor the person against whom the writ issues were parties to the foreclosure action, the notice of appeal from the order granting the writ need not be served on all the parties to the foreclosure action.—*Mills v. Smiley* (on rehearing), 9 Idaho, 325, 76 Pac. 786.

Under R. S. 4808, requiring notice of appeal to be served on the adverse party, notice of appeal should be served on all parties who have an interest in conflict with a reversal of the judgment or whose rights would be adversely affected thereby.—*Nelson Bennett Co. v. Twin Falls etc. Co.*, 13 Idaho, 767, 13 Ann. Cas. 172, 92 Pac. 980.

In an action to foreclose a laborers' lien, R. & C. were made defendants and the complaint alleged that R. & C. were subcontractors, who had filed a lien for work on the same portion of the canal covered by plaintiff's claim of lien, and that any amount which may be found due to said R. & C. on their said lien is included in the amount due to plaintiff, as principal contractor, and can and should be litigated herein. R. & C. appeared generally in the action but filed no pleadings and did not set forth their lien in any manner. The court made no findings for or against R. & C., except that they were in default. The decree did not adjudge any rights in favor of or against them. Held, that R. & C. were not adverse parties within the meaning of R. S. 4808, and hence were not entitled to service of notice of appeal from the judgment.—*Nelson Bennett Co. v. Twin Falls etc. Co.*, 13 Idaho, 767, 13 Ann. Cas. 172, 92 Pac. 980.

Where a joint judgment is rendered against two defendants, and one of them appeals and the other does not, the notice of appeal must be served on the latter under R. S. 4808, he being an adverse party within the meaning of said section.—*Doust v. Rocky Mountain Bell Tel. Co.*, 14 Idaho, 677, 95 Pac. 209.

Where at the close of the evidence for plaintiff a motion for a nonsuit is sustained as to one of the defendants, and the cause

thereafter proceeds against the other defendants, and a verdict is rendered against such defendants, and the judgment of the court is written upon two separate pieces of paper in favor of the defendant upon the motion for a nonsuit and in favor of the plaintiff against the other defendants, and such papers are filed in court at different dates and entered in the judgment docket at different dates, and the defendants, against whom the judgment is rendered, appeal from the judgment, or that part of the judgment rendered against them, and do not appeal from the judgment rendered on the motion for nonsuit, the defendant in whose favor the judgment of nonsuit is entered is not an adverse party as to that portion of the judgment from which the appeal is taken, and could in no way be prejudicially affected by a reversal of such part of the judgment, and need not be served with the notice of appeal.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

Where H. and C. execute a mortgage upon real property, and the property is afterward transferred to K., who assumes and agrees to pay such mortgage, and K. thereafter transfers said property to M., who assumes and agrees to pay such mortgage, and in an action to foreclose such mortgage, all of said parties are made defendants, and a joint judgment is rendered against all foreclosing said mortgage and directing a deficiency judgment to be entered, against all the defendants, and M. appeals from such judgment, the appeal will be dismissed upon failure to serve the notice of appeal upon H., C., and K., notwithstanding the fact that judgment by default was entered against them.—*Diamond Bank v. Van Meter*, 18 Idaho, 243, 21 Ann. Cas. 1273, 108 Pac. 1042.

Where one of several defendants takes an appeal, and the attorneys for such defendant sign a notice of appeal as "attorneys for defendants," and it appears throughout the record that there was a great number of defendants in the case, and that they were represented by various attorneys, and that the attorneys who prosecuted the appeal were attorneys for only one defendant, and the notice of appeal was not served on the other defendants, who did not in fact appeal, held, that the appeal was only prosecuted on behalf of the one defendant, and that the notice of appeal has not been served on the adverse parties, and that the appeal should be dismissed.—*Johnston v. Bronson*, 19 Idaho, 449, 114 Pac. 5.

Where B. M. commences an action against B. K. for the recovery of the possession of personal property, and D. asks and is permitted to intervene, and denies the material allegations of the complaint, and alleges that intervenor was the original purchaser of the property from plaintiff under a conditional sale, and that there has been no violation of the terms of the contract, and seeks damages, and after the evidence is in the court sustains a motion to nonsuit the intervenor on its cross-complaint and then sustains a motion made by the defendant and intervenor for a nonsuit against the plaintiff, upon appeal the intervenor is an "adverse party" within the meaning of R. S. 4808, and notice

of appeal should have been served on the intervener, and for a failure to do so the appeal must be dismissed.—*Berlin Mach. Works v. Bradford-Kennedy Co.*, 21 Idaho, 669, 123 Pac. 637.

Where a party is named as one of the defendants, and the record fails to show that the summons was served on him, or that he appeared in any manner in the case, and neither the findings of fact nor the judgment refer to him in any manner, it is not necessary to serve the notice of appeal on him, as he is not an adverse party under the provisions of R. C. 4808.—*McKinnon v. McIlhargey*, 24 Idaho, 720, 135 Pac. 826.

5. — Waiver.

Appearance in the supreme court by respondent's attorney by motion to dismiss the appeal for insufficiency of the notice of appeal and raising the question of the legal sufficiency of the judgment in the justice's court was a general appearance waiving failure of said notice.—*Moore v. Koubly*, 1 Idaho, 55.

Admission of due service of a notice of appeal is a waiver of irregular service, and, in general, any action which is equivalent to acknowledgment of notice waives any defects in such notice.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

(E) ENTRY, DOCKETING AND APPEARANCE.

Appearance as waiver of notice of appeal. See ante, VII, (D), 5.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

An appeal to the supreme court carries with it only such proceedings as were had in the district court down to the time of perfecting said appeal, and any process issued in said cause after said appeal, whether with or without authority of law, is under the control of the district court under R. S. 3862, subdivision 8.—*Miller v. Pine Mining Co.*, 3 Idaho, 603, 32 Pac. 207.

After an order refusing to settle a bill of exceptions has been appealed from, it is then too late for the trial court to amend such order, as it loses jurisdiction in the matter when the appeal is taken. In such case a motion to substitute an amended order for the original will be denied.—*Richardson v. Bohnney*, 18 Idaho, 328, 109 Pac. 727.

Where a judgment was entered holding certain sales and transfers of personal and other property fraudulent and void, and a receiver was appointed to take charge of such property, and an appeal was taken by the defendants, and an undertaking on appeal in the sum of \$300 was filed, the court has the jurisdiction and power to continue the receivership for the preservation of such property pending the appeal.—*Morbeck v. Bradford-Kennedy Co.*, 18 Idaho, 458, 118 Pac. 261.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

Continuance of receivership pending appeal. See ante, VIII.

Undertakings on appeal. See ante, VII, (C).

An undertaking placed on file to stay the execution of a judgment, although the jurat to the affidavit of justification is not signed by the officer administering the oath to the sureties, if sufficient in other respects, will stay the issuance of execution therein, and if the clerk issue execution, it should be quashed by the district court on motion.—*Miller v. Pine Mining Co.*, 3 Idaho, 603, 32 Pac. 207.

R. S. 4810 provides for and defines the kind of undertaking required in an appeal from a money judgment. R. S. 4520 provides that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage and that "if it appear from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance, against the defendant personally liable for such debt." R. S. 4817, 4809, provide that in cases not provided for in R. S. 4810 and other specified sections, the perfecting of an appeal by making a deposit or giving an undertaking in the sum of \$300 stays proceedings in the court below. Held, that, on appeal from a judgment for foreclosure of a chattel mortgage, an undertaking in the sum of \$300 is sufficient to stay the execution on the judgment pending the appeal, and if the district court requires a further undertaking to stay execution, such undertaking is void and cannot be enforced against the sureties thereon.—*Barnes v. Buffalo Pitts Company*, 6 Idaho, 519, 57 Pac. 267.

R. S. 4813, providing that in case of mortgage foreclosure a supersedeas bond shall cover any deficiency that may arise on the sale of the property, does not apply to judgments and decrees foreclosing mechanics' and laborers' liens, and in the latter case a supersedeas bond is not required to cover any deficiency that may arise on the sale of the property.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 722, 95 Pac. 827.

On an appeal from a decree foreclosing a mechanic's or laborer's lien, in order to stay proceedings it is necessary that the amount of the stay bond to cover waste and the use and occupation of the premises directed to be sold, be fixed by the trial judge, and such a supersedeas bond is properly given under R. S. 4813.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 722, 95 Pac. 827.

A decree foreclosing a mechanic's or laborer's lien and directing the sale of the property on which the lien is claimed is not a money judgment within the meaning of R. S. 4810, which provides that for a stay of proceedings on a money judgment, the appellant must give bond in "double the amount named in the judgment or order appealed from."—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 722, 95 Pac. 827.

The court may in its sound discretion suspend the operation of an injunction during an appeal.—*Waters v. Dunn*, 18 Idaho, 450, 110 Pac. 258.

An appeal from an order denying an application for a temporary restraining order does not operate as a supersedeas of the order appealed from, and at the same time, in effect,

grant the restraining order pending the appeal.—*Roberts v. Kartzke*, 18 Idaho, 552, 111 Pac. 1.

Editorial Notes.

Supersedeas, implied power of courts to issue: 67 Am. St. Rep. 714.

Suspension of injunction pending appeal: See note 38 L. R. A., N. S., 436.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

Matters of which supreme court will take judicial notice. See Evidence, I.

(A, B) MATTERS TO BE SHOWN BY RECORD AND SCOPE AND CONTENTS THEREOF.

Questions presented for review. See post, X, (K).

1. In General.

The party moving for an appeal must show affirmatively that he has complied with the law relative to appeals in order to give the supreme court jurisdiction.—*Anderson v. Knott*, 1 Idaho, 626.

Where the transcript fails to show a compliance with the provisions of the statute or the rules of court in taking an appeal, the appeal will be dismissed.—*Pence v. Lemp*, 4 Idaho, 526, 43 Pac. 75; *Penny v. Nez Perce County*, 4 Idaho, 642, 43 Pac. 570.

Under R. C. 4818, amended by Laws 1911, page 375, on an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or reporter's transcript prepared and settled as prescribed in R. C. 4434.—*First Nat. Bank of American Falls v. Shaw*, 24 Idaho, 134, 132 Pac. 802.

2. Judgment-roll.

Inserting papers in transcript which are not part of judgment-roll. See post, X, (F).

When all the defendants were served and some of them did not appear, the summons becomes a part of the judgment-roll, and hence is properly inserted in the transcript on appeal; it is also proper to insert it therein when some error is assigned in regard to it or its service.—*Taylor v. McCormick*, 8 Idaho, 37, 66 Pac. 805.

On appeal from a judgment, a motion to strike from the record on appeal any papers, records or copies thereof which are not a part of the judgment-roll, as specified in R. S. 4456, subdivision 2, will be granted.—*Williams v. Boise Basin etc. Co.*, 11 Idaho, 233, 81 Pac. 646.

Where the judgment-roll in a case where service was obtained by publication contains the affidavit and order for publication, such papers cannot be considered, either by the trial court or the appellate court on the question of the court's jurisdiction to enter the judgment, collaterally attacked, since they are no part of the judgment-roll as defined by R. S. 4456, subdivision 1.—*O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

Under R. S. 4456, requiring that a copy of any order made on demurrer shall become part of the judgment-roll, a copy of such order made and entered on the minutes of the court becomes a part of the judgment-roll, and is reviewable on an appeal from a final judgment.—*Perkins v. Loux* (on rehearing), 14 Idaho, 607, 95 Pac. 694.

The minutes of the court, as such, are not properly part of the judgment-roll, and cannot be examined or considered on an appeal from the judgment unless the same are incorporated and settled in a bill of exceptions.—*Williams v. Boise Basin Min. & Dev. Co.*, 11 Idaho, 233, 81 Pac. 646; *In re Paige*, 12 Idaho, 410, 86 Pac. 273; *Perkins v. Loux* (on rehearing), 14 Idaho, 607, 95 Pac. 694.

Under R. S. 4456, subdivision 1, specifying the contents of the judgment-roll, the affidavit and order for publication of a summons are not required to be inserted in the judgment-roll.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Under R. C. 4456, subdivision 2, as amended by Laws 1909, page 76, bills of exception are not made a part of the judgment-roll.—*Haas v. Teters*, 19 Idaho, 182, 113 Pac. 96.

3. Notice of Appeal.

The record on appeal must affirmatively show service of the notice of appeal on the adverse party or his attorney.—*People v. Lynch*, 1 Idaho, 358; *Gorman v. Comms. Boise County*, 1 Idaho, 627; *Caldwell v. Ruddy*, 1 Idaho, 760; *Adams v. McPherson*, 3 Idaho, 718, 34 Pac. 1095.

It is the duty of the clerk of court to certify merely the facts in relation to the notice of appeal and its service leaving the legal sufficiency thereof for the court, and the clerk's certificate that a "judgment has been duly appealed" will not obviate insufficiency in the service.—*Moore v. Koubley*, 1 Idaho, 55.

Where the record on appeal fails to show that the notice of appeal was filed with the clerk, the appeal will be dismissed.—*Tootle v. French*, 3 Idaho, 1, 25 Pac. 1091.

Where the record shows failure to serve notice of appeal from an order overruling a motion for a new trial within sixty days, the appeal will be dismissed.—*Tootle v. French*, 3 Idaho, 1, 25 Pac. 1091.

Under R. S. 4818, providing that on appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, an appeal will be dismissed where the record contains no copy of the notice of appeal but merely a certificate of the clerk that such notice was filed.—*Stevens v. Hall*, 9 Idaho, 233, 73 Pac. 527.

4. Undertaking on Appeal.

Under R. S. 4821, the record on appeal must show that an undertaking on appeal in due form has been properly filed, or that the same has been waived by stipulation of the parties.—*Rich v. French*, 3 Idaho, 727, 35 Pac. 173.

Where the clerk certifies that a sufficient undertaking on appeal in due form of law has been filed and appellants fail to present a copy of the undertaking, such certificate will be deemed sufficient as to the regularity of the undertaking.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

Where the record shows no certificate by the clerk or the attorneys to the effect that an undertaking on appeal in due form has been properly filed and there is no stipulation of the parties waiving the undertaking as required by R. S. 4821, the appeal will be dismissed.—*Village of Hailey v. Riley*, 13 Idaho, 749, 92 Pac. 756.

Where the clerk and attorneys decline to certify that an undertaking on appeal has been filed in due form, and there is no waiver of such undertaking, and an undertaking has in fact been filed, a certified copy of the undertaking may be filed in the supreme court, which will determine the fact whether an undertaking has been filed in due form.—*Village of Hailey v. Riley*, 13 Idaho, 749, 92 Pac. 756.

An affidavit of the clerk of the district court cannot be substituted for the certificate of the clerk or attorneys required by R. S. 4821, showing the filing of an undertaking on appeal or a waiver thereof.—*Village of Hailey v. Riley*, 13 Idaho, 749, 92 Pac. 756.

5. New Trial—Motions, Notice and Affidavits Pertaining Thereto.

Time for appealing. See ante, VII, (A), 3.

Proceedings in lower court. See ante, V, (D).

Where affidavits were introduced on the hearing of a motion for new trial in explanation of the absence of defendant from the trial, and it does not appear that these affidavits were made part of either the bill of exceptions or of the statement on motion for new trial, the supreme court will not notice such affidavits on appeal.—*Sweetser v. Mellick*, 4 Idaho, 201, 38 Pac. 403.

Under R. S. 7942, subdivision 4, the record must show an exception taken to an order granting or refusing a new trial in order to entitle appellant to a review of such order.—*State v. Smith*, 4 Idaho, 733, 44 Pac. 554.

Under R. S. 4818, providing that any statement used on motion for a new trial or settled after decision of such motion may be used on appeal from a final judgment, what purports to be a statement on motion for a new trial will not be considered where it does not appear that any motion for a new trial was ever made or passed upon by the court.—*Steffy v. Esler*, 6 Idaho, 228, 55 Pac. 239.

An affidavit not identified as having been used on the hearing of the motion for a new trial cannot be considered on appeal.—*Bonner v. Powell*, 7 Idaho, 104, 61 Pac. 138.

Under R. S. 4443, 4820, notice of intention to move for a new trial is not made part of the record on appeal, and if no notice is given or if it is insufficient, objection must be made either on settlement of the statement or on

the hearing of the motion for new trial and the objection must be noted and incorporated in a statement or bill of exceptions to be reviewed on appeal.—*Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363.

Under R. S. 4443 and 4820, the notice of intention to move for a new trial is not made part of the record on appeal, and it is not necessary that the record show service of the same.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

If a notice of intention to move for a new trial has not been served, or is insufficient, it is the duty of the respondent to make objection thereto at the time of the settlement of the statement or at the time of the hearing of the motion for new trial, and have his objection noted and settled in the statement or bill of exceptions or it will not be considered on appeal.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

Where the affidavit on motion for a new trial is not incorporated in a statement or bill of exceptions, it will be stricken from the transcript on appeal.—*Russell v. Irish*, 20 Idaho, 194, 118 Pac. 501.

Under R. C. 4443, as amended by Laws 1911, page 378, the notice of motion for a new trial is a part of the files and part of the record required to be furnished on appeal.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

6. Stipulations.

Stipulation cannot cure defects in taking appeal.

See ante, VII, (A), 6.

An agreement by the respective parties to an action that a certain document is the statement in the case is an agreement that such statement is correct.—*Moore v. Taylor*, 1 Idaho, 583.

The appellate court will not go outside the record to consider affidavits to prove oral stipulations of the parties; such stipulations when made should be entered of record or reduced to writing and filed with the other papers in the case.—*Sebree v. Smith*, 2 Idaho, 359, 16 Pac. 915.

A stipulation that the files and copies of the record in certain bankruptcy proceedings in which the principal defendant was appointed assignee and the bond sued on was given "may be omitted from the printed transcript on appeal, and the parties hereto agree that said records and files, as the same are now in the above court, may be used on the hearing of said appeal," is contrary to the rule of court requiring transcripts to be printed and will be disregarded.—*First Nat. Bk. v. Martin*, 6 Idaho, 204, 55 Pac. 302.

Where evidence contained in a transcript on appeal is not incorporated in a bill of exceptions or statement settled by the trial court or judge, it cannot be considered on appeal by virtue of a stipulation between counsel that the appeal "shall be heard before the supreme court at the May term thereof upon this transcript, all questions of time of service being hereby waived."—*Hays v. Crutcher*, 10 Idaho, 260, 77 Pac. 620.

(C) NECESSITY OF BILL OF EXCEPTIONS, CASE, OR STATEMENT ON MOTION FOR NEW TRIAL.

Nature, form and contents in general of bill of exceptions, and settlement and filing thereof. See *Exceptions, Bill of*.

Contents, making and settlement. See post, X, (D).

Certification. See post, X, (G).

Necessity of exceptions in trial court. See ante, V, (O).

1. In General.

What constitutes judgment-roll. See ante, X, (A, B), 2.

Upon an appeal from a judgment, without a statement or bill of exceptions, nothing can be considered but the judgment-roll.—*Purdy v. Steel*, 1 Idaho, 216; *Gamble v. Dunwell*, 1 Idaho, 268; *McCoy v. Oldham*, 1 Idaho, 465; *Ray v. Ray*, 1 Idaho, 705; *Graham v. Linehan*, 1 Idaho, 780; *Jones v. St. John Irr. Co.*, 2 Idaho, 58, 3 Pac. 1; *Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107; *Purdum v. Taylor*, 2 Idaho, 167, 9 Pac. 607; *Washington etc. R. R. Co. v. Osborne*, 2 Idaho, 557, 21 Pac. 421; *Swartz v. Davis*, 9 Idaho, 238, 74 Pac. 800.

Where an action is tried in the district court upon its merits, and a finding of facts is made and judgment rendered thereon, no exceptions being taken, the only question that will be considered is whether the complaint states facts sufficient to warrant the judgment.—*Diehl v. Hull*, 1 Idaho, 352.

The supreme court cannot consider errors not apparent in the record, nor brought into it by a statement or bill of exceptions, properly signed and settled by the judge of the district court, or agreed to by the parties.—*People v. Hunt*, 1 Idaho, 433.

Where there is no statement of the case or bill of exceptions, and the pleadings warrant the verdict and judgment, the supreme court will affirm the judgment.—*Hyde v. Harkness*, 1 Idaho, 638.

To entitle a party to a writ of error, it is not necessary that there should be either bill of exceptions or statement.—*Van Camp v. Commrs. Custer County*, 2 Idaho, 29, 2 Pac. 721.

Papers in a transcript on appeal not shown by the record to have been used on the hearing in the district court and not appearing in the bill of exceptions nor filed until after the bill of exceptions was settled, will be stricken on motion.—*Anderson v. Shoshone Co.*, 6 Idaho, 76, 53 Pac. 105.

Under R. S. 4456, subdivision 2, providing that the pleadings are a part of the judgment-roll, an amended answer with all of its paragraphs is part of the judgment-roll regardless of the fact that some of such paragraphs have been stricken out on motion.—*Warren v. Stoddard*, 6 Idaho, 692, 59 Pac. 540.

On appeal from a judgment without a statement or bill of exceptions, nothing belongs to the record except the judgment-roll and no question outside of the record can be considered by the court.—*Williams v. Boise Basin etc. Co.*, 11 Idaho, 233, 81 Pac. 646.

Affidavits purporting to show errors committed in impaneling the jury are no part of

the judgment-roll, and can only be reviewed on appeal when saved by bill of exceptions.—*Crowley v. Croesus Gold etc. Min. Co.*, 12 Idaho, 530, 86 Pac. 536.

Where a rule of court in force in the district court is relied upon on appeal, it must be embodied in the record and presented to the appellate court by bill of exceptions or other proper method for review.—*Powell v. Springton Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

Where a transcript contains a bill of exceptions on the order taxing costs, and the appeal from the order taxing costs is dismissed because not taken in time, such bill of exceptions will be stricken on motion.—*Campbell v. First Nat. Bank*, 13 Idaho, 95, 88 Pac. 639.

A motion to vacate the verdict of the jury and grant a new trial, and to enter judgment non obstante veredicto cannot be brought to the supreme court on appeal except by statement or bill of exceptions.—*Stoddard v. Fox*, 15 Idaho, 704, 99 Pac. 122.

Though the supreme court cannot examine the evidence for the purpose of determining its sufficiency, because of the lack of proper showing that the record contains all the evidence, such fact is not sufficient ground for striking the bill of exceptions from the transcript if it contains any exceptions taken upon the trial or other assignments of error.—*Stoddard v. Fox*, 15 Idaho, 704, 99 Pac. 122.

An order of the court made after final judgment taxing costs is an order from which a separate appeal is allowed; and an appeal from the judgment does not present to this court for review the action of the court in taxing costs, and the memorandum of costs and the motion to retax are not properly a part of the record on appeal from the judgment.—*Keane v. Pittsburg Lead Mining Co.*, 17 Idaho, 179, 105 Pac. 60.

An order entered on the minutes denying the relief prayed for is no part of the judgment-roll, and can be brought before the supreme court only by incorporation in a bill of exceptions.—*Bissing v. Bissing*, 19 Idaho, 777, 115 Pac. 827.

2. Matters Deemed Excepted to.

The exceptions which by the civil practice act the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during the trial, and cannot be considered on appeal without being incorporated into a bill of exceptions and thus made part of the judgment-roll.—*Fox v. West*, 1 Idaho, 782; *Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107; *Guthrie v. Fisher*, 2 Idaho, 111, 6 Pac. 111; *Purdum v. Taylor*, 2 Idaho, 167, 9 Pac. 607; *Berry v. Alturas County*, 2 Idaho, 296, 13 Pac. 233.

Orders and rulings of the court to which exceptions are allowed by statute, as enumerated in R. S. 4427, and which are not made part of the judgment-roll, must be reviewed on an appeal from an order granting or refusing a new trial, and cannot be reviewed on an appeal from the judgment where they are not incorporated in a bill of exceptions.—*Perkins v. Loux* (on rehearing), 14 Idaho, 607, 95 Pac. 694.

3. Process and Pleading.

An exception to the order of the court sustaining a motion for judgment on the pleadings must be made a part of the record on appeal by bill of exceptions settled under Code of Civil Procedure, 406, or it will not be reviewed on appeal.—*Purdum v. Taylor*, 2 Idaho, 167, 9 Pac. 607.

Under R. S. 4427, providing that an order sustaining or overruling a demurrer is deemed excepted to, and need not be embodied in a bill of exceptions, the court can review the ruling on a demurrer to a cross-complaint on which judgment of dismissal is based without a bill of exceptions.—*Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

An order made and entered in the minutes of the court striking portions of a pleading cannot be reviewed on an appeal from the judgment, unless the same is incorporated in a bill of exceptions.—*Perkins v. Loux* (on rehearing), 14 Idaho, 607, 95 Pac. 694.

Under R. S. 4456, specifying what the judgment-roll shall contain, and R. S. 4818, prescribing what papers shall be furnished on appeal, a motion made to the trial court to strike from the complaint certain portions thereof will be stricken from the record on appeal on motion of the adverse party, where no bill of exceptions or statement has been settled.—*Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384.

4. Evidence.

Exceptions to the ruling of the court in admitting or rejecting evidence may be considered on a statement, where a statement is authorized, the same as in a bill of exceptions.—*Bradbury v. Idaho etc. L. I. Co.*, 2 Idaho, 239, 10 Pac. 620.

Exhibits used on the trial, but not incorporated into a bill of exceptions or statement on motion for new trial, are not a part of the record on appeal and will be stricken from the transcript on motion.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189.

Under R. S. 4441, 4442, providing the method of procedure on motion for a new trial, and R. S. 4818, specifying what papers are to be used on appeal from judgment, the evidence on an appeal from a judgment can be brought before the supreme court for review only by incorporating it into a statement of the case on motion for a new trial or into a bill of exceptions.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189.

Under R. S. 4428, a bill of exceptions need not contain a specification of errors relied on unless the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to sustain it, in which case the bill of exceptions must specify the particulars in which the evidence is insufficient, and if it does not, a motion to strike will be sustained by the appellate court.—*Hole v. Van Duzer*, 11 Idaho, 79, 81 Pac. 109.

Under R. S. 4807 and 4428, on an appeal from a judgment taken within sixty days from the rendition thereof, the appellate court will not examine the evidence to determine whether it supports the findings and judgment, unless the bill of exceptions contains

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the specifications of the particulars in which the evidence is alleged to be insufficient to support the findings and judgment.—*Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374.

Where evidence offered and refused by the court is not made a part of the judgment-roll by a bill of exceptions, this court will not examine such evidence upon an appeal from the judgment.—*Olympia Min. Co. v. Kerns*, 15 Idaho, 371, 97 Pac. 1031.

5. Instructions.

Where the errors in an instruction are apparent and clearly erroneous, and there is no reason to suppose that the errors were inadvertent and might have been corrected if specified by counsel at the time, the court will not refuse to review an exception thereto on the ground that it is too general.—*Snyder v. Viola Min. etc. Co.*, 3 Idaho, 28, 26 Pac. 127.

Instructions refused by the trial court must be incorporated in the statement on motion for a new trial or they will not be considered on appeal.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

The instructions are no part of the judgment-roll under R. S. 4456, subdivision 2, and can only be reviewed on appeal when saved by bill of exceptions.—*Crowley v. Croesus Gold etc. Min. Co.*, 12 Idaho, 530, 86 Pac. 536.

It is unnecessary to incorporate instructions in the bill of exceptions, as they are required to be sent up in the record, but it is necessary to identify the particular instruction to which defendant objects and excepts and the objectionable portion thereof.—*State v. Suttles*, 13 Idaho, 88, 88 Pac. 238.

6. Stenographer's Notes and Transcript and Settlement Thereof.

Under R. C. 4434, as added by Laws of 1911, chapter 119, page 379, a party appealing and desiring to procure a review on appeal to the supreme court of any ruling of the district court, made during the trial, or the sufficiency of the evidence to sustain the verdict or decision in an action or special proceeding as the same appears in the transcript of the testimony and proceedings, including the instructions given or refused and exceptions thereto on the trial or such part thereof as may be necessary, in lieu of preparing, serving and procuring the settlement of a bill of exceptions, should procure a transcript of the stenographer's notes, and have the same settled and allowed by the trial judge, in accordance with the provisions of subdivision 3 of said section.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

The various sections of the statute amended by chapters 117, 118, and 119, Laws 1911, do not require the reporter's transcript to contain the specifications of error of the insufficiency of the evidence to support the verdict, and such specifications are not required to be stated in the transcript on appeal, except as stated in the notice of the motion.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

The transcription of the stenographer's notes prepared and settled in accordance with R. C. 4434, as added by Laws 1911, chapter 119,

is made for the purpose of being used as part of the record on appeal, and takes the place of the statement and bill of exceptions, prepared under R. C. before such section was amended, but is not required to be made and settled before the motion for a new trial is heard.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

Under R. C. 4434, as amended, Laws 1911, page 379, and rule 54 (96 Pac. xii) of this court, the transcript of the evidence certified to by the stenographer must be settled by the trial judge in order to have the same reviewed upon an appeal to this court.—*Furey v. Taylor*, 22 Idaho, 605, 127 Pac. 676.

Where a motion to dismiss an appeal is made on the ground that the stenographer's transcript was not settled as required by R. C. 4434, subdivision 3, and such motion is made within the time required by rule 54 (96 Pac. xii) of the rules of this court, the motion must be granted and the appeal dismissed.—*Edwards v. Anderson*, 23 Idaho, 508, 130 Pac. 100.

Under R. C. 4434, subdivision 3, as amended by Laws 1911, page 379, chapter 119, the transcript of the evidence certified to by the stenographer must be settled by the trial judge in order to have the same reviewed upon appeal.—*Edwards v. Anderson*, 23 Idaho, 508, 130 Pac. 1001.

That the stenographer's transcript of the proceedings and the reporter's transcript of the trial were never settled or approved by the trial judge was not ground for dismissing the appeal.—*Strand v. Crooked River Min. & Mill. Co.*, 23 Idaho, 577, 131 Pac. 5.

Under R. C. 4434, as amended by Laws 1911, chapter 119, page 379, in order to review the matters contained in the stenographer's transcript, such transcript must be settled by the judge, and when so settled has the force and effect of a bill of exceptions duly settled and allowed, and will be deemed adequate to present for review any ruling appearing therein to have been excepted to, and, when not so settled, the same will be stricken from the transcript upon proper motion.—*Strand v. Crooked River etc. Co.*, 23 Idaho, 577, 131 Pac. 5.

Where the transcript of evidence as certified by the stenographer was not settled and allowed by the trial judge, the court will grant a motion to strike the transcript of evidence.—*Strand v. Crooked River etc. Co.*, 23 Idaho, 577, 131 Pac. 5.

Under the amended and revised appellate practice and procedure, as adopted by the 1911 session of the legislature, the appellant has no control over the getting out of the transcript either of the reporter's notes or of the judgment-roll and record in the case except to file his praecipe for the record and pay the estimated fees therefor until the transcript is delivered to him for service.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

Under R. C. 4434, as amended by Laws 1911, chapter 119, page 379, it was the purpose and intent of the legislature to vest the jurisdiction and authority in the district judge to control the getting out of reporter's

notes and to grant necessary extensions of time for the reporter to transcribe his notes and to make all orders in relation thereto.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

Supreme court rule 77, with reference to extensions of time within which to extend reporter's notes and the showing to be required by the district judge before granting such extensions is directory and not mandatory and a failure to comply therewith will not work a dismissal of an appeal where the appellant has been diligent in the prosecution of the appeal and has done everything required of him by statute to be done.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

Under the amended and revised statutes prescribing the appellate practice and procedure, a reporter's transcript of the testimony, duly signed and certified by the judge of the district court, takes the place of a statement or bill of exceptions.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

Under R. C. 4434, as amended by Laws 1911, page 379, it was not intended that, where separate appeals are taken by different parties, and one of the parties secures and pays for a transcript of the reporter's notes, the other appellants refusing to secure such transcript or pay therefor, such appellants can take advantage of the records thus secured and base their appeals on such transcript.—*Morris-Roberts Co. v. Mariner*, 24 Idaho, 788, 135 Pac. 1166.

(D) CONTENTS, MAKING AND SETTLEMENT OF BILL OF EXCEPTIONS, OR STATEMENT ON MOTION FOR NEW TRIAL.

Nature, form and contents in general of bills of exceptions. See Exceptions, Bill of.

1. In General.

A statement made on motion for a new trial may be considered on an appeal from the judgment, for the purpose of determining whether any errors in law were committed by the court below in the progress of the trial.—*Forsythe v. Richardson*, 1 Idaho, 459; *Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697.

Where affidavits, depositions or minutes of the court are incorporated into a statement either in haec verba or by appropriate reference, it is unnecessary to have any further identification of them.—*Moore v. Taylor*, 1 Idaho, 583.

A document or paper may be made a part of a bill of exceptions by reference, without copying the same therein, providing the identification is sufficient and the paper or document is placed in the record.—*Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574; *Storer v. Heitfeld*, 17 Idaho, 113, 105 Pac. 55.

Where a statement on motion for a new trial fails to specify the particulars in which the evidence is insufficient to support the verdict or other decision, as required by R. S. 4441, subdivision 3, the statement will be disregarded on appeal.—*Robson v. Colson*, 9 Idaho, 215, 72 Pac. 951.

Under R. S. 5818, prescribing what papers shall be furnished by the appellant on appeal

from a final judgment, a bill of exceptions contained in the transcript showing much of the evidence given on the trial may be used on appeal for determining whether errors of law have been made in the trial of the case.—*Bank of Commerce v. Ada County Abstract Co.*, 11 Idaho, 756, 85 Pac. 919.

The minutes of the court not preserved by bill of exceptions are no part of the papers required to be furnished on appeal under R. S. 4819, and will be stricken on motion.—*In re Paige*, 12 Idaho, 410, 86 Pac. 273.

A statement on motion for a new trial may be used as a bill of exceptions on an appeal from the judgment on such matters as are authorized to be heard upon such appeal, regardless of whether such statement was used on a motion for a new trial or not.—*Steve v. Bonners Ferry Lumber Co.* (on rehearing), 13 Idaho, 384, 92 Pac. 363.

Orders extending time for the preparation of the statement or bill of exceptions are not a necessary part of the record on appeal, and it is not necessary that they be included in the statement on motion for new trial.—*Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363.

A bill of exceptions will not be stricken from the transcript because it does not contain "an assignment of errors" of the particulars in which it is claimed the evidence is insufficient to support the judgment, but will be retained and considered, for the purpose of determining alleged errors of law occurring during the progress of the trial.—*Humphrey v. Whitney*, 17 Idaho, 14, 103 Pac. 389.

A statement of the case, prepared and settled to be used on motion for a new trial, may be used as a bill of exceptions on appeal from the judgment on all questions of law therein saved by exception, though no motion for new trial was ever made.—*Quayle v. Ream*, 17 Idaho, 545, 106 Pac. 610.

2. Amendments and Engrossment.

Amendments to record in general. See post, X, (I).

Where there was no engrossment of the statement, or settlement thereof, the appeal will be dismissed.—*Pence v. Lemp*, 4 Idaho, 526, 43 Pac. 75.

Where amendments are offered and allowed to a proposed statement on motion for a new trial, the statement as amended should be engrossed by the appellant or plaintiff in error or the appeal will be dismissed.—*Hatta-baugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831.

Where numerous amendments are offered to a proposed statement on motion for a new trial, amendments as allowed in connection with the proposed statement must be engrossed before it is settled as a complete record.—*Doust v. Rocky Mountain Bell Tel. Co.*, 14 Idaho, 677, 95 Pac. 209.

Where amendments are proposed to a bill of exceptions, and request is made that such amendments be added thereto, without indicating any particular place in which the same shall be inserted in the proposed bill, and it cannot be ascertained from the amendments

proposed as to where they shall be inserted, such proposed bill of exceptions and the amendments need not be engrossed after settlement and allowance by the judge, but it is sufficient to incorporate them in the record showing the proposed bill and the amendments added thereto.—*Shumake v. Shumake*, 17 Idaho, 649, 107 Pac. 42.

Where proposed amendments to a proposed statement are not delivered to the clerk of the court for the judge within ten days after the service of such amendments upon the moving party, it is thereafter too late for counsel for the adverse party to ask for any amendment of the statement or for the moving party to insist that he has not adopted all the amendments, and it is the duty of the judge to settle the statement with the amendments proposed.—*Coast Lbr. Co. v. Wood*, 18 Idaho, 28, 108 Pac. 338.

Where amendments are offered to a proposed statement and such amendments consented to, the proposed statement with amendments should be engrossed and presented to the judge for settlement within a reasonable time.—*Spokane etc. Ry. Co. v. Dunn*, 19 Idaho, 734, 115 Pac. 501.

3. Settlement and Filing.

Settlement of transcript of evidence prepared by court reporter. See ante, X, (O), 6.

The affidavit of one attorney to the effect that a bill of exceptions was not served upon respondent prior to its settlement is not sufficient where respondent was represented by two attorneys, as the affiant can actually know of such failure of service upon himself, and not upon the other attorney.—*Jones v. St. John Irr. Co.*, 2 Idaho, 74, 74 Pac. 129.

A paper inserted in the record, denominated a statement, and which does not appear to have been settled and signed by the trial judge, is not a part of the judgment-roll, and will not be considered on appeal.—*Crews v. Baird*, 2 Idaho, 103, 6 Pac. 116.

An objection that a statement on motion for a new trial was not filed until several months after the date of its settlement is properly overruled where there is no showing of fraud or misconduct on the part of the party seeking to use the same, or that the failure to file has been knowingly and intentionally caused by the adverse party.—*Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Van Camp v. Breyer*, 13 Idaho, 209, 89 Pac. 754.

Where the transcript shows that the bill of exceptions was not settled and filed until after the hearing of the motion for new trial, such bill of exceptions will be stricken from the transcript.—*Wood v. Tanner*, 15 Idaho, 689, 99 Pac. 123.

Where a proposed statement is not presented and settled within the time required by law and is inserted in the transcript, on motion, it will be stricken therefrom.—*Featherstone v. Keane*, 18 Idaho, 24, 108 Pac. 337.

Under the facts of this case, held, that no good excuse was shown for the long delay in presenting the proposed statement to the

judge for settlement.—*Spokane etc. Ry. Co. v. Dunn*, 19 Idaho, 734, 115 Pac. 501.

(E) ABSTRACTS OF RECORD.

(No paragraphs.)

(F) MAKING, FORM AND REQUISITES OF TRANSCRIPT.

Transcript of stenographer's report. See ante, X, (O), 6.

Transmission, filing, printing and service. See post, X, (H).

The papers constituting the judgment-roll are specified in civil practice act, section 221 and R. S. 4818; and papers not enumerated therein cannot properly be inserted in the transcript, and if placed there, can constitute no part of the record.—*Graham v. Linehan*, 1 Idaho, 780; *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

The supreme court can consider only those parts of a transcript on appeal, prescribed by civil practice act, section 317, or what has been made part of the transcript by order of the court.—*Ramsay v. Hart*, 1 Idaho, 423.

Upon appeal from a judgment upon the judgment-roll alone, a written stipulation signed by both parties stipulating for judgment in behalf of plaintiff in a certain sum is properly no part of the judgment-roll, and would, on motion, be stricken out; yet where such stipulation is in the record without objection, and is referred to by both parties in argument upon hearing the appeal, it will be considered by the court as part of the transcript by consent of the parties.—*Grete v. Knott*, 2 Idaho, 13, 3 Pac. 25.

An original complaint, which has been superseded by an amended complaint, should not be introduced into the transcript on appeal from an order retaxing costs.—*Thiessen v. Riggs*, 5 Idaho, 487, 51 Pac. 107.

Papers in a transcript on appeal not shown by the record to have been used on the hearing in the district court, and not appearing in the bill of exceptions nor filed until after the bill of exceptions was settled, will be stricken out on motion.—*Anderson v. Shoshone Co.*, 6 Idaho, 76, 53 Pac. 105.

Supreme court rule 27, paragraph 3, requires the cover and first page of the transcript on appeal to contain the title of the cause in the court below, substituting the words "appellant" and "respondent" for "plaintiff" and "defendant," also the names of counsel for appellant and respondent. The rule further requires that the papers making up the transcript must be chronologically inserted, and that each ten lines of the transcript be numbered. Held, that there must be a substantial compliance with these requirements or the appeal will be dismissed.—*Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

The transcript on appeal to the supreme court need not be signed.—*Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

Documents not shown to have been filed in the trial court cannot be inserted in the transcript on appeal.—*Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

Failure to insert papers in a transcript chronologically, failure of first paper to state title of the court and the cause in the court below, failure to number each ten lines, in violation of supreme court rule 27, paragraph 3, will not of themselves be cause for dismissal, where such violations of the rule do not obstruct the examination of the record.—*Taylor v. McCormick*, 8 Idaho, 37, 66 Pac. 805.

Under supreme court rule 27, paragraph 7, the necessary expense of maps forming part of the transcript on appeal may be taxed at costs, but the expense thereof may be avoided by complying with rule 19, which allows the original to be transmitted by order of the trial judge or stipulation of counsel.—*Dunbar v. Griffiths*, 14 Idaho, 120, 93 Pac. 654.

Under supreme court rule 17, a motion to strike the transcript must be made at the first term after the transcript is filed or it will be denied.—*Perkins v. Loux*, 14 Idaho, 607, 95 Pac. 594.

The title of the cause as shown in the transcript is sufficient where it is the same as the title in the complaint.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361.

It is the duty of counsel to have their transcripts on appeal printed in accordance with the rules of the court.—*Richardson v. Bohney*, 18 Idaho, 328, 109 Pac. 727.

Under R. C. 4818, on an appeal from a final judgment, the appellant is required to furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies; hence a bill of exceptions found in the transcript is properly there when appellant relies on it upon his appeal.—*Haas v. Teters*, 19 Idaho, 182, 113 Pac. 96.

Under R. C. 4456, subdivision 2, all bills of exceptions settled and filed prior to the rendition of judgment become a part of the judgment-roll, and on an appeal from the judgment, under R. C. 4818, become a part of the transcript.—*Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

The title to a case on appeal, as the same appears upon the title page of the transcript, together with the respective names of appellant and respondent, considered and held to be a sufficient compliance with the rules of the court to entitle the case to a hearing.—*Johnston v. Bronson*, 19 Idaho, 449, 114 Pac. 5.

Where the appeal from the judgment is not taken within one year and is dismissed, and the appellant has appealed from an order denying a motion for a new trial, and the record on appeal contains no certificate showing the papers, records, and files that were used and considered by the trial judge on the hearing of the motion, and a motion is made to dismiss the appeal on the ground that the record does not contain the judgment-roll, held, that the appellate court is unable to determine from the record whether or not the judgment-roll was used on the hearing in the lower court, or what papers were used on the hearing in the lower court, and is consequently unable to tell what papers and files and records should be contained in the transcript, as provided in R. C. 4443, and that the

appeal should accordingly be dismissed.—*Johnston v. Brownson*, 19 Idaho, 449, 114 Pac. 5.

A motion to strike the statement from the transcript on appeal and to dismiss the appeal on the ground that the record contained no certificate by the judge that the statement was used on the hearing of the motion for a new trial will not be granted where the record contained a stipulation by the attorneys showing that the statement was so used, this constituting a sufficient identification.—*Russell v. Irish*, 20 Idaho, 194, 118 Pac. 501.

Under supreme court rule 20, a paper when once inserted in the transcript must not be repeated, unless the adverse party claims that such paper is incorrect as first inserted; and when found once in any part of the transcript it is sufficient to refer to it as having been already inserted therein.—*King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292.

The fact that an appellant does not file a praecipe designating the papers desired to be included in the transcript with the clerk within five days, as required by R. C. 4820a, under Laws 1911, page 375, chapter 117, is not a ground for dismissing an appeal, where the record shows that the attorneys certify that the transcript does contain all the papers desired to be included in the transcript, and the clerk certifies that the transcript contains all the files and records of the case.—*Strand v. Crooked River etc. Co.*, 23 Idaho, 577, 131 Pac. 5.

(G) AUTHENTICATION AND CERTIFICATION.

Conclusiveness of certificate by attorneys. See post, X, (J).

Necessity of paying fees as prerequisite. See ante, VII, (O), 1.

Effect of certificate of clerk as to filing of notice of appeal. See ante, X, (A, B), 3.

Certificate of clerk or attorneys as to filing undertaking. See ante, X, (A, B), 4.

Affidavits used on motions which are incorporated into a transcript on appeal must have the certificate of the judge or the clerk that they were the affidavits used on the hearing of the motion.—*Goodman v. Minear Min. etc. Co.*, 1 Idaho, 131.

A statement on a motion for a new trial can only become a part of the record by the certificate of the judge or referee who tried the case.—*Hyde v. Harkness*, 1 Idaho, 623.

Under R. S. 4821, the clerk of the district court or the attorneys of record are authorized to certify that a transcript on appeal contains correct copies of all papers used on the hearing of a motion in the court below.—*Simmons Hdw. Co. et al. v. Alturas Com. Co.*, 4 Idaho, 386, 39 Pac. 553.

The clerk of the court from which an appeal is taken is the only person that can certify to the papers provided for in R. S. 4819. *Simmons Hdw. Co. et al. v. Alturas Com. Co.*, 4 Idaho, 386, 39 Pac. 553.

The certificate of the clerk to the typewritten transcript on appeal is not a sufficient certification of the printed transcript.—*Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239.

R. S. 4819, provides that on an appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of the papers used on the hearing in the court below. R. S. 4821, provides that such copies "must be certified to be correct by the clerk or attorneys." Held, that a certificate of the clerk that the papers and records contained in the transcript are true and correct copies of the originals on file in his office fails to show that such papers were used or were all that were used on the hearing and the appeal will therefore be dismissed.—*Village of Sandpoint v. Doyle*, 9 Idaho, 236, 74 Pac. 861.

The certificate of the clerk of the district court that certain affidavits were used on an application for a new trial is not sufficient to warrant the supreme court in considering such affidavits, the proper procedure being a certificate of the trial judge in an authenticated record showing what papers were considered on the motion for new trial.—*Crowley v. Croesus Gold Min. etc. Co.*, 12 Idaho, 530, 86 Pac. 536. Overruled in *Hall v. Jensen*, 14 Idaho, 165, 93 Pac. 962.

A certificate of the trial judge to a statement on motion for new trial, stating, "I have this day settled the within statement in the manner marked by me in pencil, allowing the proposed amendments where so marked," is insufficient, since it shows that it was made before the statement was engrossed, and does not show what amendments were allowed or disallowed.—*Crowley v. Croesus Gold etc. Min. Co.*, 12 Idaho, 530, 86 Pac. 536.

Where a certificate of the judge in settling a statement on motion for new trial recites that the statement "contains all the evidence introduced or considered herein," the statement will be treated on appeal as containing all the evidence in the case, although the record shows that some documentary evidence used on the hearing has been omitted, since the supreme court will assume from this certificate of the trial judge and counsel's knowledge thereof, that what was left was unimportant and immaterial.—*Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Van Camp v. Breyer*, 13 Idaho, 209, 89 Pac. 754.

Where a demurrer to a complaint is sustained and judgment of dismissal entered, and the clerk certifies that the transcript on appeal constitutes a full and complete record of the cause, enumerating the various papers, and that "said record constitutes a full, true and correct record of the above-entitled action, with indorsements thereon as the same are now of record and on file in my office," such certificate is sufficient.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

Under R. S. 4443, 4820, 4821, designating the records and papers that shall be brought up on an appeal from an order denying or granting a motion for a new trial, and the manner of identification and certification of the same, the record on appeal must contain a certificate from the judge or clerk showing what papers, documents or files were used or considered by the court or judge in passing on

the motion.—*Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363.

On appeal from an order denying a motion for new trial, the certificate to the transcript must show that it contains all the papers, records and files used by the trial judge in passing on the motion.—*Doust v. Rocky Mountain Bell Tel. Co.*, 14 Idaho, 677, 95 Pac. 209.

A motion to strike from the transcript the affidavit on motion for a new trial on the ground that it has not been identified or certified by the trial judge as having been used or considered on the hearing of the motion for new trial, will be denied where the stipulation of counsel shows that such affidavit was used on the hearing of the motion for new trial.—*Hall v. Jensen*, 14 Idaho, 165, 93 Pac. 962.

The certificate of the trial judge certifying to the different papers and documents used upon a motion to dismiss an appeal, although incorporated into the record and designated as a bill of exceptions, is not strictly a bill of exceptions, but is a certificate of identification under the statute, as to the papers used upon the hearing of the motion, and will be considered only as such certificate.—*Libby v. Spokane Valley etc. Co.*, 15 Idaho, 467, 98 Pac. 715.

Where a bill of exceptions contains a certificate of the trial judge that the same is settled "as a true bill of exceptions in this case," such certificate is not sufficient to show that it contains all the evidence introduced at the trial, or all of the evidence introduced at the trial upon the particular question involved.—*Hewitt v. Great Western etc. Co.*, 20 Idaho, 235, 118 Pac. 296.

On an appeal from a judgment, where the transcript on appeal contains the judgment-roll, certified to by the clerk of the court, and such judgment-roll is set forth in the transcript on appeal, and the transcript on appeal is certified to by the clerk of the district court, in which it is stated that the transcript "contains a full and true and correct copy of the original papers now on file in my office in the above-entitled action," and specifies all the papers filed in the case, and in addition says, "(9) Clerk's Certificate of Judgment-roll," such certificate shows the transcript contains the judgment-roll.—*Truman v. Village of St. Maries*, 21 Idaho, 632, 123 Pac. 508.

Record examined, and held that it is so indefinite and uncertain, and the settlement and certification thereof is so irregular, as to require a dismissal of the appeal.—*Primrose v. Armstrong Machinery Co.*, 23 Idaho, 551, 131 Pac. 14.

Editorial Notes.

Effect on bill of exceptions of neglect of judge to sign same within time required by law: *Ann. Cas.* 1913A, 914.

(H) TRANSMISSION, FILING, PRINTING AND SERVICE OF COPIES.

Settlement and filing of bill of exceptions or statement. See ante, X, (D), 3.

A transcript filed on Friday preceding Monday, the first day of the term of this court,

is in time under the rules of the supreme court.—*Sebree v. Smith*, 2 Idaho, 357, 16 Pac. 477.

Where an appeal was perfected by filing the proper undertaking June 9, 1892, and it is shown that the trial judge undertook to settle and certify the bill of exceptions August 22, 1892, but because of an error or mistake which was corrected by the trial judge, the bill of exceptions was not in fact settled and certified until the correction of said error or mistake on October 7, 1892, the sixty-day period for filing and serving the transcript did not begin prior to October 7, 1892.—*Miller v. Pine Mining Co.*, 3 Idaho, 426, 31 Pac. 802.

R. S. 4808 provides that an appeal is taken and perfected when the notice of appeal is served and filed, and the proper undertaking is placed on file. R. S. 4814 provides that whenever an appeal is perfected as provided in the preceding sections of the chapter, it stays all further proceedings in the court below. Supreme court rule 27, paragraph 8, provides that a transcript of the record must be served on the adverse party, and filed in this court, within sixty days after the appeal is perfected. Held, that the time for filing and serving the transcript does not begin to run until the notice of appeal has been filed and served and the undertaking filed.—*Hattabaugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831.

Under R. S. 4889, 4890, providing in what cases papers and notices may be served by mail, the transcript of the record on appeal may be served by mail in the cases in the statute specified.—*Hattabaugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831.

Where a typewritten copy of a transcript on appeal in a civil case is filed with the clerk of the supreme court, but no funds were deposited with the clerk nor any arrangement made for procuring the printing of such transcript as required by supreme court rule 27, paragraph 10, the appeal will be dismissed.—*Buckingham v. Reid*, 5 Idaho, 312, 48 Pac. 1069.

Under R. S. 250, subdivision 1, as amended by Laws of 1901, page 163, the attorney general of the state is the attorney for a county when it is a party in a case on appeal, unless the interest of the county is adverse to the state or some officer thereof acting in his official capacity, and, in such case, under supreme court rule 27, paragraph 9, requiring the transcript on such appeal to be served on him, and rule 6, paragraph 3, requiring the brief of appellant on such appeal to be likewise served, a motion to dismiss such appeal for failure so to serve the transcript and brief will be sustained.—*Corker v. Elmore County*, 11 Idaho, 787, 84 Pac. 509.

Where the transcript on appeal has not been filed within the time prescribed by the rules of the supreme court and it does not appear that an extension of time has been granted, a motion to dismiss the appeal will be granted. *California Con. Min. Co. v. Manley*, 12 Idaho, 221, 85 Pac. 919.

Judgment was filed February 18, 1905. Notice of appeal was served and filed April 17, 1905, and an undertaking on appeal was filed April 19, 1905. The transcript on appeal

was not served or filed until May 25, 1907. Held, that the appeal should be dismissed on motion for failure to comply with supreme court rule 27, paragraph 9, requiring transcripts to be filed within sixty days after the appeal is perfected.—*Finney v. American Bonding Co.*, 13 Idaho, 534, 90 Pac. 859.

Where the record shows that judgment was entered on June 26, 1908, and the notice of appeal was served and filed on August 20th, and the transcript was served on respondent on December 17th, and filed in this court on December 19, 1908, the transcript is filed in time, where it also appears that the appellants' counsel consumed only twenty-three days (exclusive of the time the bill of exceptions was held by the trial judge) between the day the appeal was taken and the date the transcript was filed in this court.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361.

Under supreme court rule 25, the time during which the trial court or judge holds a bill of exceptions or statement prior to the settlement and filing thereof and the time during which the attorney for the respondent may retain the transcript on appeal before certifying or refusing to certify the same must be excluded in computing the sixty days' time in which a transcript is required to be filed.—*Featherstone v. Keane*, 18 Idaho, 24, 108 Pac. 337.

The time for filing a transcript on appeal is a matter within the power of counsel to cover by stipulation, and, where the transcript is filed within an extension of time so stipulated for, it is filed in time.—*Johnston v. Bronson*, 19 Idaho, 449, 114 Pac. 5.

The amendments embodied in Laws 1911, chapters 117, 118, 119, pages 375 to 381, with reference to the prosecution of appeals to the supreme court, do not prohibit the printing of transcripts on appeal, and the appellate court will allow costs to be taxed for a printed transcript at the same rate as has heretofore been allowed under the rules of the supreme court.—*Ulbright v. Baslington*, 20 Idaho, 546, 119 Pac. 294.

Where an order has been made by a justice of this court upon a proper showing, extending the time within which the transcript may be filed beyond the period fixed by the statute and the rules of this court, and such transcript is filed within the time prescribed by the order, the appeal will not be dismissed.—*Strand v. Crooked River etc. Co.*, 23 Idaho, 577, 131 Pac. 5.

Where it appears from the record on appeal that the transcript was not served upon the adverse party, and a motion is made in this court to dismiss the appeal upon the ground that such transcript was not served, said motion will be sustained as Laws 1911, section 2, page 380, is mandatory and requires the transcript to be served.—*Strand v. Crooked River etc. Co.*, 23 Idaho, 577, 131 Pac. 5.

Supreme court rule 26 provides, if the transcript is not filed within the time prescribed by rule 23, the appeal or writ of error may

be dismissed on motion, without notice.—*First Nat. Bank of American Falls v. Shaw*, 24 Idaho, 134, 132 Pac. 802.

Where the transcript is not prepared and filed upon appeal with the clerk of this court in accordance with the requirements of R. C. 4818, amended, and R. C. 4820a, added by Laws 1911, page 375, and there is no showing that the fees were tendered to the clerk of the district court to pay for the preparation of the transcript, and the transcript is not prepared and filed in this court within the time and in the manner prescribed by the rules of this court, the appeal upon proper motion will be dismissed.—*First Nat. Bank of American Falls v. Shaw*, 24 Idaho, 134, 132 Pac. 802.

A failure on the part of either the court reporter to prepare a transcript of his notes or on the part of the clerk of the district court to prepare and deliver a transcript or file the same in the supreme court cannot result in or work a dismissal of the appeal unless the appellant has been guilty of laches and negligence or has in some way contributed to or encouraged the delay and failure on the part of the proper officer to act.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

The amended and revised appellate practice and procedure, as adopted by the 1911 session of the legislature, leaves the preparation of the transcript of the reporter's notes and the record in the case to the court reporter and the clerk of the district court, and the duty of filing such record in the supreme court is imposed upon the clerk of the district court, and, on failure by the reporter or the clerk to discharge this duty promptly and with diligence, either the district judge or the supreme court may issue orders and mandates to compel prompt and timely action on the part of these court officials.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

Supreme court rule 23 requires that the transcript on appeal must be filed in this court within sixty days after the appeal is perfected or writ of error issued, and under rule 25 this time limit may be extended by order of the court or justice thereof upon good cause shown by affidavit or by stipulation of parties, but only one order shall be made by the court or justice, nor shall such extension exceed thirty days.—*First Nat. Bank of American Falls v. Shaw*, 24 Idaho, 134, 132 Pac. 802.

Under the amended and revised statutes prescribing the appellate practice and procedure, the time for filing a transcript on appeal as prescribed by supreme court rules 23, 25, is suspended during the time the reporter is preparing his notes and until the same is settled and allowed by the district judge.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

This court will require a strict compliance with all the provisions of the revised and amended appellate practice and procedure, as enacted by the 1911 session of the legislature, in so far as those provisions contemplate the speedy prosecution of appeals and the elimination of delays.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

(I) DEFECTS, OBJECTIONS, AMENDMENT AND CORRECTION.

Amendments to proposed bill of exceptions or statement. See ante, X, (D), 2.

Waiver of notice of appeal or defects therein. See ante, VII, (D), 5.

Affecting undertaking. See ante, VII, (C), 5.

Failure to file the transcript on appeal within the time prescribed by the rules of court is ground for the dismissal of the appeal; but such failure may be excused for cause shown.—*Westheimer v. Thompson*, 3 Idaho, 418, 31 Pac. 797; *Taylor v. McCormick*, 8 Idaho, 37, 66 Pac. 805.

Several months after the time for filing the transcript on appeal respondent moved to dismiss the appeal on the ground that no transcript had been filed. Appellant moved to extend the time for filing the transcript. Held, that no sufficient cause being shown to excuse appellant's laches, the appeal should be dismissed.—*Mahoney v. Marshall*, 3 Idaho, 343, 29 Pac. 110.

Where the record on appeal shows that no statement of the case nor bill of exceptions has been settled by the trial court, the court on motion will strike from the record appellant's notice of intention to move for new trial, notice of settlement of statement, the order refusing to settle statement, and the affidavits on motion for new trial.—*Rich v. French*, 3 Idaho, 727, 35 Pac. 173.

On a motion to dismiss an appeal by reason of failure to comply with the court rules with reference to filing and service of transcript and briefs, affidavits tending to excuse such laches must be presented on the hearing of the motion, where notice of the hearing has been served on appellants; and it is too late to present such affidavits on a motion to reinstate the cause after motion to dismiss has been heard and allowed.—*Jacobs v. Shenon*, 4 Idaho, 341, 39 Pac. 193.

Failure of the appellant to serve a statement on motion for a new trial or transcript on appeal on one of the defendants cannot be taken advantage of by his codefendants, such defendant having waived the lack of service by not raising the question.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

A motion to strike from the transcript on appeal, a part thereof denominated a "supplement," containing papers not called to the attention of the trial court on submission of the demurrer in the action without argument, will be sustained.—*First Nat. Bank v. Sampson*, 7 Idaho, 564, 64 Pac. 890.

Where matter has been improperly inserted in the transcript on appeal, the same will be stricken on motion.—*Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384.

Where a certificate to a transcript is defective and a motion to dismiss the appeal for that reason is made, and a corrected certificate is offered at the hearing of the motion, the amended certificate will be admitted and the motion denied.—*Barrow v. B. R. Lewis Lbr. Co.*, 14 Idaho, 698, 95 Pac. 682.

A statement on motion for new trial, appearing in the record properly certified, and made a part thereof, will not be stricken from the transcript although the appeal is taken

more than sixty days after the entry of judgment, but may be considered by the appellate court for the purpose of determining whether the trial court committed any errors of law during the progress of the trial.—*Havlick v. Davidson*, 15 Idaho, 787, 100 Pac. 91.

The statute does not require a formal motion to be made for a new trial; yet it contemplates a motion for a new trial, and, when such motion is put in writing and filed as a part of the records in the case, the same will not be stricken.—*Storer v. Heitfeld*, 17 Idaho, 113, 105 Pac. 55.

Where a bill of exceptions is part of the judgment-roll but not relied upon on the appeal, it may be omitted from the transcript on stipulation, but will not be stricken on respondent's motion.—*Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

Where a motion for a new trial has been made in writing and served upon opposing counsel and through neglect or oversight has not been signed, and the court acts upon it as though it had been signed, such motion will not be stricken from the transcript on appeal for that reason.—*Nobach v. Scott*, 20 Idaho, 558, 119 Pac. 295.

Where an objection to the transcript upon the ground that the same does not show that the evidence transcribed by the stenographer was settled by the trial judge is made for the first time in this court when the cause is brought on for hearing upon the argument upon the merits, such objection will not be considered because such objection is not made in the manner prescribed by rule 54 of the rules of this court.—*Furey v. Taylor*, 22 Idaho, 605, 127 Pac. 676.

(J) CONCLUSIVENESS AND EFFECT, IMPEACHING AND CONTRADICTING.

Where a bill of exceptions is presented for settlement after the trial of a case and is certified to as correct by respondent's attorneys and such bill is thereafter settled by the judge and used on the hearing of a motion for a new trial, it is too late to raise the objection on appeal that such bill was not settled in time.—*Stufflebeam v. Montgomery*, 3 Idaho, 20, 26 Pac. 125.

Where counsel for respondents have certified that the transcript on appeal is correct and contains all the evidence in the case, they cannot be heard to contradict such certificate, unless it is shown that the certificate was obtained by fraud and deceit and that it is not a true and correct transcript.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

The certificate of the clerk of the district court that an undertaking on appeal has been filed within the time allowed by law is sufficient when no showing is made to the contrary that the same was not filed within the time prescribed by law.—*Strand v. Crooked River etc. Co.*, 23 Idaho, 577, 131 Pac. 5.

(K) QUESTIONS PRESENTED FOR REVIEW.

Order granting new trial where evidence is conflicting. See post, XVI, (G), 6.

As dependent on certification of record. See ante, X, (G).

Necessity of taking exceptions in lower court. See ante, V, (O).

On appeal a finding of fact will not be reviewed unless the evidence upon the trial in reference thereto is fully and clearly reported in the record.—*Biborado v. Quang Pang Min. Co.*, 2 Idaho, 144, 6 Pac. 125; *Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031; *Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189.

Where the record does not show the grounds upon which a new trial was granted, and no error warranting a new trial is apparent from the record, the order granting a new trial will be reversed.—*Lowe v. Long*, 5 Idaho, 122, 47 Pac. 93; *Sweetzer v. Mellick*, 5 Idaho, 783, 51 Pac. 985.

Where the complaint will support the judgment, appellant must show error or the judgment will be affirmed.—*Murphy v. Fuld*, 2 Idaho, 175, 9 Pac. 609.

An offer of oral proof being made and rejected and exceptions duly taken, the appellate court must be satisfied from the record that the offered evidence was material or tended to support some issue involved, before it will be treated as error.—*United States v. Alexander*, 2 Idaho, 386, 17 Pac. 746.

The supreme court will not review the sufficiency of the evidence to sustain the findings or judgment on an appeal from the judgment, unless the bill of exceptions contains a specification of the particulars in which it is claimed the evidence is insufficient.—*Humphrey v. Whitney*, 17 Idaho, 14, 103 Pac. 389.

Where there is a controversy between a mortgagee, who holds a mortgage upon an irrigation canal or system, and purchasers of water rights from such irrigation canal or system as to whether the water rights and water contracts executed by the company after the making of such mortgage are affected by the mortgage or the foreclosure of the same, this court will not reverse the ruling of the trial court in admitting such water rights and contracts in evidence, where the record fails to present to this court such water rights and water contracts for review.—*Hewitt v. Great Western etc. Co.*, 20 Idaho, 235, 118 Pac. 296.

Where instructions are requested upon the trial by either party to the suit, and such instructions are refused, it is necessary for the appellant to bring to this court upon appeal all the instructions given upon the trial, in order to obtain a review of such refusal.—*Marysville Merc. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

In an action by mortgagor against a mortgagee for damages and penalty under B. C. 3402, on appeal from the judgment, where the evidence is not brought up in the record, instructions will not be considered, although excepted to in the lower court, where the appellate court cannot say, as a matter of law, that such instructions would have been erroneous under any state of facts which might have been presented in the case; but, on the contrary, the appellate court will assume that the instructions were given in the light of the evidence adduced on the trial.—*McDonald v. Challis*, 22 Idaho, 749, 128 Pac. 570.

Where the record sent up on appeal leaves it in doubt as to whether all the evidence in the case has been sent up, and there is reason to believe from the contents of the record that material exhibits have been omitted, an appellate court will not examine such record, with a view to determining and passing upon the case upon its merits.—*Primrose v. Armstrong Machinery Co.*, 23 Idaho, 551, 131 Pac. 14.

Where an instruction is requested by counsel for defendant, such defendant, on appeal to this court, cannot urge error on the part of the trial court to the effect that the trial court had added certain words to the instruction requested, when the record fails to show that such change was made by the trial court.—*Wheeler v. Gilmore etc. R. R. Co., Ltd.*, 23 Idaho, 479, 130 Pac. 801.

(L) MATTERS NOT APPARENT OF RECORD.

All intendments must be in favor of sustaining the judgments of courts of original jurisdiction, and to disturb such judgment it is not sufficient that error may have intervened, but it must be affirmatively shown by the record.—*Goodman v. Minear Min. Co.*, 1 Idaho, 131.

The supreme court will not scrutinize a voluminous transcript to ascertain whether an inferior court may possibly have committed some error to the prejudice of the complaining party, unless it shall first have been assigned as such.—*Feirbaugh v. Masterson*, 1 Idaho, 135.

Where no bill of exceptions or statement, agreed to and signed by the attorneys, or settled and signed by the judge, appears in the record, the supreme court cannot review the evidence on an appeal from the judgment.—*Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134.

Where the transcript on appeal contains no bill of exceptions or statement bringing up the evidence, the supreme court will not disturb the findings of the trial court.—*Zion's etc. Institution v. Armstrong*, 6 Idaho, 464, 56 Pac. 168.

On appeal from the judgment alone, evidence contained in the transcript but not saved by bill of exceptions or statement allowed by the trial court or judge cannot be considered.—*Hays v. Crutcher*, 10 Idaho, 260, 77 Pac. 620.

Where a motion for judgment on the pleadings is in the record, but there is nothing in the record to show that the trial court ever passed on the motion, the alleged error in denying the motion cannot be reviewed on appeal.—*Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965.

Where the action of the district court in refusing to permit the appellant to file an amended undertaking on appeal is assigned as error, and the transcript does not contain the original undertaking on appeal from the probate court, or a copy thereof, from which the supreme court may ascertain whether or not it was capable of amendment, the decision of the trial court must be sustained.—*Watt v. Decker*, 16 Idaho, 184, 101 Pac. 253.

Editorial Notes.

Deposition of appeal where without fault of appellant the record is lost or incomplete: 25 L. R. A., N. S., 860.

XI. ASSIGNMENT OF ERRORS.

Waiver of error by failure to assign error. See post, XVI, (I).

Specifications of insufficiency of the evidence, which designate some particular fact and aver that it is not justified by nor sustained by, or is contrary to the evidence, are sufficient.—Bernier v. Anderson, 8 Idaho, 675, 70 Pac. 1027; Palmer v. Northern Pac. Ry. Co., 11 Idaho, 583, 83 Pac. 947; Bell v. Bell, 15 Idaho, 7, 96 Pac. 196.

Where the specifications of error are sufficient to inform opposing counsel of the grounds of the alleged insufficiency of the evidence to support the verdict, it is immaterial what language is used in the specifications or what their form.—Palmer v. Northern Pac. Ry. Co., 11 Idaho, 583, 83 Pac. 947; Brown v. Bracking, 11 Idaho, 678, 83 Pac. 950.

Where a litigant has saved his exceptions and is in a position to present cross-assignments of error, they must be presented within the time allowed for presenting amendments to a statement on motion for a new trial.—Gordon v. Lemp, 7 Idaho, 677, 65 Pac. 444.

Under R. S. 4427, allowing an aggrieved party an exception as a matter of law to an order denying his motion for a new trial, an appellant who has assigned his errors in the statement and bill of exceptions and has pointed out the insufficiency of the evidence to support certain findings, as well as the errors of law committed on the trial, is entitled to appeal from the order overruling the motion for new trial to have those assignments of error considered.—Whitney v. Dewey, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117.

Where the issues were whether the road in controversy was a public or private road, whether it had been traveled by the public for a period of five years and whether the crossing in question was on the land of plaintiff, specifications of the insufficiency of the evidence to sustain the verdict are sufficient which state that "the evidence is undisputed that the road in question was a private road, that it had not been built or used longer than four years, and that the crossing in question was not on the land of plaintiff."—Palmer v. Northern Pac. Ry. Co., 11 Idaho, 583, 83 Pac. 947.

Where the appellant specifies in his brief that the evidence does not support the findings and judgment, and fails to specify such error in the bill of exceptions, the supreme court will not examine the evidence to determine whether or not it supports the findings and judgment.—Later v. Haywood, 14 Idaho, 45, 93 Pac. 374.

Where a finding of fact is not excepted to and there is no assignment of error in the record specifying in any manner that said finding is not supported by the evidence, it is too late to assign such finding as error on a petition for rehearing.—Nelson Bennet Co. v. Twin Falls etc. Co. (on rehearing). 14 Idaho, 5, 93 Pac. 789.

"Assignments of error," when not made a part of the bill of exceptions, are no part of the transcript on appeal.—Humphrey v. Whitney, 17 Idaho, 14, 103 Pac. 389.

The bill of exceptions need not contain specifications of error except where it is claimed upon the appeal that the finding or decision is not supported by the evidence.—Humphrey v. Whitney, 17 Idaho, 14, 103 Pac. 389.

Under the facts of this case, the specifications of insufficiency of evidence to sustain the decision are sufficient to authorize and require the court to examine the evidence on appeal.—Sponberg v. First Nat. Bank of Montpelier, 18 Idaho, 524, Ann. Cas. 1912A, 95, 110 Pac. 716.

Under R. C. 4406, the decision of the trial court consists of the findings of fact and conclusions of law which must be in writing and filed with the clerk. An oral opinion announced by the court from the bench prior to making of findings of fact and conclusions of law, or a written opinion addressed to counsel which is not in the nature of findings and conclusions, is not the decision of the court, and exceptions taken thereto and assignments of error directed against such an opinion are not assignments against the decision of the court, and will not call for a review thereof on appeal.—Stewart Min. Co. v. Ontario Min. Co., 23 Idaho, 724, 132 Pac. 787.

XII. BRIEFS.

Waiver of error by failure to discuss. See post, XVI, (I).

Where a brief on appeal raises a question not raised in the trial court, the court will grant a motion to strike so much of the brief as relates to such question and the party will not be allowed the costs of printing the same. Jolly v. Woodward, 4 Idaho, 496, 42 Pac. 512.

Errors assigned and argued in briefs of counsel on appeal should be inserted immediately after the statement of the case and just preceding the argument.—Murphy v. Russell & Co., 8 Idaho, 133, 67 Pac. 421.

Under supreme court rule 6, paragraph 1, the brief of appellants must contain a distinct enumeration of the several errors relied on.—Standley v. Flint, 10 Idaho, 629, 79 Pac. 815.

Appellant's brief contained no enumeration of the errors relied on for reversal but discussed the errors complained of referring to the page and folio of the transcript containing the same. The statement on motion for new trial contained specific assignments of error. After service of the original brief and prior to the call of the case for argument, appellant prepared, served and filed a supplemental brief, in which the errors relied on were specifically enumerated. Held, a substantial compliance with the rules of court and therefore, the supplemental brief would not be stricken out.—Whitney v. Dewey, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117.

An appeal will not be dismissed under the rules of this court where counsel for appellant have failed to file briefs but do appear and argue the case orally.—Havlick v. Davidson, 15 Idaho, 787, 100 Pac. 91.

The failure to file briefs within the time specified by the rules of this court is not a ground for dismissing the appeal, except that, where other grounds exist, such fact may be taken into consideration in determining whether the appeal has been prosecuted with due diligence, and not for the purpose of delay.—*Strand v. Crooked River etc. Co.*, 23 Idaho, 577, 131 Pac. 5.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

Right to new appeal on dismissal of prior appeal. See ante, I.

Waiver of right to have appeal dismissed. See ante, IV, (B).

Dismissal for defects in undertaking. See ante, VII, (C).

Dismissal for failure to appeal in time or for premature appeal. See ante, VII, (A).

Dismissal for defects in the form or making of transcript. See ante, X, (F).

For defects in the filing or service of transcripts. See ante, X, (H).

Dismissal for failure to engross or settle statement. See ante, X, (D), 2.

Where the transcript on appeal contains no order or judgment from which an appeal will lie, the appeal should be dismissed on the court's own motion.—*Potter v. Talkington*, 5 Idaho, 317, 49 Pac. 14; *Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76; *Ellis v. Bingham Co.*, 7 Idaho, 86, 60 Pac. 79.

Where a judgment entered by the trial court is in conformity with the opinion and mandate of the supreme court, an appeal therefrom will be dismissed.—*Phillips v. Salmon M. & D. Co.*, 9 Idaho, 775, 76 Pac. 1128; *Idaho Comstock Co. v. Lundstrum*, 9 Idaho, 785, 76 Pac. 762.

Motion by a party to dismiss a case in the supreme court will be denied when the case was not brought there by the parties but was certified by the trial court.—*Beachy v. Lamkin*, 1 Idaho, 50.

In an action where relief is granted both parties, on motion to dismiss the appeal under supreme court rule 3, the certificate of the clerk below, under rule 4, not showing the nature and substance of the judgment appealed from, such certificate will not justify dismissal of the appeal.—*Dunniway v. Lawson*, 2 Idaho, 632, 23 Pac. 78.

Supreme court rule 3, providing for the dismissal of appeals, is merely directory; and the court will not dismiss an appeal under this rule unless it be made to appear that justice requires such dismissal.—*Dunniway v. Lawson*, 2 Idaho, 632, 23 Pac. 78.

Where an appeal has been dismissed for failure to file the transcript within the time required by the supreme court rules, and the appellants under said rules move to restore the cause on affidavit that on account of pressure of business and inadvertence they failed to file the same, such showing is insufficient. *Fahey v. Belcher*, 3 Idaho, 355, 29 Pac. 112.

A dismissal of an appeal for failure to file the transcript is a bar to another appeal unless such dismissal is made without prejudice to a second appeal.—*Fahey v. Belcher*, 3 Idaho, 644, 32 Pac. 1135.

Upon a motion to reinstate a cause on the calendar once dismissed by the supreme court, the affidavit should show that the appeal has merit.—*Jacobs v. Shenon*, 4 Idaho, 341, 39 Pac. 193.

Under supreme court rule 17, requiring that objections to the transcript must be noted in writing and filed at least one day before argument or they will not be regarded, a motion to dismiss an appeal filed on the day set for argument, will be disregarded.—*Richards v. Scott*, 7 Idaho, 726, 65 Pac. 433.

A motion to dismiss the appeal from a judgment on the ground that the record does not contain all the papers used on the hearing below is properly denied, such omission being ground for suggestion of diminution of the record and not ground for dismissal.—*Zienke v. Northern Pac. Ry. Co.*, 7 Idaho, 746, 65 Pac. 431.

An appeal will not be dismissed for including in the transcript papers which are not necessarily a part thereof, but the party inserting such papers must pay for the printing thereof.—*Taylor v. McCormick*, 8 Idaho, 37, 66 Pac. 805.

Where a final judgment has been rendered in an action and the time for appeal therefrom has expired, an appeal from an order granting a temporary injunction in the action will be dismissed on the ground that a decision on the appeal would be ineffectual for any purpose.—*City of Wallace v. Deane*, 8 Idaho, 344, 69 Pac. 62.

An appeal from a judgment will be dismissed where all the questions involved have been decided on appeal from an order overruling a motion for a new trial in the same action.—*Coats v. Harris*, 9 Idaho, 470, 75 Pac. 246.

Where a motion to disregard a statement on motion for new trial is sustained, the appeal from the order overruling the motion for new trial will be dismissed.—*Robson v. Colson*, 9 Idaho, 215, 72 Pac. 951.

Where no good reason is shown for the delay, failure to have a motion for a new trial passed upon within a year from the rendition of the judgment will authorize dismissal of the appeal from the order denying the new trial.—*McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67.

The trial judge and the clerk of court certified that the transcript on appeal contained all the papers, etc., used on the hearing of a motion to release attached property after final judgment. Subsequently, on motion to dismiss the appeal, the trial judge and clerk certified that other papers were used on the hearing. The party introducing the omitted paper, respondent on appeal, failed to furnish a certified copy of such paper for the record. Held, that the appeal would not be dismissed, a motion for diminution of the record being the proper remedy.—*Coe v. Cleghorn*, 10 Idaho, 162, 77 Pac. 331.

Where respondent moves to dismiss an appeal on the ground that the notice of appeal is not addressed or directed to all the defendants in the case, and was not served on all the defendants, and the motion does not specify or indicate any person on whom service of

notice of appeal was not made, and the record fails to show whether all or any of the defendants were served with process and brought into court, the motion to dismiss will be denied.—*Frost v. Alturas Water Co.*, 11 Idaho, 294, 81 Pac. 996.

Where it is shown that counsel for appellant was notified to appear and show cause why a motion to dismiss the appeal should not be sustained, and he does not appear, the motion will be sustained.—*National Bank of the Republic v. Agnew*, 12 Idaho, 189, 85 Pac. 116.

A motion to dismiss an appeal on the ground "that no sufficient undertaking on said appeal was ever filed in said cause" is so indefinite and uncertain in not specifying the particulars of insufficiency, that the court will disregard the motion.—*Jackson v. Barrett*, 12 Idaho, 465, 86 Pac. 270.

On appeal from a judgment of dismissal in an action by a county to recover a road poll tax, though the record fails to show that the board of county commissioners authorized the taking of the appeal, the fact that the county appears on the hearing of the appeal by the county attorney and attorney general and the fact that the prosecuting attorney makes affidavit that he was authorized by the board to take the appeal will be sufficient grounds on which to deny a motion to dismiss the appeal.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

A motion to dismiss an appeal on the ground that no undertaking on appeal has been filed is not indefinite or uncertain.—*Village of Hailey v. Riley*, 13 Idaho, 749, 92 Pac. 756.

Where an appeal is taken from an order denying a new trial, after the expiration of one year from the date of the judgment, and proper diligence is not shown in prosecuting such appeal, the appeal will be dismissed on motion.—*Smith v. American Falls etc. Co.*, 15 Idaho, 89, 95 Pac. 1059.

Where it is shown that sixteen months have elapsed between the date of judgment and the hearing of a motion for new trial, and no excuse is shown for the delay, the appeal from an order overruling motion for new trial will be dismissed.—*Smith v. American Falls etc. Co.*, 15 Idaho, 89, 95 Pac. 1059.

Under R. S. 4823, providing that the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal, an order dismissing an appeal without stating that the dismissal is made without prejudice, works an affirmance of the judgment and a second appeal therefrom will be dismissed.—*West v. Dygert*, 15 Idaho, 350, 97 Pac. 961.

Where an appeal is taken from an order denying a new trial after the expiration of one year from date of judgment, and proper diligence is not shown in prosecuting such appeal, the same will be dismissed upon proper motion.—*Wood v. Tanner*, 15 Idaho, 689, 99 Pac. 123.

Where the record does not show that any order was ever made or entered overruling a motion for a new trial, a motion to dismiss

the appeal from the order overruling the motion for new trial will be sustained.—*Havlick v. Davidson*, 15 Idaho, 787, 100 Pac. 91.

On motion to dismiss an appeal for laches in the prosecution thereof, the showing of appellant held sufficient to exempt appellant from the charge of laches.—*Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481; *Leggett v. Evans*, 16 Idaho, 760, 102 Pac. 486.

Where an appeal is taken from an order denying an application for a temporary restraining order made upon the complaint alone, without notice to the adverse party, to restrain a canvassing board from canvassing the vote of a certain precinct in a county, and a motion is made to dismiss the appeal based upon the affidavit of the clerk of the canvassing board, showing that such board had canvassed and certified the abstract of votes of such county and precinct prior to the taking of the appeal, the motion will be granted and the appeal dismissed.—*Roberts v. Kartzke*, 18 Idaho, 552, 111 Pac. 1.

A dismissal of an appeal taken by several plaintiffs was filed by their attorney, pursuant to a stipulation wherein defendants agreed to satisfy the judgment against plaintiffs for costs in the sum of \$1,050.70, and to pay their attorney's fees in the sum of \$2,500. Such dismissal was filed without the consent of one plaintiff who, though a party in interest, had declined to have anything to do with the action or contribute toward the expense incurred in its prosecution. Held, on objection of such plaintiff to the dismissal, that he should be allowed to prosecute the appeal upon executing an undertaking for \$5,000, binding him to pay the sums provided for by the stipulation and costs which might accrue, and that in default thereof the appeal should be dismissed.—*Brainard v. Independent etc. Telephone Co.*, 24 Idaho, 466, 134 Pac. 832.

Editorial Notes.

Right of appellant to dismiss appeal: 2 Ann. Cas. 794; 11 Ann. Cas. 966.

XIV. DOCKETS, CALENDARS, AND PROCEEDINGS PRELIMINARY TO HEARING.

Under Laws 1899, page 6, an appeal in special proceedings to remove county commissioners must be heard like any other cause at the place designated in such law for the hearing of causes by the supreme court.—*Mahoney v. Elliot*, 8 Idaho, 190, 67 Pac. 317.

XV. HEARING AND REHEARING.

A motion for a new trial is not a proper proceeding in the supreme court to obtain a rehearing on an issue of law when said court is proceeding under its original jurisdiction.—*People v. George*, 3 Idaho, 108, 27 Pac. 680.

Where a case has been submitted for final determination and the appeal is dismissed and the judgment of the lower court affirmed, a rehearing will not be granted on an application to vacate and set aside the order dismissing the appeal.—*Adams v. McPherson*, 4 Idaho, 5, 35 Pac. 690.

On the certificate of a judge who settles a bill of exceptions showing that the certificate attached to the bill of exceptions was false, a rehearing will be granted.—*Griffith v. Montandon*, 4 Idaho, 105, 74 Pac. 406.

A petition for rehearing will not lie in the case of preliminary or interlocutory orders of the supreme court.—*Prout v. Mounce*, 6 Idaho, 590, 57 Pac. 307.

Supreme court rule No. 22, providing that applications for rehearing may be made, does not apply to cases of which the supreme court has original jurisdiction.—*Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323.

Where a rehearing is granted generally, the case stands as though no hearing had been had, and all points and questions that might have been raised on the original hearing may be presented on the rehearing.—*Olympia Min. Co. v. Kerns*, 13 Idaho, 514, 91 Pac. 92.

Where the trial court makes findings upon all the issues in the case and enters judgment, and upon appeal the findings and judgment are affirmed, and a rehearing is granted in this court, and upon the rehearing the appellant contends that a new trial should be granted, and that a new party be made a party defendant and brought into the case by proper service, and it appears from the record filed on appeal that the subject matter alleged in the application to have a new party brought in was not involved in the case appealed and decided in the former opinion, such opinion will be affirmed and a new trial will be denied.—*Wittenberg v. Northern Idaho Pine Lbr. Co.*, 23 Idaho, 66, 131 Pac. 1.

XVI. REVIEW.

Review of case tried on documentary evidence. See post, XVI, (D).

Questions presented by record. See ante, X.

(A) SCOPE AND EXTENT IN GENERAL.

Right to review record in attachment suit in action on release bond. See Attachment and Garnishment, X.

Necessity of bill of exceptions. See ante, X, (C).
Presentation of issues and questions in lower court. See ante, V, (A).

Parties entitled to allege error. See post, XVI, (C).

Scope and contents of record as determining extent of review. See ante, X.

Exceptions to findings of fact on the ground that they are contrary to the evidence can only be reviewed on appeal from an order overruling the motion for new trial.—*Toulouse v. Burkett*, 2 Idaho, 184, 10 Pac. 26.

Affidavits and papers which are not shown to have been presented to the court or judge thereof at the hearing on a motion to dissolve an injunction, and which appear from the judge's certificate not to have been used or considered by him on such hearing, cannot be considered on appeal from an order made granting or denying such motion.—*Dougal v. Eby*, 11 Idaho, 789, 85 Pac. 102.

Where the trial court grants a motion for new trial without designating the grounds on which the order is based, the appellate court need only determine whether or not the order

can be sustained on any ground named in the motion and assignments and specifications of errors.—*Buckle v. McConaghy*, 12 Idaho, 733, 88 Pac. 100.

Appellate courts will not pass on moot questions.—*Porter v. Speno*, 13 Idaho, 600, 92 Pac. 367.

Where the question of the insufficiency of the evidence to support the verdict or decision is properly raised, it may be determined on appeal from an order denying a motion for new trial taken within sixty days from the date of such order, though the appeal from the judgment is not taken within sixty days after its rendition.—*White v. Whitcomb*, 13 Idaho, 490, 90 Pac. 1080.

Where counsel objects to the admission of evidence without assigning any ground or reason for the objection, the ruling of the trial court thereon will not be reviewed on appeal.—*Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374.

Where a complaint states a cause of action and an answer is filed specifically denying all of its material allegations, and also sets up a special defense, and a demurrer to the special defense is sustained and the case is thereafter brought on for trial, at the opening of which the defendant admits that all of the allegations of the complaint are true, and judgment is rendered against him, and the only question on appeal raised is the action of the court in sustaining the demurrer to the special defense, the court will not pass upon that question, for the reason that a decision of it could in no manner affect the judgment rendered and entered on the admissions of the defendant.—*Cameron v. Huntbach*, 15 Idaho, 568, 98 Pac. 1080.

An abstract question, the determination of which could in no manner affect the judgment appealed from, will not be decided by the supreme court on appeal.—*Cameron v. Huntbach*, 15 Idaho, 568, 98 Pac. 1080.

Upon an appeal from a judgment of nonsuit, the supreme court will review not only the action of the trial court in disposing of the motion for a nonsuit, but also such errors of law as occurred during the trial, when properly excepted to and made a part of the record by a proper bill of exceptions.—*Sponberg v. First Nat. Bank*, 15 Idaho, 671, 99 Pac. 712.

Errors of law occurring at the trial may be reviewed upon an appeal from the judgment, although no specification of the particular errors of law, on which the appellant relies, is contained in the bill of exceptions.—*Humphrey v. Whitney*, 17 Idaho, 14, 103 Pac. 389.

Where motion for a new trial has been made on several grounds, and the trial court grants the same, without designating the ground upon which the order is made, the order will not be disturbed on appeal, if it could have properly been granted on any ground mentioned in the motion.—*Penninger Lateral Co. v. Clark*, 20 Idaho, 166, 117 Pac. 764.

The fact that the trial court gives a wrong reason for striking out certain evidence is not

a reason for reversal of the case.—Valentine v. Rosenhaupt, 19 Idaho, 130, 112 Pac. 685.

Under R. C. 4439 and section 4440, as amended by Laws 1911, page 377, the question of the insufficiency of the evidence is a ground for a new trial, and, on appeal from an order on motion for a new trial, such ground or the sufficiency of the evidence to justify the verdict or other decision may be reviewed.—Buster v. Fletcher, 22 Idaho, 172, 125 Pac. 226.

The word "decision," as used in R. C. 4434, as added by Laws 1911, chapter 119, relating to the record wherein a desire to procure a review on appeal of the sufficiency of the evidence to sustain the verdict or decision, includes the trial court's findings of fact and conclusions of law where a case is tried to the court.—Buster v. Fletcher, 22 Idaho, 172, 125 Pac. 226.

Under R. C. 4818, as amended by Laws 1911, page 375, upon an appeal from a final judgment where the appellant furnishes this court with a copy of the notice of appeal, of the judgment-roll, and of the reporter's transcript as prepared and settled as provided by R. C. 4434, as added by Laws 1911, chapter 119, and the insufficiency of the evidence is properly presented by specification of such insufficiency in the brief on appeal, this court has full power and authority to determine whether the evidence is sufficient to support the findings or the verdict.—Buster v. Fletcher, 22 Idaho, 172, 125 Pac. 226.

(B) INTERLOCUTORY, COLLATERAL AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS.

Final or interlocutory character of judgment as affecting right to appeal. See ante, III, (D), (E), (F).

Review of interlocutory matters on appeal as dependent on time of taking appeal. See ante, VII, (A), 4.

The special findings of a jury in an equity case being merely advisory, instructions given by the court are immaterial and will not be reviewed on appeal.—Kelly v. Perrault, 5 Idaho, 221, 48 Pac. 45; Daly v. Josslyn, 7 Idaho, 657, 65 Pac. 442; Gordon v. Lemp, 7 Idaho, 677, 65 Pac. 444.

An order sustaining plaintiff's demurrer to the counterclaim set forth in the answer may be reviewed on appeal from the final judgment by defendant.—Miller v. Hunt, 6 Idaho, 523, 57 Pac. 315.

Under R. S. 4427 an order striking out a portion of a pleading is deemed excepted to, and, appearing in the record or files, may be reviewed upon appeal as though settled in a bill of exceptions.—Warren v. Stoddart, 6 Idaho, 692, 59 Pac. 540.

Orders of a court from which the statute makes no specific provision for an appeal (in this case, an order striking out portions of a pleading) may be reviewed on appeal from the judgment or order denying or granting a new trial, and need not be specified in the notice of appeal.—Warren v. Stoddart, 6 Idaho, 692, 59 Pac. 540.

An order quashing and dismissing the information in a proceeding brought under R. S. 7459 to remove county commissioners is not appealable under R. S. 4807, section 3, and can be reviewed only on appeal from the final judgment.—Mahoney v. Elliott, 8 Idaho, 356, 69 Pac. 108.

All interlocutory and nonappealable orders of the district court made prior to judgment may be reviewed on appeal from the judgment when properly presented by the record.—In re Paige, 12 Idaho, 410, 86 Pac. 273.

All orders that could as well be reviewed on an appeal from the judgment or from the order granting or refusing a new trial as on separate appeals should be reviewed on appeal from the judgment or from the order granting or denying a new trial.—Dahlstrom v. Portland Min. Co., 12 Idaho, 87, 85 Pac. 916.

Where the record fails to show the grounds of a motion to remand made in the district court, the supreme court will not review the action of the trial court on such motion.—Medbury v. Maloney, 12 Idaho, 634, 88 Pac. 81.

If the defendant fails to demur to the complaint, the appellate court will not reverse a judgment on an objection that the "complaint does not state a cause of action," where the complaint states that the injury complained of was the direct result of the negligent and careless construction and management of the property of defendant and calls attention to the particular portion of such property that was badly constructed and managed and resulted in the injury complained of.—Crowley v. Croesus Gold etc. Min. Co., 12 Idaho, 530, 86 Pac. 536.

Where a complaint is amended, the action of the trial court in overruling a demurrer to the original complaint cannot be alleged as error on appeal.—Andrews v. Moore, 14 Idaho, 465, 94 Pac. 579.

To review the sufficiency of the allegations of a complaint, there must be an appeal from the judgment and such question will not be considered or determined on an appeal from an order denying a new trial.—Naylor v. Lewiston etc. Ry. Co., 14 Idaho, 789, 96 Pac. 573.

Under R. S. 4807, subdivision 3, specifying from what orders an appeal will lie, and R. S. 4824, specifying what may be reviewed on appeal from a judgment, all orders not directly appealable under the former statute may be reviewed on appeal from the judgment.—Maple v. Williams, 15 Idaho, 642, 98 Pac. 848.

An objection that the complaint does not state facts sufficient to constitute a cause of action cannot be reviewed upon an appeal from an order denying a motion for a new trial.—Maw v. Coast Lumber Co., 19 Idaho, 396, 114 Pac. 9.

Where a motion is made for a nonsuit at the close of the evidence on the part of the plaintiff, upon the ground that the evidence is insufficient to warrant the submission of the case to the jury, and the motion is denied, and evidence is thereafter offered by the defendant, the ruling of the trial court upon the

motion is not reviewable upon an appeal from the judgment or from the order overruling the motion for a new trial.—*Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465; *Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

A motion for continuance is reviewable on appeal from the judgment.—*Richards v. Richards*, 24 Idaho, 87, 132 Pac. 576.

Editorial Notes.

Review, on appeal from final judgment, of interlocutory appealable order, decision, etc., not theretofore appealed from: Ann. Cas. 1913A, 816; 11 Ann. Cas. 552.

(C) PARTIES ENTITLED TO ALLEGE ERROR.

Failure to raise question in lower court. See ante, V, (A).

Harmless error. See post, XVI, (H).

Judgment by consent where usury statute not complied with. See ante, III, (F).

Necessity of taking exceptions in lower court. See ante, V, (C).

Necessity of objections in lower court. See ante, V, (B).

Errors against respondent will not be reviewed on appeal, where respondent has filed no appeal.—*Jones v. St. John Irrigation Co.*, 2 Idaho, 58, 3 Pac. 1; *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715; *Sabin v. Burke*, 4 Idaho, 28, 37 Pac. 352; *Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105; *Harris v. Coates*, 8 Idaho, 491, 69 Pac. 475; *Sponberg v. First Nat. Bank*, 15 Idaho, 671, 99 Pac. 712.

No error can be taken advantage of by a party not injured thereby.—*Glendenning v. McNutt*, 1 Idaho, 592.

Where respondent claims that a clerical error was made by the clerk in the court below in entering the judgment, but no appeal was taken on that ground, the supreme court will decline to correct the alleged error.—*Cowen v. Harrington*, 5 Idaho, 329, 48 Pac. 1059.

Failure of appellant to serve statement on motion for new trial on a respondent cannot be taken advantage of by a co-respondent where the party not served fails to complain.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 508.

Consent to a decree of foreclosure does not estop defendant from objecting, on appeal, to a deficiency judgment against defendant's wife and ordering a joint sale of all property covered by several mortgages sought to be foreclosed, and an application of the proceeds to the aggregate amount of all the mortgage debts.—*Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893.

A party who requests an erroneous instruction or one in conflict with an instruction already given cannot complain thereof.—*Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

Error in the exclusion of competent evidence will not be considered on appeal where the party prejudiced does not appeal.—*Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995.

Where no appeal is taken from an order overruling a demurrer to the complaint, the action of the court therein cannot be reviewed on an appeal taken by the plaintiff.—*Rauh v. Oliver*, 10 Idaho, 3, 77 Pac. 20.

Editorial Notes.

Right to question sufficiency of complaint for first time on appeal: 3 Ann. Cas. 545.

Appellant cannot complain of an instruction given by the trial court when a similar instruction has been given at appellant's request.—*American Bonding Co. v. Regents of University*, 11 Idaho, 163, 81 Pac. 604.

Where the issues joined cover a claim for injuries and damages suffered under a specified contract, and the parties thereafter stipulate before the referee that "a full and complete accounting between plaintiff and defendant shall be had and taken of all matters and things" arising out of another and separate contract "the same as if it were part of the complaint," the losing party cannot complain on appeal that the evidence and findings touching such new issue are outside of the issues made by the pleadings.—*Lindstrom v. Hope Lbr. Co.*, 12 Idaho, 714, 88 Pac. 92.

Where a defendant in a water suit, brought for the purpose of determining priorities of appropriators, answers the complaint and also files a cross-complaint in which he sets up his claim to a certain quantity of the waters of the stream and pleads the facts entitling him to a decree establishing his rights, and he raises no objections to the insufficiency of description of the lands to be irrigated as contained in the complaint, and in no way calls the matter to the attention of the trial court, and a decree is entered describing the lands to be irrigated both by the plaintiff and the defendants and all the parties to the action, in the language of the complaint and the cross-complaint, any insufficiency, error or defect in the description must be first raised in the trial court and called to the attention of the court entering the decree before it can be considered on appeal, and in case of appeal any error assigned by the appellant in reference to such defective or insufficient description will be held to have been participated in and invited by the appellant, and he will not be allowed a reversal of the judgment on account thereof.—*Farmers' etc. D. Co. v. Nampa etc. Irr. Dist.*, 14 Idaho, 450, 94 Pac. 761; *Farmers' etc. D. Co. v. Riverside Irr. Co.*, 14 Idaho, 462, 94 Pac. 765; *Farmers' etc. D. Co. v. Pioneer Irr. Dist.*, 14 Idaho, 463, 94 Pac. 764; *Farmers' etc. D. Co. v. New York Canal Co.*, 14 Idaho, 464, 94 Pac. 764.

Where an action is brought to recover damages for loss of hay crop caused by flooding plaintiff's land, and an injunction prayed for to prevent a repetition of such flooding, and the defendant by its answer sets up several separate defenses, and when the case is called for trial moves to have the court refer the cause to a master in chancery to determine the measure of damages that plaintiff would be entitled to, if the defendant were condemning the right to flood and overflow the plain-

tiff's land permanently and perpetually, and such reference is made over the objection of the plaintiff, and the cause is tried by the referee, and his finding and decision reported to the court, and the court enters judgment thereon, and in accordance therewith, on an appeal therefrom the defendant will not be permitted to take advantage of the error made by the court in referring the case to a referee, for the reason that it invited the court to make the error.—*Gaskill v. Washington Water Power Co.*, 17 Idaho, 128, 105 Pac. 51.

Under B. C. 4442, as amended by Laws 1911, chapter 118, a motion for a new trial may be brought to a hearing upon motion of either party, and if the appellant does not ask that the motion be called up or heard until after the stenographer's notes have been transcribed, and after such notes have been transcribed said hearing upon the motion for a new trial is heard, and the respondent makes no objection to the hearing of the motion for a new trial at the time on the ground that there has been an unreasonable delay, the respondent waives any objection to such hearing and cannot complain for the first time in this court on the ground that there was an unreasonable delay on the part of the appellant in bringing such motion to a hearing.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

(D) AMENDMENTS, ADDITIONAL PROOFS, AND TRIAL OF CAUSE ANEW.

Amendment of record. See ante, X, (I).

Amendments of bill of exceptions or statement. See ante, X, (D), 2.

Amendment in lower court pending appeal. See ante, VIII.

Where the proofs tend to establish certain rights not within the issues, and no amendments are made in the pleadings in the trial court, the supreme court cannot go beyond the issues to modify the judgment.—*Abbott v. Reedy*, 9 Idaho, 577, 75 Pac. 764.

Where a case has been heard and determined entirely on depositions, the supreme court will pass on the weight and preponderance of the evidence.—*Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213; *Ainslie v. Idaho World Ptg. Co.*, 1 Idaho, 641.

Where the testimony is taken before a referee and the district judge does not see or hear any of the witnesses, and the question of the sufficiency of the evidence is raised, the supreme court will make an original examination of the entire evidence and determine the weight and preponderance thereof.—*Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938.

On appeal from an order granting a new trial made by a judge other than the judge before whom the case was tried, the supreme court will examine and weigh the evidence the same as the nisi prius court should do.—*Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Van Camp v. Breyer*, 13 Idaho, 209, 89 Pac. 754.

Where a new trial is granted by the judge before whom a case was tried and the successor in office of such judge thereafter on stipulation tries the case on the evidence

taken on the former trial, the supreme court on appeal will consider the evidence the same as though the case were being originally heard in that court.—*Village of Sandpoint v. Doyle*, 14 Idaho, 749, 17 L. R. A., N. S., 497, 95 Pac. 945.

Where a case was originally heard by the trial court on an agreed statement of facts, and no oral evidence was introduced, and judgment was thereupon entered and a motion was subsequently made on affidavits to vacate and set aside the judgment, and no oral evidence was introduced, the appellate court will examine the record as though the matter had never been heard or examined by the trial court, and will exercise its discretion in the matter, the same as a trial court is authorized to do in such matters.—*Council Improvement Co. v. Draper*, 16 Idaho, 541, 102 Pac. 7.

Where the trial court has heard and determined a case solely on depositions and documentary evidence, and an appeal is taken from the judgment on the ground that it is not supported by the evidence, the appellate court will examine and weigh the evidence the same as if the case were being tried de novo.—*Spofford v. Spofford*, 18 Idaho, 115, 108 Pac. 1054.

Where only documentary evidence is before the court below, and it renders its decision upon such evidence alone, this court will make an original examination of the evidence as contained in the record, and will exercise its judgment and discretion, the same as if the case were being presented to it in the first instance.—*Parsons v. Wrble*, 19 Idaho, 619, 634, 115 Pac. 8, 13.

The rule adopted in this state that where a case has been heard in the trial court wholly upon depositions and documentary evidence, and no witnesses appeared and testified, the appellate court will examine and weigh the evidence for the purpose of determining the preponderance thereof, will not be applied in any case where witnesses have appeared and testified before the trial court, although the greater part of the case was heard on depositions and documentary evidence.—*Jones v. Marshall*, 24 Idaho, 678, 135 Pac. 841.

Editorial Notes.

Jurisdiction of court to try case de novo on appeal where lower court was without jurisdiction: Ann. Cas. 1913C, 120.

(E) PRESUMPTIONS.

Affirmance on failure to show error. See post, XVII, (B).

Presumption where verdict of jury is for less than amount claimed. See Damages, VII.

1. In General.

The burden is on the party alleging error to show it affirmatively by the record.—*Goodman v. Minear Min. Co.*, 1 Idaho, 131; *Murphy v. Fuld*, 2 Idaho, 175, 9 Pac. 609; *Toulouse v. Burkett*, 2 Idaho, 288, 13 Pac. 172.

All presumptions and intendments are in favor of the regularity of the proceedings of the courts of record.—*Lowe v. Turner*, 1 Idaho, 107.

Where error is shown it is presumed to have worked injury to the party against whom it was committed unless it affirmatively appears from the record that no injury did or could result.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

Where the testimony in the trial court is not all contained in the record, the supreme court is bound to presume that the testimony was in every respect sufficient to support the verdict.—*State v. Perry*, 4 Idaho, 224, 38 Pac. 655.

Where the record affirmatively shows that the lower court had jurisdiction to enter the judgment, the regularity of the proceedings and jurisdiction of the court below will be presumed on appeal.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 102.

Where an appeal is taken from justice or probate court on questions of law alone, and the record on appeal to the supreme court fails to show on what ground the trial court based its opinion that it was "necessary or proper" to try the case anew under R. S. 4844, and the transcript on appeal does not purport to contain all the papers filed in the trial court, it will be presumed that a proper showing was made to the district court, as it is a court of general jurisdiction.—*Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.

Where the record and judgment recite that a case was tried by the court without a jury and certain affidavits in the record state that the case was tried by the judge at chambers, and the appeal is on the judgment-roll alone, the appellate court will hold that the case was tried by the court.—*Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434.

It will be presumed on appeal in the absence of a showing to the contrary that demand required by R. S. 4141 was made for the issuance of an alias summons.—*Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323.

Where an order made by the trial judge is not dated, the presumption is, in the absence of any other showing, that it was made on the date it was filed.—*Sandstrom v. Smith*, 11 Idaho, 779, 84 Pac. 1060.

Where the trial judge specifies no grounds on which he bases his order dissolving an injunction, it will be assumed on appeal that it was made on one or all of the grounds specified in the motion to dissolve.—*Powell v. Springston Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

The decision of a court of general jurisdiction is presumed to be correct until the contrary is shown.—*Watt v. Decker*, 16 Idaho, 184, 101 Pac. 253.

A document or paper may be made a part of a bill of exceptions by reference, without copying the same therein, providing the identification is sufficient and the paper or document is placed in the record; and, in the absence of a showing to the contrary, the supreme court will presume that the document or paper appearing in the record is the one identified in the bill of exceptions.—*Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574; *Storer v. Heitfeld*, 17 Idaho, 113, 105 Pac. 55.

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2. Pleadings.

Where the record shows that a general demurrer was filed, but is silent as to what disposition was made thereof, the appellate court will presume that it was either abandoned or overruled.—*Schultz v. Keeler*, 2 Idaho, 333, 13 Pac. 481; *United States v. Alexander*, 2 Idaho, 386, 17 Pac. 746.

Where there are both issues of law and fact and the cause is brought on for trial and a judgment rendered, the presumption on appeal will be that the issue of law was first disposed of by an order overruling the demurrer.—*Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107.

Where the judgment-roll shows the amended pleadings, the court will presume that the pleadings contained in the transcript, certified by the clerk to be correct, are those which constitute the judgment-roll.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361.

Where the record shows that the default of the defendant is entered for want of an answer, and trial had and judgment rendered, the supreme court will presume, in the absence of a showing to the contrary, that the trial court acted upon the demurrer, and overruled the same.—*Culver v. Mountain Home Electric Co.*, 17 Idaho, 669, 107 Pac. 65.

3. Instructions.

Where written instructions are not given to the jury, the supreme court will presume that the law of the case was correctly given, unless the contrary appears.—*Monarch etc. Co. v. McLaughlin*, 1 Idaho, 617.

Where no written instructions were given and the great preponderance of evidence is against the verdict, the supreme court will presume that the jury misconceived either the evidence or the law, and will order a new trial.—*Monarch etc. Co. v. McLaughlin*, 1 Idaho, 617.

Where the trial court refused to give certain requested instructions, and the record fails to show the instructions given by the court on its own motion, the supreme court cannot determine whether there was error in such refusal, as it is presumed that the court fully and fairly instructs on all the issues involved.—*Gumaer v. White Pine Lbr. Co.*, 11 Idaho, 591, 83 Pac. 771.

The instructions given in a case must be read and considered together as a whole, and where they are not inconsistent but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole instruction rather than to an isolated portion thereof.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

4. Findings of Court or Referee.

Where no testimony is reported in a statement, from which the supreme court can determine as to the propriety or impropriety of the findings of the trial court, the presumption is that the testimony was, in every respect, sufficient to support the findings.—*Hazard v. Cole*, 1 Idaho, 276.

On appeal it will be held that all questions put in issue and not found upon would have been found against the appellants or that they were deemed immaterial.—*Gamble v. Dunwell*, 1 Idaho, 268.

In the absence of findings of fact from the record in a case tried by the court without a jury, the presumption is that such findings were waived.—*Squier v. Lowenberg*, 1 Idaho, 785.

Where appellant fails to show affirmatively error in the findings of the referee, the correctness of such findings will be presumed and the judgment thereon affirmed.—*Montandon v. Walker*, 2 Idaho, 165, 9 Pac. 608.

Where the record does not affirmatively show that findings of fact were not waived, the presumption is that they were waived.—*Parker v. Beagle*, 4 Idaho, 453, 40 Pac. 61.

Where the record fails to show whether or not the trial court made findings of fact, the presumption is that the necessary findings were either made or waived.—*Bunnell etc. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767.

In an action for flooding lands, plaintiff alleged that his lands were permanently destroyed to his damage in the sum of \$2,500. The court found that said lands have been damaged in the sum of \$453.50. The transcript on appeal did not contain the evidence. Held, that the supreme court would presume that the trial court applied the correct rule in assessing damages, as between the rules governing permanent and temporary injury.—*Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574.

Where a trial court has made findings in a case which are sufficient to support the judgment, and which are contrary to and inconsistent with any finding that might have been made on any other issue in the case which could have been favorable to the adverse party, it will be presumed that, had the court made findings on such other issue, they would have been against the losing party on such issue.—*Mine etc. Co. v. Idaho Consol. Mines Co.*, 20 Idaho, 300, 118 Pac. 301.

Where the evidence is not before the supreme court on appeal, it will be presumed that it was sufficient to support the finding of the trial court.—*McCormick v. Brown*, 22 Idaho, 52, 125 Pac. 197.

5. Judgments and Orders After Judgment.

The presumption of law is that the facts stated in the recitals of a judgment of a court of general jurisdiction were proven by competent evidence, though such evidence forms no part of the judgment-roll.—*Grete v. Knott*, 2 Idaho, 13, 3 Pac. 25.

Where the record fails to show the date of the adjournment of the term of the district court, at which the order vacating judgment was made, laches will not be presumed.—*Baker v. Knott*, 3 Idaho, 700, 35 Pac. 172.

Under R. S. 4229, allowing relief in certain cases from judgments, etc., if application therefor be made within six months after adjournment of the term, a motion to set aside judgment need not be made within six months

from the date of rendition thereof, but will be presumed to have been made in time if the record does not show the date of adjournment of the term.—*Kerns v. McAuley*, 8 Idaho, 558, 69 Pac. 539.

Where a judgment of the trial court is attacked, the presumption is that the judgment was rendered and entered on sufficient and competent evidence; and in order to overcome that presumption, the party attacking the judgment should furnish to the appellate court all the evidence, or substance thereof, that was produced before the trial court, and his record should show that it does in fact contain all the evidence.—*Stoddard v. Fox*, 15 Idaho, 704, 99 Pac. 122.

Where a defendant against whom a default judgment has been entered serves and files notice of motion to vacate and set aside the judgment and open the default, and thereafter a hearing is had on the same, and the judgment is vacated and the default is set aside, and an appeal is taken from such order, and the record on appeal is silent on the question as to whether a formal motion was made, the appellate court will presume that a motion was made on the grounds designated in the notice, and that the court granted a motion that had been made by the moving party. In other words, the granting of a motion implies the making of a motion.—*Hall v. Whittier*, 20 Idaho, 120, 116 Pac. 1031.

On appeal from an order setting aside a default every reasonable presumption will be indulged in support of the order.—*Humphreys v. Idaho Gold Mines etc. Co.*, 21 Idaho, 126, 120 Pac. 823.

In an action to remove a public officer the record on appeal failed to show whether any evidence was taken. The judgment recited that the cause came on "to be heard upon the complaint and the answer filed herein" and "the court having overruled a demurrer to the answer," "it is adjudged that this action be and the same is hereby dismissed." Held, that it will be presumed on appeal that no evidence was introduced in support of the accusation or that if evidence was introduced it did not support the accusation and that therefore, the judgment of dismissal was proper.—*State v. Wylie*, 24 Idaho, 548, 135 Pac. 59.

6. New Trial, Notice and Motion.

Where the trial court grants a motion for new trial without designating on what grounds the new trial is granted, it will be presumed that the order was made on one or all the grounds specified in the motion.—*Buckle v. McConaghy*, 12 Idaho, 733, 88 Pac. 100.

Where a trial court makes an order denying a motion for new trial, the appellate court will presume, in the absence of a showing to the contrary, that a proper notice of intention to make such motion was filed and served, and that a motion for a new trial was properly made and presented to the court or judge thereof.—*Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363.

Where the transcript shows that a motion for a new trial was brought on to be heard, and the same was heard and denied by the court, and there is nothing in the record to

show that the motion was not properly made and filed, this court will presume that it was properly made.—*Leggett v. Evans*, 16 Idaho, 760, 102 Pac. 486.

7. Matters Connected With Taking or Perfecting Appeal.

Where it does not affirmatively appear that no notice for the settlement of the statement on motion for new trial was given, the supreme court will presume that such notice was given.—*Stevens v. Northwestern Stage Co.*, 1 Idaho, 604.

To overcome the presumption of regularity in the action of the trial court in settling a bill of exceptions by showing that the bill was settled without having been served on the adverse party, proof of the failure of such service must be made, upon due notice of motion to strike to the adverse party.—*Jones v. St. John Irr. Co.*, 2 Idaho, 74, 74 Pac. 129.

It is not necessary that the record on appeal should contain the evidence upon which the judge acted in allowing an extension of time for defendant to prepare and serve its statement on motion for a new trial, as provided in R. S. 4932, the presumption being that good cause was shown therefor.—*Snyder v. Viola Min. etc. Co.*, 3 Idaho, 28, 26 Pac. 127.

(F) DISCRETION OF LOWER COURT.

1. In General.

An application for a change of venue is addressed to the sound legal discretion of the trial court, and the decision reached by the trial court on such matter will not be reversed on appeal, unless the showing made is such as to convince the appellate court that the trial court has abused such discretion.—*Gibbert v. Washington Water Power Co.*, 19 Idaho, 637, 115 Pac. 924.

In determining whether or not a trial court has abused the discretion vested in it in denying a motion for change of venue, some weight and consideration may be given to the fact that the judge is personally acquainted with a large number of the citizens of the counties of his district, and is in a large degree familiar with the sentiment prevailing in his district touching questions of public importance, and those matters which necessarily attract the attention of the press and the public generally.—*Gibbert v. Washington Water Power Co.*, 19 Idaho, 637, 115 Pac. 924.

2. Continuance or Postponement.

A motion for continuance is addressed to the sound legal discretion of the court, and, unless there is a clear abuse of that discretion, the order made will not be disturbed on appeal.—*Cox v. Northwestern Stage Co.*, 1 Idaho, 376; *Williams v. Olden*, 7 Idaho, 146, 97 Am. St. Rep. 250, 61 Pac. 517; *State v. Wetter*, 11 Idaho, 433, 83 Pac. 341; *Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108; *Storer v. Heitfeld*, 17 Idaho, 113, 105 Pac. 55; *Miller v. Brown*, 18 Idaho, 200, 109 Pac. 139; *Richards v. Richards*, 24 Idaho, 87, 132 Pac. 576; *De Puy v. Peebles*, 24 Idaho, 550, 135 Pac. 264.

Editorial Notes.

Refusal of continuance for illness of party as discretionary: 42 L. R. A., N. S., 662.

3. Injunctions.

The action of the trial court in granting or refusing to grant an injunction pendente lite will not be reversed on appeal unless it clearly appears that there was an abuse of discretion.—*Washington etc. Co. v. Coeur d'Alene Co.*, 2 Idaho, 439, 17 Pac. 142; *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Shields v. Johnson*, 10 Idaho, 454, 79 Pac. 394; *Castelbury v. Harte*, 15 Idaho, 399, 98 Pac. 293; *Fischer v. Davis* (on rehearing), 19 Idaho, 493, 116 Pac. 412; *Wayne v. Alspach*, 20 Idaho, 144, 116 Pac. 1033; *Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 280, 129 Pac. 932.

4. Rulings as to Pleadings.

Amendments to pleadings rest largely in the discretion of the trial court, and the rulings of the trial court will not be disturbed on appeal, unless it appears that the exercise of such discretion has deprived the party complaining of some substantial right.—*Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108; *Mantle v. Jack Waite Min. Co.*, 24 Idaho, 613, 135 Pac. 854.

5. Conduct of Trial.

The order of proof is within the discretion of the trial court, and except in cases of manifest abuse of discretion, the supreme court will not interfere with the ruling of the court below in that respect.—*Lalande v. McDonald*, 2 Idaho, 307, 13 Pac. 347.

Great latitude of discretion is allowed in the trial of challenges for cause, and the decision of the court thereon will not be disturbed unless it clearly appears that there was an abuse of discretion.—*United States v. Alexander*, 2 Idaho, 386, 17 Pac. 746.

Leading questions are within the legal discretion of the trial judge, and where such discretion is not abused, this court will not reverse a case because the court allowed leading questions.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

6. Submission of Issues or Questions to Jury.

It is the province of the court to determine as to what particular facts the jury shall find specially, and no error lies to the refusal of the court to instruct the jury to find specially on any particular question.—*Luffkins v. Collins*, 2 Idaho, 256, 10 Pac. 300.

7. Opening Default.

An application to set aside and vacate a judgment is addressed to the discretion of the court, and unless it appears that such discretion has been abused, the order will not be disturbed on appeal.—*Holland Bank v. Lieuallen*, 6 Idaho, 127, 53 Pac. 398; *Western Loan etc. Co. v. Smith*, 12 Idaho, 94, 85 Pac. 1084; *Culver v. Mountain Home Electric Co.*, 17 Idaho, 669, 107 Pac. 65; *Harr v. Knight*, 18 Idaho, 53, 108 Pac. 539; *Morbeck v. Brad-*

ford-Kennedy Co., 19 Idaho, 83, 113 Pac. 89; Green v. Kandle, 20 Idaho, 190, 118 Pac. 90; Humphreys v. Idaho Gold Mines etc. Co., 21 Idaho, 126, 120 Pac. 823.

An application to open a default is addressed to the sound legal discretion of the trial court, and the order of the court will not be reversed on appeal, unless it clearly appears that the court abused its discretion; and in determining the question of discretion, the power of the court should be freely and liberally exercised, under the statute, to mold and direct its proceedings, so as to dispose of cases upon their substantial merits.—Holzman v. Henneberry, 11 Idaho, 428, 83 Pac. 497; Pittock v. Buck, 15 Idaho, 47, 96 Pac. 212; Hamilton v. Hamilton, 21 Idaho, 672, 123 Pac. 630.

A motion to vacate and set aside a judgment under R. C. 4229 is addressed to the sound legal discretion of the court, and when that discretion has been brought to bear upon all the facts presented in the motion and has been exercised in the light of the statutes bearing upon the questions encompassed by the motion, and there is nothing which makes it appear that such discretion has been arbitrarily exercised in disregard of the established rules of law and principles of justice, an appellate court will not disturb the order and judgment of the court that was called upon to exercise the discretion.—Richards v. Richards, 24 Idaho, 87, 132 Pac. 576.

8. New Trial.

Where the record shows no abuse of discretion in granting an order for a new trial, the order will not be disturbed.—Heilner v. Brown, 2 Idaho, 263, 12 Pac. 903; Jacksha v. Gilbert, 4 Idaho, 738, 44 Pac. 555; Brossard v. Morgan, 6 Idaho, 479, 56 Pac. 163; Twin Springs etc. Co. v. Upper Boise etc. Co., 6 Idaho, 687, 59 Pac. 535; Gray v. Pierson, 7 Idaho, 540, 64 Pac. 233; Walsh v. Winston Bros. Co., 18 Idaho, 768, 111 Pac. 1090; McGuire v. Grangeville Sav. etc. Co., 19 Idaho, 635, 115 Pac. 18; Say v. Hodgkin, 20 Idaho, 64, 116 Pac. 410; Baillie v. City of Wallace, 22 Idaho, 702, 127 Pac. 908.

Where the record does not show the grounds on which a new trial was granted and no error warranting a new trial appears therein, the order granting a new trial will be reversed.—Lowe v. Long, 5 Idaho, 122, 47 Pac. 93.

In reviewing the action of the district court in granting a new trial, the supreme court is not confined to the question of whether there has been an abuse of discretion by the trial court, but it will inquire whether the promotion of justice demands that a new trial shall be granted.—Wood Livestock Co. v. Woodmansee, 7 Idaho, 250, 61 Pac. 1029.

Where, in granting a new trial, the grounds thereof are not stated, the supreme court on appeal will examine the record, and if it contains sufficient error to warrant the granting of a new trial, the order will be sustained.—Bernier v. Anderson, 8 Idaho, 675, 70 Pac. 1027.

Upon appeal from an order granting a new trial on the ground of the insufficiency of the

evidence to justify the verdict, even though the evidence is conflicting, such order will not be reversed, unless it affirmatively appears to have been a clear abuse of discretion.—Wolfe v. Ridley, 17 Idaho, 173, 20 Ann. Cas. 39, 104 Pac. 1014; Say v. Hodgkin, 20 Idaho, 64, 116 Pac. 410.

Where, on a motion for a new trial, affidavits are filed by the moving party in support of such motion, and counter-affidavits are filed by the party opposing such motion, and it appears from such affidavits that the facts stated are in the main cumulative, and that none of them were beyond the reach of the appellants, who by proper diligence could have produced them at the trial, and it appears from such affidavits that they do not show such surprise as would warrant the granting of the new trial, and that the new evidence stated in the affidavits discovered since the trial of the cause does not show that at the trial there had been a miscarriage of justice, or the denial of any legal right of the appellants by the verdict of the jury, the order of the trial court in denying the motion will not be reversed.—Darling v. Fremstadt, 22 Idaho, 684, 127 Pac. 674.

(G) QUESTIONS OF FACT, VERDICTS AND FINDINGS.

Review of case tried on documentary evidence. See ante, XVI, (D).

1. In General.

Where the material issues are submitted to the jury on instructions of the court, not excepted to by the appellants, the verdict of the jury will not be disturbed on appeal.—Coffin v. Bradbury, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

The evidence in a will contest being substantially conflicting as to testator's competency to make a will, the judgment of the trial court will not be disturbed on appeal.—Pine v. Callahan, 8 Idaho, 684, 71 Pac. 473.

2. Verdicts on Conflicting Evidence.

See, also, post, XVI, (G), 3.

A verdict on substantially conflicting evidence will not be disturbed.—Ainslie v. Idaho W. Ptg. Co., 1 Idaho, 641; Chamberlain v. Woodin, 2 Idaho, 642, 23 Pac. 177; O'Conner v. Langdon, 3 Idaho, 61, 26 Pac. 659; Vanhook v. West, 3 Idaho, 627, 32 Pac. 1133; Coffin v. Bradbury, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715; Murphy v. Montandon, 4 Idaho, 320, 39 Pac. 195; Griffiths v. Montandon, 4 Idaho, 377, 39 Pac. 548; Sears v. Flodstrom, 5 Idaho, 314, 49 Pac. 11; Simpson v. Remington, 6 Idaho, 681, 59 Pac. 360; Bonner v. Powell, 7 Idaho, 104, 61 Pac. 138; Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936; Cash Hardware Co. v. Sweeney, 9 Idaho, 148, 72 Pac. 826; Deeds v. Stephens, 10 Idaho, 332, 79 Pac. 77; Kendrick State Bank v. Northern Pac. Ry. Co., 10 Idaho, 483, 79 Pac. 457; Watson v. Molden, 10 Idaho, 570, 79 Pac. 503; Hansen v. Haley, 11 Idaho, 278, 81 Pac. 935; Frepons v. Grostein, 12 Idaho, 671, 87 Pac. 1004; McKissick v. Oregon Short Line Ry. Co., 13 Idaho, 195, 89 Pac. 629; Vollmer Clearwater Co. v. Rogers, 13 Idaho, 564, 92 Pac. 579; Church v. Van Housen, 15 Idaho,

249, 97 Pac. 36; *Osburn v. Oregon R. R. etc. Co.*, 15 Idaho, 478, 19 L. R. A., N. S., 742, 98 Pac. 627; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91; *Whitney v. Woodmansee*, 15 Idaho, 735, 99 Pac. 968; *Eaves v. Sheppard*, 17 Idaho, 268, 134 Am. St. Rep. 256, 105 Pac. 407; *Edmundson v. Taylor*, 17 Idaho, 618, 106 Pac. 991; *Thomason v. Lane-Potter Lumber Co.*, 20 Idaho, 771, 119 Pac. 875; *Carlson v. Crescent etc. Box Mfg. Co.*, 20 Idaho, 794, 120 Pac. 460; *Seawell v. Pacific & I. N. Ry. Co.*, 21 Idaho, 277, 121 Pac. 556; *Coe v. McGran*, 23 Idaho, 582, 131 Pac. 1110; *Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929.

Where there is a substantial conflict in the evidence, the verdict of the jury will not be disturbed on appeal, unless it is plainly contrary to the decided weight of evidence.—*Hawkins v. Pocatello Water Co.*, 3 Idaho, 766, 35 Pac. 711.

Where the questions of sale, delivery and acceptance of goods are submitted to the jury under proper instructions by the court, the verdict of the jury thereon on substantially conflicting evidence will not be disturbed.—*Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

Where the evidence as to the amount of damages is substantially conflicting, the verdict and judgment will not be disturbed.—*Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459.

The fact that the evidence of respondent was negative in character will not justify the court in disturbing a verdict based on conflicting evidence.—*Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Idaho, 663, 132 Pac. 112.

3. Sufficiency of Evidence to Support Verdict.

Review where case is tried wholly on documentary evidence. See ante, XVI, (D).

A judgment will not be reversed where the evidence is conflicting and there is substantial evidence to support the verdict of the jury.—*Gumaer v. White Pine Lbr. Co.*, 11 Idaho, 591, 83 Pac. 771; *Just v. Idaho Canal etc. Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381; *Quayle v. Ream*, 17 Idaho, 545, 106 Pac. 610; *Friedrich v. Donahue*, 20 Idaho, 92, 116 Pac. 1029; *McMahon v. Cooper*, 23 Idaho, 413, 130 Pac. 456.

Under R. S. 4824, as amended by Laws 1907, page 483, the verdict of the jury will not be set aside where there is substantial evidence to support such verdict.—*Roseborough v. Whittington*, 15 Idaho, 100, 96 Pac. 437; *Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94; *Leggett v. Evans*, 16 Idaho, 760, 102 Pac. 486; *Herculith Co., Ltd., v. Gustafson*, 22 Idaho, 537, 126 Pac. 1050; *Johnson v. Fisher*, 23 Idaho, 561, 131 Pac. 8.

The rule that the court will not disturb a verdict based on substantially conflicting testimony does not apply where such testimony consists wholly of depositions.—*Ainslie v. Idaho World Printing Co.*, 1 Idaho, 641; *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213.

Where there is some evidence to sustain each of the material questions upon which a jury is bound to find in order to support a

verdict, the supreme court should not disturb the verdict.—*Cox v. Northwestern Stage Co.*, 1 Idaho, 376.

The verdict of a jury against defendants in an action for the recovery of personal property is conclusive on appeal to the supreme court on the question of ownership, and also upon all the allegations of the complaint material to recovery in the action, if there is any evidence to sustain the verdict.—*Lufkins v. Collins*, 2 Idaho, 256, 10 Pac. 300.

Where special findings of a jury are not supported by the evidence they will be disregarded.—*First Nat. Bank v. Van Ness*, 4 Idaho, 539, 43 Pac. 59.

Where there is no substantial conflict in the evidence, and the evidence is insufficient to support the verdict, the judgment will be reversed.—*Quayle v. Ream*, 15 Idaho, 666, 99 Pac. 707.

The verdict of the jury will not be set aside on the ground of excessive damages being awarded in a personal injury case, where it does not appear that the jury have acted under any improper influence, bias or prejudice, or mistaken the rule of law by which damages are to be regulated. In such cases the court should consider whether the verdict is fair and reasonable under all the circumstances, and it will be so presumed unless the contrary is shown.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

Evidence examined but not stated and held to support the verdict and judgment on three causes of action and insufficient as to the fourth.—*Hibler v. Smith*, 20 Idaho, 590, 119 Pac. 41.

It is the duty of the appellate court to set aside the verdict of a jury where there is no evidence to sustain it, or where it is against the law given to the jury by the court; and if the appellate court is satisfied that but one conclusion can be deduced from the evidence, and that conclusion is that the negligence of the plaintiff was a proximate cause of the injury and that the injury would not have occurred, had the plaintiff exercised ordinary care, then, in such case, a verdict for plaintiff for personal injuries must be set aside.—*Rip-petoe v. Feely*, 20 Idaho, 619, 119 Pac. 465.

Where the verdict is manifestly against the overwhelming weight of the evidence, so as to suggest that it was rendered through bias, prejudice, or passion, and that injustice has been done thereby, the verdict must be set aside.—*Goldstone v. Rustemeyer*, 21 Idaho, 703, 123 Pac. 635.

In an action to recover damages resulting from alleged negligence, if the facts are such that more than one reasonable conclusion or inference can be drawn from the circumstantial facts in evidence—one that negligence has been shown, and the other that negligence has not been shown—and if the jury decide and determine that negligence has been shown the verdict of the jury should not be disturbed.—*Calkins v. Blackwell Lumber Co.*, 23 Idaho, 128, 129 Pac. 435.

Where there is some evidence to support the verdict of the jury, the judgment will not be reversed.—*Lott v. Oregon Short Line R. Co.*, 23 Idaho, 324, 130 Pac. 88.

The rule that the supreme court will not reverse a judgment where there is a conflict in the evidence does not apply where the evidence is conflicting upon a question which under all the proof is shown not to be the controlling question which governs the right of recovery.—*Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Where the supreme court is unable to say that there is no substantial evidence to support the verdict, it will not disturb such verdict.—*Quirk v. Sunderlin*, 23 Idaho, 368, 130 Pac. 374.

Where the insufficiency of the evidence is assigned as error, and the specific reasons for such contention are assigned, and the evidence is conflicting upon the specific issues assigned, and the cause is submitted to the jury, and they have found generally, this court will not reverse or disturb the verdict of the jury.—*Wheeler v. Gilmore etc. R. R. Co., Ltd.*, 23 Idaho, 479, 130 Pac. 801.

The supreme court will not disturb the verdict of the jury on the ground that the weight of evidence is against the respondent.—*Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Idaho, 663, 132 Pac. 112.

The general rule in this state is that this court on appeal will not disturb the verdict of a jury, unless the amount is so large as to suggest passion, prejudice or corruption on the part of the jury.—*Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Idaho, 663, 132 Pac. 112.

Though the preponderance of evidence is in favor of appellant, the court will not disturb the verdict and judgment where there is substantial evidence supporting the contention of respondent.—*Meeker v. Trappett*, 24 Idaho, 198, 133 Pac. 117.

Editorial Notes.

Review of question of inadequacy or excessiveness of damages: 26 L. R. A. 384, 47 L. R. A. 33.

4. Findings of Court.

Review where case was tried on documentary evidence. See ante, XVI, (D).

See, also, post, XVI, (G), 5.

Findings of fact by the court and judgment thereon, based on evidence substantially conflicting, will not be disturbed on appeal.—*Sabin v. Burke*, 4 Idaho, 28, 37 Pac. 352; *Spaulding v. Coeur d'Alene Ry. etc. Co.*, 5 Idaho, 528, 51 Pac. 408; *Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 473; *Cartier v. Buck*, 9 Idaho, 571, 75 Pac. 612; *Abbott v. Reedy*, 9 Idaho, 577, 75 Pac. 764; *Cowden v. Finney*, 9 Idaho, 619, 75 Pac. 765; *Cowden v. Mills*, 9 Idaho, 626, 75 Pac. 766; *Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760; *Turmes v. Kisner*, 12 Idaho, 147, 85 Pac. 212; *Hunt v. Capital State Bank*, 12 Idaho, 588, 87 Pac. 1129; *Lindstrom v. Hope Lbr. Co.*, 12 Idaho, 714, 88 Pac. 92; *Heckman v. Espey*, 12 Idaho, 755, 88 Pac. 80; *State v. Baird*, 13 Idaho, 126, 89 Pac. 298; *Miller v. Donovan*, 13 Idaho, 735, 13 Ann. Cas. 259, 92 Pac. 992; *City of Pocatello v. Bass*, 15 Idaho, 1, 96 Pac. 120; *McCallum v. McClarren*, 15 Idaho, 374, 98 Pac. 200; *Hutchinson v. Watson Slough Ditch Co.*,

16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059; *Tomsche v. Hummel*, 18 Idaho, 23, 108 Pac. 343; *Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851; *Western Moline Plow Co. v. Caldwell*, 18 Idaho, 463, 110 Pac. 533; *Salisbury v. Spoford*, 22 Idaho, 393, 126 Pac. 400; *Miller v. Blunck*, 24 Idaho, 234, 133 Pac. 383.

The appellate court will give to the findings of the trial court the most liberal construction the language used will permit in order to sustain a judgment founded thereon. *Eastwood v. Standard M. & M. Co.*, 11 Idaho, 195, 81 Pac. 382; *Wilkinson v. Bethel*, 13 Idaho, 746, 93 Pac. 27; *Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

Where the findings of fact sustain the conclusions of law, the judgment below will not be disturbed on appeal simply for the reason that some of the findings of fact and conclusions of law are irrelevant.—*Riborado v. Quang Pang Min. Co.*, 2 Idaho, 144, 6 Pac. 125.

The findings of the court on questions of fact have the same force and effect as the verdict of the jury and where there is a substantial conflict in the testimony it is the duty of the appellate court to affirm the decision.—*Sabin v. Burke*, 4 Idaho, 28, 37 Pac. 352.

Where there is a commingling of findings of fact with conclusions of law, a judgment will not be reversed for that reason, if all the material issues are found.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

Where there is evidence to support the finding of the court and the judgment, the judgment will not be reversed.—*Brown v. Grubb*, 23 Idaho, 537, 130 Pac. 1073.

A finding supported by evidence cannot be disturbed on appeal because of insufficiency of the evidence.—*Brown v. Grubb*, 23 Idaho, 537, 130 Pac. 1073.

Where the evidence is conflicting as to the facts, and there is substantial evidence supporting the findings of fact by the trial court, the findings and the decree entered in accordance therewith will not be reversed.—*Brinton v. Steele*, 23 Idaho, 615, 131 Pac. 662.

Where there is substantial evidence supporting the findings and judgment, the judgment will be affirmed.—*Morris-Roberts Co. v. Mariner* (on rehearing), 24 Idaho, 788, 135 Pac. 1166.

Editorial Notes.

Weight in appellate court of finding of judge as to amount of damages as compared with verdict of jury: Ann. Cas. 1913C, 178.

5. Findings in Equitable Actions.

See, also, ante, XVI, (G), 4.

In action for specific performance. See Specific Performance, IV.

The rule that the supreme court will not reverse a judgment where there is a substantial conflict in the evidence applies to equity cases heard on oral testimony.—*Stuart v. Hauser*, 9 Idaho, 53, 72 Pac. 719; *Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218; *Robbins*

v. Porter, 12 Idaho, 738, 88 Pac. 86; Later v. Haywood, 15 Idaho, 716, 99 Pac. 828; Snowy Peak Min. Co. v. Tamarack & Chesapeake Min. Co., 17 Idaho, 630, 107 Pac. 60; Blackfoot State Bank v. Crisler, 20 Idaho, 379, 118 Pac. 775; Weeter Lumber Co. v. Fales, 20 Idaho, 255, Ann. Cas. 1913A, 403, 118 Pac. 289; Miller v. Mitcham, 21 Idaho, 741, 123 Pac. 941; Wittenberg v. Northern Idaho Pine Lbr. Co., 23 Idaho, 66, 131 Pac. 1.

Where witnesses appear and testify in a court of equity and there is a substantial conflict in the evidence, the appellate court will not disturb the findings and judgment of the trial court.—Morrow v. Matthew, 10 Idaho, 423, 79 Pac. 196.

Where there is substantial evidence to support the findings of the court, they will not be set aside on the ground of insufficiency of the evidence.—Bowers v. Cottrell, 15 Idaho, 221, 96 Pac. 936.

The rule requiring a plaintiff seeking reformation of a contract or a specific performance to establish his case by clear and satisfactory evidence is a rule by which the trial court is to weigh and consider the evidence, and, unless that rule has been substantially departed from by the trial court in arriving at his decision, the appellate court will not disturb the findings and judgment.—Panhandle Lbr. Co. v. Rancour, 24 Idaho, 603, 135 Pac. 558.

6. Order Granting New Trial.

What record must show. See ante, X, (A, B), 5.

The appellate court will not disturb a verdict or judgment or order denying a new trial, where there is a substantial conflict in the testimony and no rule of law appears to have been violated.—Mootry v. Hawley, 1 Idaho, 543.

Where there is a substantial conflict in the evidence, an order made by the trial court, granting a new trial, will not be disturbed on appeal.—Buckle v. McConaghy, 12 Idaho, 733, 85 Pac. 100; Wolfe v. Ridley, 17 Idaho, 173, 20 Ann. Cas. 39, 104 Pac. 1014; Penninger Lateral Co. v. Clark, 20 Idaho, 166, 117 Pac. 764.

7. Failure to Make Findings.

Reversal for failure to find on all issues. See post, XVII, (D).

Where, in a divorce action, defendant charges plaintiff with desertion, failure of the trial court to find on such issue is not cured by a finding "that all the material allegations and denials of defendant's answer in conflict with the foregoing findings are found to be unsupported by the evidence and untrue."—Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938.

Where the court enters a judgment upon findings that do not respond to all the material issues, the action of the court in so doing and in failing to find on all the material issues is "against law" and is a ground for new trial under R. S. 4439, subdivision 6, providing that a new trial may be granted on the ground "that the decision herein is against the law."—Brown v. Macey, 13 Idaho, 451, 90 Pac. 339.

(H) HARMLESS ERROR.

Persons entitled to allege error. See ante, XVI, (C).

See New Trial.

1. In General.

For errors or defects in the pleadings and proceedings, which do not affect the substantial rights of the party complaining, a judgment will not be reversed.—Dangel v. Levy, 1 Idaho, 722.

A judgment will not be reversed on the ground of error which does not affect the substantial rights of the parties especially when such judgment is sustained by facts alleged and admitted by the pleadings of the respective parties.—Smith v. Ellis, 7 Idaho, 196, 61 Pac. 695.

The notice of an application for an injunction stated that an injunction would be asked restraining defendants from removing the timber and logs cut from certain lands. The injunction issued restrained defendants from trespassing on said premises and from removing said logs or from cutting timber. It was shown on the hearing that defendants had already ceased to cut logs therefrom. Held, that the fact that the injunction went further than the notice therefor specified would not be reversible error, inasmuch as it commanded defendants to refrain from doing what they had already ceased to do and hence did not prejudice them.—Staples v. Rossi, 7 Idaho, 618, 65 Pac. 67.

Under R. S. 4231, providing that the court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, technical errors which do not affect the substantial rights of the parties will be disregarded.—White v. Johnson, 10 Idaho, 438, 79 Pac. 455.

Where it appears that a motion is made for a new trial, and affidavits are made and filed in support of such motion, and opposing counsel serves counter-affidavits in opposition to the affidavits filed by the moving party, and it appears that such affidavits inadvertently were not filed within the prescribed time, and the trial judge upon the affidavit of counsel for the party opposing said motion makes an order directing that said counter-affidavits shall be filed nunc pro tunc as of the date such affidavits were served upon the moving party, the order of the trial court denying a new trial will not be reversed, as such action of the trial court does not affect any substantial right of the appellant.—Darling v. Fremstadt, 22 Idaho, 684, 127 Pac. 674.

2. Pleadings.

Where a demurrer to the answer is sustained and the plaintiff thereupon files an amended answer, setting up substantially the same defense, to which amended answer no demurrer is interposed, and plaintiff then withdraws from any further participation in the trial of the case, the error, if any, in sustaining the demurrer is harmless, for the reason that defendant was permitted under the amended answer to make the same defense as under the original answer.—Barnes v. Pitts Agricultural Works, 6 Idaho, 259, 55 Pac. 237.

Where a complaint is amended, it takes the place of the original, and the action of the trial court in overruling a demurrer to the original complaint becomes of no consequence and cannot be alleged as error on appeal.—*Havlick v. Davidson*, 15 Idaho, 787, 100 Pac. 91.

Where a demurrer to the complaint on the ground that the complaint does not allege the place of injury, is overruled, and the defendant pleads as a defense facts arising by reason of the law of the place where the accident occurred, then he is in no way prejudiced by the ruling of the court upon the demurrer.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

The action of the trial court in refusing to pass upon the demurrer, before the time the injunction was issued, became immaterial for the reason that the injunction was thereafter dissolved, and no appeal was taken from the action of the trial court in dissolving said injunction, and the complaint was sufficient to entitle the plaintiff to maintain the cause of action alleged in the complaint.—*McMahon v. Cooper*, 23 Idaho, 413, 130 Pac. 456.

3. Evidence.

Irrelevant evidence is not sufficient ground for the reversal of a judgment when it does not prejudice the cause of the party excepting to it.—*Bradbury v. Idaho etc. L. I. Co.*, 2 Idaho, 239, 10 Pac. 620.

The admission of incompetent evidence to prove a fact admitted by the answer is not reversible error.—*Hawkins v. Pocatello Water Co.*, 3 Idaho, 766, 35 Pac. 711.

Where material evidence offered by defendant is rejected but subsequently another witness for defendant is permitted to testify as to the same matter, the error is immaterial and not prejudicial to defendant.—*Lewis v. Utah Constr. Co.*, 10 Idaho, 214, 77 Pac. 336.

Where, on cross-examination, plaintiff is asked a question which tends to show that he has been guilty of laches in asserting his claim to the property, the error in rejecting such testimony is rendered harmless when the facts sought to be shown as to laches are frequently brought out during the course of the trial.—*Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196.

In an equity case, the appellate court will hesitate to reverse a judgment on account of an erroneous ruling in the admission of evidence, unless it appears that the court was proceeding on a wrong theory of the case, or that the admission or rejection of the evidence offered misled or surprised the losing party or deprived him of some right or embarrassed him in the presentation of some substantial part of his cause of action or grounds of defense.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

Where an amended complaint has been filed, and the court erroneously rejects the original complaint offered in evidence to show the contradiction between the allegations of the two complaints, the error is cured by the admission of oral evidence of the facts

desired to be shown by the complaint.—*Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574.

The plaintiff cannot be prejudiced by a ruling of the trial court in sustaining an objection to a question when the answer to such question, if given, in addition to the evidence offered, would not make a prima facie case for the plaintiff.—*Spongberg v. First National Bank*, 15 Idaho, 671, 99 Pac. 712.

To render the action of the trial court, in sustaining an objection to a question, prejudicial, it must appear from the record that the plaintiff's case failed by reason of the ruling of the trial court.—*Spongberg v. First Nat. Bank*, 15 Idaho, 671, 99 Pac. 712.

The supreme court will not reverse a cause because of an error of the trial court in sustaining an objection to a question, where such ruling of the trial court is not prejudicial.—*Spongberg v. First Nat. Bank*, 15 Idaho, 671, 99 Pac. 712.

If upon trial a question is asked, to which objection is made and sustained by the court, and the plaintiff does not prove, or offer to prove, the other facts necessary to entitle the plaintiff to recover, the ruling of the trial court is not prejudicial.—*Spongberg v. First Nat. Bank*, 15 Idaho, 671, 99 Pac. 712.

It was error to allow a witness to testify to statements made by the witness to one of the defendants as to what the principal would be willing to do, but such error does not appear to have prejudiced the rights of the defendants, and is not ground for the reversal of the judgment.—*Rosnagle v. Armstrong*, 17 Idaho, 246, 105 Pac. 216.

The admission in evidence of papers as exhibits in the case alleged to contain a witness' signature, without permitting such witness to examine the paper so as to identify it understandingly, was not prejudicial error, where, after such papers were introduced, it was apparently admitted that witness signed them, he not being placed upon the stand to testify to the contrary.—*Keating v. Keating Mining Co.*, 18 Idaho, 660, 112 Pac. 206.

Where improper questions are asked, and the answers are so indefinite and general that the jury could in no way have been aided, influenced, or misled by such answers, the judgment will not be reversed solely because of the error of the court in permitting such questions to be answered.—*Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463.

The answer of a witness that a telephone pole through which an injury occurred "did not belong to defendant," though merely a conclusion, held not reversible error where competent evidence was already introduced to the same effect.—*Powers v. Independent etc. Tel. Co.*, 19 Idaho, 577, 114 Pac. 666.

Where opinions are asked of expert witnesses on a matter of common knowledge, and such opinions are given, and it does not appear that the parties against whom such evidence is given will be injured, it is not reversible error.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

Where a trial court has admitted evidence on the part of plaintiff, over the objection of the defendant, on the theory that statements and allegations contained in an exhibit were allegations of the complaint, and should be taken as part of the pleading, and, after the evidence is all in, the plaintiff has moved the court for leave to amend the pleading by alleging the fact stated in the exhibit, and on which evidence has been admitted in order to make the pleading conform to the facts proven, and the motion is denied on the objection of the defendant, the rulings of the court did not prejudice any substantial right of the defendant, and the judgment should not be reversed on account of such erroneous rulings.—*Sweeney v. Johnson*, 23 Idaho, 530, 130 Pac. 997.

Where an action is brought to quiet title to real estate and the trial court rejects certain evidence that ought to have been admitted, and it appears to the appellate court that if all of the evidence offered by the plaintiff had been admitted the plaintiff would not have been entitled to any relief, the judgment will not be reversed on the ground that the court rejected such evidence.—*McKinnon v. McIlbargay*, 24 Idaho, 720, 135 Pac. 826.

4. Trial in General.

Where plaintiff has been nonsuited, the trial court's remarks in the presence of the jury touching the weight of evidence or credibility of witnesses, though improper, are not prejudicial.—*Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868.

Where it is charged upon appeal that the trial court erred in overruling a challenge to a juror, and the record does not show that the party complaining was compelled to use one of his peremptory challenges upon the juror challenged for cause, and was thereby deprived of a peremptory challenge, it will be presumed that he was not compelled to exercise all of the peremptory challenges allowed him by law, and for that reason could not have been prejudiced by the action of the trial court in denying the challenge for cause.—*Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465.

A judgment will not be reversed by this court on the alleged error that the evidence was not introduced in proper order, unless such alleged error appears to have been prejudicial, as the order of proof is a matter largely within the discretion of counsel.—*Marysville Merc. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

When the question before the jury was whether a price was agreed upon for the performance of certain work, or whether the price was left open and the reasonable value thereof was left undetermined, to be settled or agreed upon after the work was completed, and the court states to the jury during the trial that the defendant is entitled to recover the reasonable value of the work, such remark was reversible error, as the court there decided a question of fact that ought to have been submitted to the jury.—*Goldstone v. Rustmeyer*, 21 Idaho, 703, 123 Pac. 635.

Where, in an action for injuries, a physician was permitted to give a full and detailed ac-

count of his examination of plaintiff, and the conditions that he found, defendant was not prejudiced by the exclusion of a question whether the witness found the tissues broken down, referring to the condition of parts removed by a surgical operation.—*Jones v. City of Caldwell*, 23 Idaho, 467, 130 Pac. 995.

5. Instructions.

Where the instructions, taken as a whole, fairly submit the case to the jury, the verdict will not be disturbed on account of mere inaccuracies in some of the instructions given.—*Lufkins v. Collins*, 2 Idaho, 256, 10 Pac. 300.

In determining whether an instruction given was prejudicial, the entire charge should be looked into; and if the charge, as a whole, fairly presents the case to the jury, the verdict should not be disturbed. The same rule will apply where instructions are refused.—*Hopkins v. Utah Northern Ry. Co.*, 2 Idaho, 300, 13 Pac. 343.

A mere misuse of the conjunction "and" in the place of the disjunctive "or" in an instruction, which has clearly and repeatedly correctly stated the law, is harmless error.—*O'Connor v. Langdon*, 3 Idaho, 61, 26 Pac. 659.

Where the court instructed the jury that they must be governed by the evidence in assessing damages and that they must find the data therefor within the evidence, and the record shows that no claim for or proof of damages on account of loss of time was made, and it is clear from the record that the jury did not consider such element in assessing damages, an erroneous instruction to the effect that loss of time is a proper element to be considered is not sufficient to work a reversal.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 93 Pac. 957.

Instructions must be considered together and as a whole, and when so construed, if they fully and fairly state the law applicable to the evidence, there is no error in giving them, though detached sentences or separate charges thereof, considered alone, might be erroneous or misleading.—*Barrow v. B. R. Lewis Lumber Co.*, 14 Idaho, 698, 95 Pac. 682.

While it was error for the court to instruct the jury that they should find for the plaintiff any sum that he might reasonably expect to receive from such son after coming of age, "if any such is shown by the evidence," when no such sum is claimed in the complaint and no evidence whatever had been introduced upon that question, held not reversible error.—*Golden v. Spokane etc. R. Co.*, 20 Idaho, 526, 118 Pac. 1076.

A misdirection as to the meaning of "good faith" in the purchase of a note, taken in connection with other instructions covering the same subject and the strong and conclusive evidence, held not reversible error.—*Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52.

6. Verdict and Findings.

Where a question submitted to the jury in a special verdict is entirely outside of the issues

and the proof submitted, the failure to answer such question is not prejudicial error. *Gross v. McNutt*, 4 Idaho, 286, 38 Pac. 935.

Where plaintiff was compelled to abandon a contract by reason of defendant's acts and thereafter sued on quantum meruit, in which action the court found that a certain contract was entered into by the parties, but omitted to find that certain specifications, attached to the contract and essential thereto, were a part of the contract, such omission was harmless error, as the action was not brought on the contract.—*Spaulding v. Coeur d'Alene Ry. etc. Co.*, 5 Idaho, 528, 51 Pac. 408.

Where the findings of fact and the judgment were signed by the trial judge, but he failed to sign the conclusions of law, and these were all filed at the same time and were sufficiently clear to show the conclusion of law which the court drew from the findings, there is no reversible error.—*Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574.

(I) ERROR WAIVED IN APPELLATE COURT.

All exceptions taken in the court below will be treated as waived unless they are assigned as errors in the supreme court.—*Purdy v. Steel*, 1 Idaho, 216.

Errors not set out in the specifications of error in the statement of the case and in the bill of exceptions will not be considered on appeal.—*Gaffney v. Hoyt*, 2 Idaho, 199, 10 Pac. 34.

Error assigned in the transcript but not referred to in brief is waived.—*Idaho Merc. Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

Specification of the insufficiency of the evidence to support the findings of the court must be made in order to have the evidence reviewed on appeal.—*Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.

(J) DECISIONS OF INTERMEDIATE COURTS.

(No paragraphs.)

(K) SUBSEQUENT APPEALS.

New appeal on dismissal of prior appeal. See ante, I.

A decision of the supreme court in a given case, even though it be erroneous, becomes the law of the case, upon the points involved, and cannot be reviewed, altered, or changed upon a subsequent hearing in this court.—*Lindsay v. People*, 1 Idaho, 438; *Palmer v. Utah & N. Ry. Co.*, 2 Idaho, 382, 16 Pac. 553.

A previous ruling by the appellate court upon a point directly made in the same and essential to the determination thereof is a final adjudication and becomes the law of the case from which the court cannot depart.—*Hall v. Blackman*, 9 Idaho, 555, 75 Pac. 608.

The doctrine of stare decisis is applicable to the question of the constitutionality of R. S. 1210, 1211, which prohibit the herding of sheep on possessory claims or within two

miles of dwellings.—*Walling v. Bown*, 9 Idaho, 740, 76 Pac. 318.

The doctrine of "law of the case" extends only to the questions squarely presented and distinctly passed upon on the former appeal.—*Hunter v. Porter*, 10 Idaho, 86, 77 Pac. 439.

Where questions are presented and distinctly passed upon on a former appeal, such decision becomes the law of the case.—*Steve v. Bonners Ferry Lumber Co.* (on rehearing), 13 Idaho, 384, 392, 92 Pac. 363.

Where a party appeals from a judgment and secures on the appeal a construction of a stipulation filed in the case, he cannot on a second appeal secure a different construction, the former construction becoming the law of the case.—*Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

Where it was necessary for the supreme court to pass on a demurrer on a prior appeal, though its opinion does not deal with the demurrer, its decision thereon will be the law of the case on that question.—*Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

Where a second appeal has been dismissed, the court will not consider or determine the question as to whether or not the original stay bond filed on the first appeal would serve to stay the execution of the judgment on the second appeal.—*Dygert v. Steele*, 15 Idaho, 362, 97 Pac. 962.

Where every question presented upon an appeal was presented and determined by this court upon a former appeal, the latter appeal will be dismissed.—*Olympia Min. Co. v. Kerns*, 15 Idaho, 371, 97 Pac. 1031.

Where an appeal has been taken from a judgment and order denying a motion for a new trial, and the insufficiency of the evidence has been assigned as ground for a reversal of the judgment, and the appellate court has refused to consider the evidence for the reason that the statement and bill of exceptions contained no specifications or particulars wherein the evidence was alleged to be insufficient, and the judgment was reversed and the cause remanded on account of the insufficiency of the findings, and the trial court was directed to make new findings upon the evidence already introduced, and enter judgment accordingly; on a subsequent appeal from the amended or new findings and judgment, the decision by the appellate court of the former appeal is not res adjudicata as to the sufficiency of the evidence.—*Later v. Haywood*, 15 Idaho, 716, 99 Pac. 828.

A decision of the supreme court on appeal establishes the law of the case for the guidance of the trial court, and for the purposes of a subsequent appeal.—*Gerber v. Nampa etc. Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104.

A question considered and passed upon on a previous appeal in the same case, which was necessary or essential to the determination of the case on appeal, becomes the law of the case in all subsequent proceedings in the same action, from the consequences of which the appellate court cannot depart.—*City of Nampa v. Nampa and Meridian Irr. Dist.*, 23 Idaho, 422, 131 Pac. 8.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.**Dismissal.** See ante, XIII.**(A) DECISION IN GENERAL.**

On appeal, where there is no issue of fact, the supreme court will order the judgment corrected if erroneous in some particular matter only; or reverse it and order the proper judgment to be entered by the court below.—*Betts v. Butler*, 1 Idaho, 185.

In passing on the meaning and effect of their judgments, courts sometimes look behind them to see upon what they are founded, and the intention is to be deduced from every part of the judgment and the proceedings leading thereto; hence, though the word "reversed" is used in a judgment of the supreme court, yet if it can be ascertained from its whole scope that it was only the intention to modify, and not vacate the judgment of the trial court, it will be considered as an affirmation of such judgment, as modified.—*Moore v. Taylor*, 1 Idaho, 630.

Where the appellate court is in possession of all the facts relative to the rights of the parties and can render full and complete justice, it will not remand the case for further litigation.—*Gorman v. Commrs. Boise County*, 1 Idaho, 655.

Where the supreme court holds that a complaint does not state facts sufficient to constitute a cause of action and sets aside a judgment of dismissal in order to give plaintiff an opportunity to amend the complaint, a temporary restraining order cannot be authorized pending such amendment.—*Boise City v. Artesian Hot & Cold Water Co.*, 4 Idaho, 392, 39 Pac. 566.

Where a judgment has been obtained by plaintiff in an action which does not survive, and the plaintiff thereafter dies before a motion for new trial is heard or before the case is heard upon appeal, a clear showing ought to be required from the moving party before the court should set aside or reverse the judgment.—*Green v. Kandle*, 20 Idaho, 190, 118 Pac. 90.

Editorial Notes.

Constitutional power of appellate court upon reversing judgment for plaintiff on verdict, to direct a judgment for defendant without remanding the case for a new trial: 2 L. R. A., N. S., 362.

(B) AFFIRMANCE.

Upon an appeal from a judgment without a statement or bill of exceptions, nothing can be considered except the judgment-roll; and if no error appear therein, the judgment will be affirmed.—*McCoy v. Oldham*, 1 Idaho, 465.

Where there is no statement of the case or bill of exceptions, and the pleadings warrant the verdict and judgment, the supreme court will affirm the judgment.—*Hyde v. Harkness*, 1 Idaho, 638.

Where the complaint will support the judgment, appellant must show error or the judgment will be affirmed.—*Murphy v. Fuld*, 2 Idaho, 175, 9 Pac. 609.

Error must affirmatively appear or the judgment of the trial court will be affirmed.—*Toulouse v. Burkett*, 2 Idaho, 288, 13 Pac. 172.

Where the findings cover all the material issues raised by the pleadings and are sufficient to support the judgment, and no errors of law appear, the judgment will be affirmed.—*Cooper v. Kellogg*, 2 Idaho, 330, 13 Pac. 350; *McGuire v. Lamb*, 2 Idaho, 378, 17 Pac. 749.

Where the supreme court affirms the decision of the lower court in sustaining a demurrer to the complaint, which, in effect, affirms the decision of the lower court in dismissing the cause, it is authorized under R. S. 3818 to set aside the judgment of dismissal in order to give the plaintiff an opportunity to amend its complaint.—*Boise City v. Artesian Hot & Cold Water Co.*, 4 Idaho, 392, 39 Pac. 566.

Where, on remittitur, the trial court amends its findings and modifies its decree in accordance with the mandate of the supreme court, its judgment will be affirmed.—*McGinness v. Stanfield*, 7 Idaho, 23, 59 Pac. 936.

Where the statement on motion for a new trial and the bill of exceptions have been stricken from the transcript, the appeal is on the judgment-roll alone and no error being apparent on the face thereof, the judgment will be affirmed.—*Swartz v. Davis*, 9 Idaho, 238, 74 Pac. 800.

Where the only assignment of error is that the evidence does not support the findings and judgment, and it appears from an examination of the evidence that it supports the findings and judgment, the judgment will be affirmed.—*Kunz v. Myers*, 15 Idaho, 65, 96 Pac. 215.

Where appellant assigns no specific errors of the trial court, in its procedure or judgment, the judgment will be affirmed.—*Sunny-side Irr. Dist. v. Stephens*, 21 Idaho, 94, 120 Pac. 169; *Crane Creek Irr. Dist. v. Martin*, 21 Idaho, 96, 120 Pac. 169.

(C) MODIFICATION.

A judgment for gold coin may be modified by the appellate court.—*Hazard v. Cole*, 1 Idaho, 276.

Where evidence is introduced tending to establish rights not in issue under the pleadings and no amendment of the pleadings is made on the trial, the supreme court will not modify the judgment so as to grant such rights.—*Abbott v. Reedy*, 9 Idaho, 577, 75 Pac. 764.

Though R. C. 3818, authorizes the supreme court to modify any order or judgment appealed from, yet where the jury in an action for conversion were erroneously authorized to award punitive damages, and the evidence as to the actual damages is confused and uncertain, the court will remand the cause for new trial rather than enter judgment for a less amount.—*Unfried v. Libert* (on rehearing), 20 Idaho, 708, 119 Pac. 885.

Where a judgment is rendered in a district court in an action to recover a money judgment, and the judgment provides "that plaintiff have and recover . . . interest thereon

at the rate of one per cent per month from the date hereof until paid," such judgment will not be reversed on account of excessive interest, but will be modified, and the court will be directed to modify said judgment, and decree that said judgment draw interest at the rate of seven per cent.—*Darling v. Fremstadt*, 22 Idaho, 684, 127 Pac. 674.

Editorial Notes.

Remittitur when excessive verdict is granted through passion or prejudice: *Ann. Cas.* 1912C, 509.

(D) REVERSAL.

Effect of failure to find all material issues. See, also, ante, XVI, (G), 7.

Where the trial court fails to find on all the material issues, including those made by affirmative defenses, the judgment will be reversed, unless a finding thereon either for or against the successful party would not affect the judgment entered.—*Carson v. Thews*, 2 Idaho, 176, 9 Pac. 605; *Tage v. Alberts*, 2 Idaho, 271, 13 Pac. 19; *Bowman v. Ayers*, 2 Idaho, 305, 13 Pac. 346; *Standley v. Flint*, 10 Idaho, 629, 79 Pac. 815; *Wood v. Broderick*, 12 Idaho, 190, 85 Pac. 490; *State v. Baird*, 13 Idaho, 126, 89 Pac. 298; *Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339; *Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374; *Village of Hailey v. Riley*, 14 Idaho, 481, 17 L. R. A., N. S., 86, 95 Pac. 686; *Uhrlaub v. McMahon*, 15 Idaho, 346, 97 Pac. 784.

Contradictory or inconsistent instructions upon a material issue are ground for reversal.—*Lufkins v. Collins*, 2 Idaho, 150, 7 Pac. 95; *Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39; *Griffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Where the record shows that a party was precluded from examining a juror for cause and that no examination of such juror was had, a new trial will be granted.—*United States v. Alexander*, 2 Idaho, 386, 17 Pac. 746.

Failure to find upon a material issue, where the same is not in effect waived, but is requested, is error, and ground for reversal.—*First Nat. Bk. v. Williams*, 2 Idaho, 670, 23 Pac. 552.

Where respondents stipulate that plaintiff's appeal is well taken, the case will be reversed and remanded.—*Lockey v. Wallace*, 3 Idaho, 691, 34 Pac. 957.

Where an appeal is taken from a money judgment and the whole record is before the court, and it is apparent therefrom that an erroneous judgment has been rendered, the judgment will be reversed though the judgment is partly in favor of appellant.—*Hampton v. Logan County Commrs.*, 4 Idaho, 646, 43 Pac. 324.

Where the only conflict in the evidence is a difference of opinion among various witnesses as to the genuineness of a disputed signature, and the verdict is against the remaining evidence, a judgment based thereon will be reversed.—*Bane v. Gwinn*, 7 Idaho, 439, 63 Pac. 634.

Where the findings of fact are incomplete and do not support the judgment, such judgment

will be reversed.—*Davis v. Devanney*, 7 Idaho, 742, 65 Pac. 500.

Where the evidence is overwhelmingly in favor of plaintiff's cause of action and there is no substantial conflict in it, judgment for defendant will be set aside and a new trial ordered.—*Idaho Merc. Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

Where the evidence in an action for services shows that plaintiff's only cause of action, if he has any, is for breach of contract to sell a certain business to plaintiff, judgment for plaintiff will be reversed.—*Pelikan v. Ridpath*, 8 Idaho, 617, 71 Pac. 125.

Where the evidence shows that the verdict of the jury is excessive, the judgment of the trial court based thereon will be reversed.—*Taylor v. Hall*, 8 Idaho, 757, 71 Pac. 116.

The fact that the findings in a case refer to maps and plats on file in the case for a complete and definite description of the property involved in the litigation, is not sufficient to work a reversal of the judgment.—*Murry v. Nixon*, 10 Idaho, 608, 79 Pac. 643.

An action was commenced and prosecuted to judgment against a domestic corporation named the "Coeur d'Alene Lumber Company, Limited," but the findings and judgment recited that the defendant is a Washington corporation, omitting the word "Limited" throughout. A Washington corporation named the "Coeur d'Alene Lumber Company" appealed from the judgment. On the hearing plaintiff and respondent admitted that the interchange of names and finding that defendant was a foreign corporation was a mistake or clerical error. Held, that the cause should be remanded with instructions to correct and modify the findings and judgment so as to run against the true defendant.—*Shepherd v. Coeur d'Alene Lbr. Co.*, 11 Idaho, 529, 83 Pac. 601.

Where an action is begun on the theory that defendants compose a voluntary, unincorporated joint stock company, and that the service of summons must be made on each defendant to give the court jurisdiction, and a judgment is entered against defendants not served and not appearing, such judgment will be set aside on appeal.—*Spotswood v. Dernham*, 12 Idaho, 400, 85 Pac. 1108.

Where, in an action to determine the amount and priorities of certain claimants to the waters of a stream, the findings of fact are contradictory and uncertain, and the intention of the court cannot be ascertained therefrom, and certain parts of the judgment are not supported by the findings, the judgment will be reversed and the case remanded for new findings and judgment.—*Frederickson v. Deep Creek Irr. Co.*, 15 Idaho, 41, 96 Pac. 117.

Where the findings and decree are not in accordance with the case as made by the complaint, the judgment will be reversed.—*Uhrlaub v. McMahon*, 15 Idaho, 346, 97 Pac. 784.

Where the verdict of the jury is not supported by the evidence, and is contrary to the law applicable to the facts alleged and proven and covered by the instructions given, the

verdict will be reversed.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

Under R. C. 4178, if the complaint fails to state facts sufficient to constitute a cause of action, the complaint will not support the judgment rendered upon said complaint; and the judgment so entered will be reversed upon appeal.—*Trueman v. Village of St. Maries*, 21 Idaho, 632, 123 Pac. 508.

Where, in an action on a note, the evidence shows that plaintiff is a bona fide holder of the note and that a new trial could be of no service to defendants, judgments for defendants will be reversed with instructions to the trial court to enter a judgment for plaintiff.—*Southwest Nat. Bk. v. Baker*, 23 Idaho, 428, 130 Pac. 799.

Where it clearly appears from the allegations of the complaint that a clerical mistake was made in a date, and the whole pleading taken together clearly shows the correct date, the judgment will not be reversed because of such clerical error.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

Where findings of fact are not certain, and will not enable the parties in interest to identify the exact line of division upon the ground, the findings and decree will be set aside, and the trial court directed to make new findings and enter a decree describing the true line between the two lots by a correct and certain description, referring to monuments and markings upon the ground showing the true line.—*Brinton v. Steele*, 23 Idaho, 615, 131 Pac. 662.

Editorial Notes.

Reversal, effect of: 28 Am. Dec. 368; 96 Am. St. Rep. 124.

Restitution of persons dispossessed under the reversed judgment: 17 Am. St. Rep. 264.

Effect of reversal where appeal is taken from part of judgment only: Ann. Cas. 1913E, 1323.

Reversal of judgment as against some persons sued as joint tort-feasors without reversing as to others: 27 L. R. A., N. S., 212.

(E) RENDITION, FORM AND ENTRY OF JUDGMENT.

In trial court. See ante, III, (F).

(F) MANDATE AND PROCEEDINGS IN LOWER COURT.

Where a demurrer to a complaint or answer is overruled by the trial court and on appeal the judgment is reversed and remanded, the allowance of amendments to the pleadings is in the sound discretion of the trial court.—*Parke v. Boulware*, 9 Idaho, 225, 73 Pac. 19.

A case was reversed and remanded with directions that a new trial be granted "or if either party does not care to introduce new testimony, the court may make findings of fact, conclusions of law and enter judgment in accordance with the views herein expressed." When the case was called for trial,

plaintiff elected to submit his case on the evidence introduced by him on the previous trial. Defendant moved for a nonsuit and declined to introduce any evidence. The court denied the motion and made findings on the evidence introduced at the former trial and entered judgment for plaintiff. Held, that such judgment will not be disturbed on appeal on the contention that no evidence was introduced and no new trial was had.—*Huber v. Mother Aurelia etc.*, 13 Idaho, 276, 89 Pac. 942.

Where, upon appeal, this court holds that the plaintiff, a foreign corporation, cannot maintain an action, by reason of the fact that the contract sued upon required that the plaintiff should be a domestic corporation organized under the laws of this state, upon the remittitur going down, and there being no substitution of a domestic corporation or change in the plaintiff, the trial court is justified in dismissing the action.—*Olympia Min. Co. v. Kerns*, 15 Idaho, 371, 97 Pac. 1031.

Where the evidence shows negligence on the part of the telegraph company, and the sufficiency of the complaint was not challenged by demurrer or upon the introduction of evidence, but was first challenged by a motion for a nonsuit, upon a reversal of the case, the plaintiff should be allowed to amend his complaint so as to allege negligence in the transmission of the telegram.—*Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

Where questions have been decided by the supreme court in a former opinion, and the case is retried upon the same pleadings and the same evidence, with some new evidence which does not change the weight of evidence, the supreme court will not review the facts in the opinion upon the second appeal.—*Beymer v. Monarch*, 23 Idaho, 292, 129 Pac. 919.

Since the issues made by the amended complaint after the reversal of this case on the former appeal were identical with the two causes of action alleged in the original complaint, the former decision in this case was the law of the case on a new trial thereof, as the causes of action arose out of the same transaction, involving the same wrongful trespass.—*Unfried v. Libert*, 23 Idaho, 603, 131 Pac. 663.

On the former appeal the right of the plaintiffs to maintain this action was sustained, aside from punitive damages.—*Unfried v. Libert*, 23 Idaho, 603, 131 Pac. 660.

Editorial Notes.

Right of appellate court to limit issues to be tried by jury upon granting of new trial: Ann. Cas. 1912D, 593.

(G) JURISDICTION AND PROCEEDINGS OF APPELLATE COURT AFTER REMAND.

Effect of transfer of cause or proceeding. See ante, VIII.

Against an order or judgment improvidently granted, upon a false suggestion or under a mistake of facts, the supreme court will afford relief even after the adjournment of the term, and will, if necessary, recall a remittitur.—*Hazard v. Cole*, 1 Idaho, 276.

The supreme court loses jurisdiction of a case when the remittitur has been sent to and filed in the court below.—*Hazard v. Cole*, 1 Idaho, 276.

Where the supreme court remands a case for "further proceedings in conformity with the views expressed herein," a writ of mandate will lie to compel the district court to act in accordance with such direction.—*American Hydraulic Placer Co. v. Rich*, 8 Idaho, 570, 69 Pac. 280.

The supreme court has power to construe its own mandate in connection with its opinion, and if it finds that the trial court erred or acted beyond its province in construing the opinion the mistake may be corrected by mandamus.—*American Hydraulic Placer Co. v. Rich*, 8 Idaho, 570, 69 Pac. 280.

The supreme court reversed a judgment of nonsuit, holding that plaintiff had made a prima facie case, and remanded the case. On a second trial, after plaintiff's counsel had made his opening statement to the jury, the court sustained defendant's motion to dismiss the action, and entered judgment of dismissal. Held, that a writ of mandate would issue directing the judge to try the case.—*Kroetch v. Morgan*, 10 Idaho, 172, 77 Pac. 19.

Where a judgment granting a perpetual injunction has been reversed on appeal and the injunction ordered dissolved, the district court has no power or authority to again issue, in the same case, an injunction or restraining order which will have the effect, temporarily at least, of the original order.—*Kerns v. Morgan*, 11 Idaho, 572, 83 Pac. 954.

Where the supreme court holds that a plaintiff cannot maintain an action, and thereby reverses the case, upon the same being called for retrial in the district court, and there being no change of plaintiff, the court is justified in refusing to admit proof to sustain the plaintiff's cause of action.—*Olympia Min. Co. v. Kerns*, 15 Idaho, 371, 97 Pac. 1031.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

In an action upon a supersedeas bond in a case wherein the proceedings have been stayed by the bond, it is not necessary to allege or prove that the action in which the bond was given, was an appealable one.—*Ray v. Ray*, 1 Idaho, 705.

The word "damages" as used in the United States statutes, concerning supersedeas bonds on writ of error and appeal to the supreme court of the United States, includes the loss which the defendant in error or appellee may sustain by reason of not having the judgment appealed from paid or executed.—*Ray v. Ray*, 1 Idaho, 705.

Editorial Notes.

Liability of sureties on appeal bonds: 38 Am. St. Rep. 702.

Appeal and error, bonds and undertakings in, defective liability of sureties on: 67 Am. St. Rep. 197.

Who is real party in interest who must bring action on appeal bond: 64 L. R. A. 605.

Form of judgment on appeal bond: 62 L. R. A. 442.

APPEARANCE.

As waiver of service of notice of appeal. See Appeal and Error, VII, (D), 5.

In justice's court. See Justices of the Peace.

Sufficiency of, to claim right of succession on behalf of alien. See Aliens.

A party who has appeared generally by demurrer cannot afterward raise the question of want of service.—*Willman v. Friedman*, 4 Idaho, 209, 95 Am. St. Rep. 59, 38 Pac. 937.

Where a party appears specially and moves to quash the summons and afterward enters a general appearance by filing a demurrer or answer, he thereby waives any irregularity or insufficiency in the summons.—*Morris v. Miller*, 4 Idaho, 454, 40 Pac. 60.

Editorial Notes.

Waiver of special appearance by pleading to merits: 4 Ann. Cas. 290.

Appearance for purpose of moving to set aside attachment for lack of jurisdiction as general or special appearance: 18 Ann. Cas. 913.

APPRAISERS.

In condemnation proceedings. See Eminent Domain.

APPRENTICES.

Relation of master and servant in general. See Master and Servant.

Remote, speculative and contingent damages in action by a master for injuries to an apprentice. See Damages, III.

ARBITRATION AND AWARD.

See Reference.

Legality of agreements to arbitrate ousting jurisdiction of courts. See Contracts, I, (F).

Stipulation in contract for submission of controversies. See Contracts, I, (A).

Where plaintiff and defendant agreed to arbitrate certain differences, the issue as to whether future damages were considered by the arbitrators is one of fact, and where there is a substantial conflict in the evidence, the jury's verdict thereon will not be disturbed.—*Frepons v. Grostein*, 12 Idaho, 671, 87 Pac. 1004.

Editorial Notes.

Joint action and consultation, when required: 1 Am. Dec. 200.

Agreements to submit to arbitration: 14 Am. Dec. 296; 29 Am. Rep. 602; 2 Am. St. Rep. 566; 15 L. R. A. 142.

Impeaching award, causes for: 14 Am. Dec. 754.

Who may submit to arbitration when acting for another: 30 Am. Dec. 626.

Notice to and hearing of the parties, whether essential: 35 Am. Dec. 591.

Effect on cause of action of submitting or agreeing to submit it to arbitration: 56 Am. Dec. 381.

Leading essentials of a valid award: 6 Am. Rep. 498.

Relations between party and arbitrator which require the setting aside of an award: 25 Am. Rep. 46.

Revocation of agreements to arbitrate: 138 Am. St. Rep. 640.

Submission to arbitration as discontinuance of pending case: Ann. Cas. 1912A, 1263.

Fact that award was prepared by attorney for party as ground for setting it aside: Ann. Cas. 1912C, 1007.

Effect of failure to swear witness: Ann. Cas. 1912D, 574.

Inadequacy of award as compared with actual loss as ground for setting award aside: Ann. Cas. 1913D, 1048.

Validity of parol submission to arbitration or parol award: Ann. Cas. 1913D, 199.

Enforcement of agreements to arbitrate: 1 Ann. Cas. 31.

Effect of award upon claim arising out of illegal transaction: 58 L. R. A. 181.

Amendment of pleadings before arbitrator: 20 Ann. Cas. 603.

ARCHITECTS.

Performance of contract. See Contracts, V.

ARRAIGNMENT.

See Criminal Law.

ARREST.

See Bail; Escape.

Illegal arrest. See False Imprisonment.

ARREST OF JUDGMENT.

In civil actions. See Judgment.

In criminal prosecutions. See Criminal Law, XIII, (E).

ARSON.

Under R. S. 7235, an attempt to commit arson is a crime.—State v. Collins, 3 Idaho, 467, 31 Pac. 1048.

An attempt to burn a city jail while occupied by prisoners is arson.—State v. Collins, 3 Idaho, 467, 31 Pac. 1048.

Editorial Notes.

Prisoner burning prison to escape: 21 Am. Rep. 257.

House, what is within the meaning of the law of arson: 22 Am. Dec. 144; 71 Am. St. Rep. 266.

What constitutes arson: 81 Am. Dec. 65.

Arson, crime of, and who may commit: 101 Am. St. Rep. 21.

Ownership of property burned as affecting crime of arson: Ann. Cas. 1912A, 1126.

Setting fire to building or property with intent to defraud insurance company as crime: Ann. Cas. 1913C, 1164.

Acts constituting attempt to commit arson: 8 Ann. Cas. 630; 4 L. R. A., N. S., 417; 6 L. R. A., N. S., 804; 41 L. R. A., N. S., 804.

ASSAULT AND BATTERY.

Assault with intent to kill. See Homicide, IV.

R. S. 6732 prescribes the punishment for the crime of assault with a deadly weapon as imprisonment for not more than two years or \$5,000 fine or both. Under an indictment for assault with intent to murder, defendant

was convicted of assault with a deadly weapon likely to produce great bodily harm, and sentenced to five years' imprisonment. Held, that the judgment was not authorized by law and therefore void.—Ex parte Cox, 3 Idaho, 530, 95 Am. St. Rep. 29, 32 Pac. 197.

A mere civil trespass on land, unaccompanied by any act amounting to a crime, or any intention to commit a crime, will not justify the shooting of the trespasser.—State v. Dixon, 7 Idaho, 518, 63 Pac. 801.

Under R. C. 6727, an "assault" consists, not only in an unlawful attempt to commit a violent injury upon the person of another, but such unlawful attempt to commit a violent injury must be coupled with the present ability to commit such injury.—State v. Yturaspe, 22 Idaho, 360, 125 Pac. 802.

An instruction of the court to the jury upon a charge of assault, "that a mere threat or menace to do violence, without any overt attempt to do violence, is not an assault; that an apparent effort to do violence, without the existence of a present ability at the time to do the violence apparently attempted, would not be an assault; and that a gun is not a deadly weapon, within the meaning of the statute, unless it is loaded; consequently in this case, in order that you may find the defendant guilty, you must find beyond a reasonable doubt that he pointed and aimed a loaded gun at the complaining witness, James A. Percy, within a distance at which the gun, if discharged, could have committed a violent injury upon the person of the complaining witness, and that the defendant unlawfully attempted to commit such injury by means of such gun"—is correct.—State v. Yturaspe, 22 Idaho, 360, 125 Pac. 802.

In a prosecution for assault, a request to instruct that "the fact, if it was a fact, that the complaining witness' reputation for peace and quietude in the community was bad may be considered as evidence that the complaining witness, and not the defendant, was the aggressor," was sufficiently covered by an instruction that the testimony as to the character of the complaining witness for peace and quietude was admitted to assist in determining whether he gave the defendant reasonable cause to apprehend such danger as to justify the defendant in drawing his gun on him on the ground of self-defense, as defined in the instructions.—State v. Yturaspe, 22 Idaho, 360, 125 Pac. 802.

In a prosecution for assault, an instruction that, in order to find defendant guilty, the jury must find that the gun pointed by defendant at the complaining witness was a loaded gun, and that there was an attempt by defendant to discharge it, was sufficiently covered by an instruction that, in order to find defendant guilty, the jury must find that he pointed and aimed a loaded gun at the complaining witness within a distance at which the gun, if discharged, could have committed a violent injury upon the complaining witness.—State v. Yturaspe, 22 Idaho, 360, 125 Pac. 802.

Editorial Notes.

Assault, by words only: 39 Am. Rep. 712.

Liability for assault of one who orally encourages another in making attack: Ann. Cas. 1912A, 830.

Injury to third person as assault with intent to kill or murder: Ann. Cas. 1912A, 1063.

Assault accompanied by threat to kill unless demand is complied with as assault with intent to kill or murder: Ann. Cas. 1913A, 202.

Right to recover exemplary damages for assault: 11 Ann. Cas. 1175.

Provocation in mitigation of damages for assault: 1 Ann. Cas. 899; 19 Ann. Cas. 762.

Pointing unloaded firearm as assault: 15 L. R. A., N. S., 1272; 41 L. R. A., N. S., 181.

Assault with intent to kill by unlawful act aimed at third person: 37 L. R. A., N. S., 172.

ASSESSMENTS.

For taxation. See Taxes.

On corporate stock. See Corporations, V, (A).

ASSIGNMENTS.

Admissions of assignor not evidence against assignee. See Evidence, VII.

Attachment of assigned property. See Attachment and Garnishment, II.

For benefit of creditors. See Assignments for Benefit of Creditors.

Liability of assignee of purchaser for logs cut on land under contract of purchase. See Logs and Logging.

Of negotiable or non-negotiable note. See Bills and Notes, V, (C).

Right of assignee of conditional sale contract to attach for nonpayment of purchase price. See Attachment and Garnishment, I.

Right of purchaser of chattel to sue on warranty after assigning chattel. See Sales, VI.

Of timber contract. See Logs and Logging.

Of cost bill. See Costs, I.

Requirements of the statute of fraud. See Frauds, Statute of, VI.

The assignee of an account may bring an action upon it, in his own name, though the assignor retain an interest in it.—Brumback v. Oldham, 1 Idaho, 709.

The assignee of a chose in action takes it subject to all equities existing at the time of the assignment.—Brumback v. Oldham, 1 Idaho, 709.

In an action by the assignee of a chose in action the consideration of the assignment need not be alleged or proved.—Brumback v. Oldham, 1 Idaho, 709.

The assignee of a chose in action is in all cases the proper party to sue.—Brumback v. Oldham, 1 Idaho, 709.

Under R. S. 4168, subdivision 2, requiring the complaint to contain a statement of the facts constituting a cause of action in ordinary and concise language, a complaint stating that defendant took possession of certain saw-logs and converted them to his own use, contrary to the form of the statute, and to the owner's damage in a specified sum, that demand was made for the same, which was refused, that said claim was duly assigned to plaintiff prior to the commencement of the suit, and praying for damages, is sufficient.—Elliot v. Collins, 6 Idaho, 266, 55 Pac. 301.

A complaint alleged that defendant employed one S. to carry the United States mail and agreed to pay S. and his employees a specified sum per year, and to pay the same out of the money received by him from the United States in payment for such services and expenses; that said S. and plaintiff, relying on said promise, entered on the performance of said contract and did carry said mail and that during that time plaintiff, at the request of S. paid expenses amounting to \$175 to enable S. to fulfill said contract; that said S. and defendant agreed to pay for said work and labor the sum of \$185; that S. assigned to plaintiff the sum of \$360 of the money due on said contract; that defendant received from the United States in payment of carrying said mail on said route, the sum of \$550, \$360 of which was received to and for the use of plaintiff and belonged to plaintiff; that defendant promised and agreed to pay the same. Held, that a defense setting up claims against S. assigned to defendant was demurrable, S. not being a party to the action.—Rauh v. Oliver, 10 Idaho, 3, 77 Pac. 20.

In the absence of statutory provisions prescribing the mode of assignment, no particular method or form is necessary to effect a valid assignment of property, claims, or debts, so as to defeat the garnishment proceedings by a creditor or assignor; if the intent of the party to effect an assignment be clearly established, it is sufficient, and the assignment may be in the form of an agreement or order or any other instrument which the parties may see fit to use for the purpose.—Porter v. Title Guaranty & S. Co., 21 Idaho, 312, 121 Pac. 548.

Where M. & P. have a claim against a railroad company for rebates, and assign and transfer such claim to T., and deliver the freight bills to T., and thereafter P., a member of M. & P., procures the possession of said freight bills by misrepresentations and delivers the same to J. P., who attempts to collect the rebates due thereon from the railroad company by garnishee proceeding, after such transfer and assignment, the fact that such freight bills were secured by P. through misrepresentations could in no way affect or defeat the right of T. to recover the debt evidenced by such freight bills.—Porter v. Title Guaranty & S. Co., 21 Idaho, 312, 121 Pac. 548.

A check given by a depositor upon a bank is a mere direction to the bank to pay a certain sum of money to the person named therein, and by the giving of such check the amount of the same does not become the property of the payee of the check nor place such fund beyond the control of the depositor.—Kaesemeyer v. Smith, 22 Idaho, 1, 123 Pac. 943.

Editorial Notes.

Ordinary bank check as assignment of funds of drawer: Ann. Cas. 1913D, 418.

Assignments of choses in action, notice to debtor of, when required: 36 Am. Dec. 475.

Assignments of salary before due: 41 Am. Dec. 443; 5 Ann. Cas. 64; 14 L. R. A. 126.

Assignment by public officer of unearned salary or fees: Ann. Cas. 1913B, 1080; 4 Ann. Cas. 423; 10 Ann. Cas. 636.

Validity of statute making assignment of unearned wages invalid except under prescribed conditions: Ann. Cas. 1913B, 531.

Assignments of expectancies, effect of: 37 Am. Dec. 128; 56 Am. St. Rep. 339.

Assignments of demands to become due: 57 Am. Dec. 440.

Assignments of mere possibilities or contingencies: 94 Am. Dec. 649.

Assignments of part of a demand or fund, to what extent enforceable: 2 Am. St. Rep. 472; 28 Am. St. Rep. 744.

Assignments, notice of, whether may give junior assignee precedence over senior: 71 Am. St. Rep. 31.

Assignability of right of action for damages for breach of contract: Ann. Cas. 1912A, 497.

Effect of assignment of "interest" in judgment: Ann. Cas. 1912B, 525.

Partial assignment of claim or demand founded on contract: Ann. Cas. 1912A, 673.

Implied warranty arising out of assignment of chose in action "without recourse": Ann. Cas. 1912A, 923.

Assignability of contract not to engage in similar business: 16 Ann. Cas. 261.

Priority of successive assignees of chose in action as dependent upon notice to debtor: 17 Ann. Cas. 442; 66 L. R. A. 761.

Assignability of cause of action for personal tort: 14 L. R. A. 512.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Insolvency.

A voluntary assignment of personal property, situated in the territory of Idaho, by a citizen of Utah, made in Utah, in trust for all his creditors and with preferences, is not good against a nonresident attaching creditor, the laws of Idaho not allowing preferences.—*Barnett v. Kinney*, 2 Idaho, 740, 23 Pac. 922. 24 Pac. 624.

In involuntary bankruptcy under R. S. 5880 et seq., as amended by Laws 1895, pages 76, 77, the election of an assignee by a majority in amount of the claims proven cannot be set aside by the court on its own motion and a new assignee appointed.—*Gaffney v. Piper*, 4 Idaho, 728, 44 Pac. 552.

Editorial Notes.

Releases, exacting in assignment for benefit of creditors, effect of: 4 Am. Dec. 445; 16 Am. Dec. 340; 24 Am. Dec. 291.

Preferences which may be created by assignment for benefit of creditors: 26 Am. Dec. 584.

Discharge in bankruptcy, whether precluded by assignment for benefit of creditors: 28 Am. Dec. 212.

Revocation of assignment for benefit of creditors: 44 Am. Dec. 426; 90 Am. Dec. 503.

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Credit, effect of clause in assignment for benefit of creditors authorizing trustee to sell upon: 48 Am. Rep. 359; 57 Am. Dec. 505; 58 Am. St. Rep. 90.

Extraterritorial effect of assignment for benefit of creditors: 78 Am. Dec. 594.

Release in, when void for fraud: 57 Am. Rep. 363.

When assignment for benefit of creditors invalid as authorizing sales on credit: 31 Am. Rep. 398.

When invalid for noncompliance with statute: 2 Am. St. Rep. 24.

Preferences in assignment for benefit of creditors, when make void: 30 Am. St. Rep. 816; 34 Am. St. Rep. 856.

When assignment for benefit of creditors deemed fraudulent, and the effect of the fraud thereon: 58 Am. St. Rep. 74.

Validity of assignment for benefit of creditors as affected by nonassent of some or all of them: Ann. Cas. 1913A, 818.

Necessity of acceptance of assignment for benefit of creditors: 24 L. R. A. 369.

Effect of preferring usurious debt in assignment: 41 L. R. A. 707.

Priority of notice to trustee gives priority of right: 66 L. R. A. 761.

Validity of provision against assignment: 21 L. R. A., N. S., 597; 35 L. R. A., N. S., 1064.

ASSISTANCE, WRIT OF.

Right of appeal. See Appeal and Error, IV, (A).

To entitle the purchaser under a judicial sale to a writ of assistance, such purchaser must show a valid judgment.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

Under R. S. 4520, providing that in actions for the foreclosure of mortgages no person, whose conveyance or lien on the mortgaged property is not recorded, need be made a party to the action, a person who has purchased the land, lived on it and paid taxes thereon for a number of years without recording his conveyance, is not a necessary party in a mortgage foreclosure action and his motion to set aside a writ of assistance granted therein will be denied.—*Mills v. Smiley*, 9 Idaho, 317, 76 Pac. 783.

Editorial Notes.

Assistance, writs of, what are and when should issue: 93 Am. St. Rep. 154; 51 Am. Dec. 152.

Writs of assistance: Ann. Cas. 1913D, 1120.

ASSOCIATIONS.

See Banks and Banking; Building and Loan Associations; Clubs; Joint Stock Companies; Partnership; Religious Societies

Benevolent corporations. See Charities.

Right to sell intoxicating liquors. See Intoxicating Liquors.

Orders, organizations or associations, which teach, advise, counsel, encourage or practice the commission of crimes forbidden by law, are criminal organizations; and to become and

continue to be a member of such an organization are such overt acts of recognition and participation as to make such member particeps criminis, and as guilty in contemplation of law as though he actually engaged in promoting their unlawful objects and purposes. *Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

Evidence held sufficient to support a finding that the order, organization or association known as the "Utah," or regular, branch of the Mormon church, teaches, advises, counsels and encourages its members, devotees and others to commit the crime of bigamy or polygamy, as a duty arising or resulting from membership in said order, organization or association.—*Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

An association of individuals was formed for the purchase of a single tract of real estate, the members and their heirs to share in the obligations and profits thereof proportionately to their interests therein. The title to the land was to be taken in the name of a trustee, the association was not to be dissolved by transfer of the interest of any member, or by death of any member; the interests of members was represented by certificates; meetings and officers were provided; the right of partition was suspended for five years, and it was provided that the members have only a right to the proceeds of the property, the title, both legal and equitable, being in the trustee. Held, that Const., article 11, sections 2 and 16 relating to corporations, have no application to such association. Held, further, that such association, though possessing some of the elements of a partnership, is not a general partnership wherein one of the partners has plenary powers to sell or dispose of the property of the association or create indebtedness beyond that provided in the articles of association.—*Spotswood v. Morris*, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

Editorial Notes.

Suits by and against unincorporated associations: 59 Am. Dec. 711; 2 L. R. A., N. S., 789.

Members, power of associations to disfranchise and expel: 63 Am. Dec. 773; 114 Am. St. Rep. 24.

Jurisdiction of courts over associations: 7 Am. St. Rep. 160; 68 Am. St. Rep. 856.

Courts, redress in, against proceedings of associations: 18 Am. St. Rep. 301; 59 Am. St. Rep. 198.

Remedies of members of associations: 59 Am. St. Rep. 198.

Conclusiveness of decisions of tribunals of associations: 49 L. R. A. 353; 2 L. R. A., N. S., 676.

ASSUMPSIT, ACTION OF.

Error in bringing assumpsit not bar to action in tort. See Actions, II.

ASYLUMS.

Inmates of soldiers' home, right to vote. See Elections, IV.

ATTACHMENT AND GARNISHMENT.

I. NATURE AND GROUNDS.

II. PROPERTY SUBJECT TO ATTACHMENT OR GARNISHMENT.

III. PROCEEDINGS TO PROCURE.

- (A) Jurisdiction and Venue.
- (B) Affidavits.
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XI. WRONGFUL ATTACHMENT.

See Execution.

Attachment not bar to right to intervene in action by another creditor against same fund. See Election of Remedies.

Form and sufficiency of assignment by debtor as affecting garnishment. See Assignments.

Liabilities of sheriffs or constables. See Sheriffs and Constables, III.

Release or continuation of attachment after bankruptcy proceedings. See Bankruptcy.

Release of, as release of surety on note. See Principal and Surety.

Right of appeal from order refusing to release attached property. See Appeal and Error, III, (D).

Suspension of action on notes where defendant has been subjected to garnishment. See Fraudulent Conveyances, III.

Transfers and transactions invalid as to attaching creditors. See Fraudulent Conveyances.

I. NATURE AND GROUNDS.

The attachment laws of Idaho give no preferences as between resident and nonresident attaching creditors.—*Barnett v. Kinney*, 2 Idaho, 740, 23 Pac. 922, 24 Pac. 624.

Where plaintiff had procured by assignment, a few days prior to commencing his suit, two small claims against defendant, which claims were unsecured, the plaintiff cannot, by uniting such claims with his secured claims in his complaint, secure the benefit of the attachment laws for any portion of the claims sued for.—*Willman v. Friedman*, 3 Idaho, 734, 35 Pac. 37.

Where plaintiff sold defendant certain real estate upon executory contract, defendant going into possession, but title remaining in plaintiff until the payment of the purchase price, plaintiff had such a lien as would bar him from resorting to attachment for the recovery of the unpaid portion of the purchase price.—*Willman v. Friedman*, 3 Idaho, 734, 35 Pac. 37.

Where a note due one day after date is made on Saturday, the maker has until the close of business hours on the following Mon-

day in which to pay the same under R. S. 12, and therefore a writ of attachment levied on Monday morning creates no lien, the action being prematurely brought.—*Sabin v. Burke* (on rehearing), 4 Idaho, 179, 37 Pac. 352.

Plaintiff held real estate as security for money furnished by him to defendant. Afterward this real estate was surrendered to defendant and received by him, and thereafter plaintiff brought suit on his debt and issued an attachment. Held, that as the security had been surrendered to and received by defendant, plaintiff was entitled to his attachment.—*Woody v. Jamieson*, 4 Idaho, 448, 40 Pac. 61.

Where a promissory note, given for the purchase price of goods, reserved title to the goods until payment of the note and interest in full and gave the payee full power to declare the note due and take possession of the goods at any time he may deem himself insecure, even before maturity thereof, attachment cannot be maintained for the purchase price under R. S. 4303, subdivision 1, in the absence of an affidavit showing that the property, through no fault of the plaintiff, could not be reached or had become valueless.—*Mark Means Transfer Co. v. MacKinzie*, 9 Idaho, 165, 73 Pac. 135.

An attachment cannot issue to secure the purchase price of property where the title to the property has been reserved in the vendor until final payment should be made.—*Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623.

Where the vendor on a conditional sale has delivered possession to the vendee and thereafter sells and assigns the contract taken from the purchaser, the assignee of such contract cannot have an attachment on failure of the purchaser to make a payment.—*Bartop v. Groseclose*, 11 Idaho, 227, 81 Pac. 623.

The contract of an indorser of a promissory note or guarantor of a bill of exchange is a contract "for the direct payment of money," and under R. S. 4302, an attachment may issue against the property of such indorser or guarantor when action is brought against the indorser or guarantor thereon.—*Armstrong v. Slick*, 14 Idaho, 208, 93 Pac. 775.

A contract providing, "We further agree that after the first day of September, 1906, to place the said 25,000 shares of Gold Ridge Mining Stock for O. B. Ross at five cents a share, clear to him, and if he so desires, the said 25,000 shares of stock will be placed before any other Gold Ridge Mining Stock is sold," is a contract for the direct payment of money and authorizes an attachment, in an action brought thereon, for failure to place or sell said stock according to the contract.—*Ross v. Gold Ridge Min. Co.*, 14 Idaho, 687, 95 Pac. 821.

Editorial Notes.

Fraudulent sale or conveyance of property as ground for attachment: 5 Ann. Cas. 618.

What intent to defraud will sustain an attachment: 30 L. R. A. 465.

What is nonresidence for purpose of attachment: 19 L. R. A. 665.

II. PROPERTY SUBJECT TO ATTACHMENT OR GARNISHMENT.

Voluntary assignment of personal property in this state by nonresident; effect of preferences on rights of attaching creditor. See Assignments for Benefit of Creditors.

A creditor has the right to attack the validity of a chattel mortgage by attaching the property described therein, giving indemnifying bond to the sheriff and selling the property.—*McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 403.

R. S. 3389, provides that all mortgaged personal property may be attached at the suit of any creditor of the mortgagor on the payment of the amount due on the mortgage or the creditor may attach the equity of redemption of the mortgagor. Held that the creditor, having elected to pursue one of such remedies, cannot thereafter change to the other.—*Baumgartner v. Vollmer*, 5 Idaho, 340, 49 Pac. 729.

Where shares of stock are pledged by indorsement and delivery of the certificates therefor, and such transfer is not recorded on the books of the corporation, an attachment by a creditor of the assignor will be valid only against the interest of the assignor, which remains after payment of the amount of the pledge.—*Mapleton Bank v. Standrod*, 8 Idaho, 740, 67 L. R. A. 656, 71 Pac. 119.

A written transfer of certificate of stock, made in good faith and for value, and accompanied by delivery, though not entered on the books of the corporation, has preference over a subsequent attachment thereon in favor of a creditor of the assignor of such stock.—*Mapleton Bank v. Standrod*, 8 Idaho, 740, 67 L. R. A. 656, 71 Pac. 119.

Where M. & P., having an acknowledged and admitted debt due them from a railroad company for rebates on freight, assigned and transferred the same to defendant for a valuable consideration prior to service of notice of garnishment on the railroad company in an action against M. & P., the debt became a debt of the railroad company to defendant and hence was not subject to garnishment in said action.—*Porter v. Title G. & S. Co.*, 21 Idaho, 312, 121 Pac. 548.

Editorial Notes.

Attachment of stock in foreign corporations: 52 Am. St. Rep. 474.

Liability to attachment, at suit of contractor's creditor, of materials furnished to be used in construction of building: Ann. Cas. 1913A, 876.

Equitable interest in personal property as subject to attachment: 11 Ann. Cas. 669.

Attachment of funds held by trustee in bankruptcy: 13 Ann. Cas. 810.

Liability of promissory note to seizure and sale under attachment: 15 Ann. Cas. 980.

Liability of intoxicating liquors to attachment: 17 Ann. Cas. 300.

Garnishment of unliquidated claims: 59 L. R. A. 353.

III. PROCEEDINGS TO PROCURE.**(A) JURISDICTION AND VENUE.**

Jurisdiction dependent on truth of affidavit. See post, III, (B).

The right of attachment is purely of statutory regulation, and where the statute provides the procedure in such cases, the plaintiff is required to pursue such course in order to sustain his action against the garnishee.—*Eagleson v. Rubin*, 16 Idaho, 92, 100 Pac. 765.

Where a statute requires that the garnishee be served with the writ and notice of attachment, which fully advises him of the nature and character of the proceedings against him, and he is given an opportunity to be heard in court and contest the merits of the claim made against him, his rights are in no way abridged by reason of the fact that he was brought into court in response to a writ or notice different in form or name from an ordinary summons.—*Eagleson v. Rubin*, 16 Idaho, 92, 100 Pac. 765.

R. C. 4310a to 4310u, inclusive, enacted March 2, 1907, prescribing the proceedings for garnishment, is constitutional.—*Eagleson v. Rubin*, 16 Idaho, 92, 100 Pac. 765.

(B) AFFIDAVITS.

Admissibility in action on release bond. See post, X.

Under R. S. 4303, an affidavit for attachment must state that the indebtedness is due. *Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539; *Gatward v. Wheeler*, 10 Idaho, 66, 77 Pac. 23.

If an affidavit for attachment is defective in not stating all that the statute requires, or if it is false, the court has no jurisdiction to issue the attachment.—*Murphy v. Montandon*, 3 Idaho, 325, 35 Am. St. Rep. 279, 29 Pac. 851.

An affidavit for attachment showing that an agreement to give plaintiff security was not carried out according to its terms, and that the security proffered was not accepted but was returned to defendant, is sufficient.—*Simmons Hdw. Co. v. Alturas Com. Co.*, *Standard Oil Co. v. Alturas Com. Co.*, 4 Idaho, 334, 95 Am. St. Rep. 134, 39 Pac. 550.

Where an affidavit in attachment purports to have been duly sworn to before a proper officer, and the name of affiant appears in the commencement of the affidavit as "A. B., being duly sworn, etc." the affidavit will be held sufficient, although the signature of affiant does not appear thereon.—*Simmons Hdw. Co. v. Alturas Commercial Co.*, *Standard Oil Co. v. Alturas Commercial Co.*, 4 Idaho, 334, 95 Am. St. Rep. 134, 39 Pac. 550.

An action was brought on two notes and an attachment issued therein on an affidavit stating that the payment of the first note had been originally secured by mortgage but that such security had become valueless, and further stating that the note upon which the second cause of action was based had not been secured by mortgage, etc. It was shown that the note sued on in the second cause of action was secured by mortgage and the attachment was dissolved as to both causes of action. Held, that the writ being an entirety, and the affidavit failing to conform to R. S. 4303 as to one cause of action, no jurisdiction to issue

the writ existed and it was properly dissolved.—*Vollmer v. Spencer*, 5 Idaho, 557, 51 Pac. 609.

Under R. S. 4303, subdivisions 1, 2, providing that the affidavit for attachment shall specify the amount of indebtedness sought to be recovered over and above all legal setoffs and counterclaims, an affidavit stating the indebtedness in a specified sum less another specified sum is fatally defective.—*Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

Under R. S. 4303, subdivisions 1, 2, an affidavit for the attachment of property of a nonresident need not aver that defendant is a nonresident where the affidavit also shows that the debt is not secured.—*Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

R. S. 4229, does not require an affidavit for attachment against a nonresident to show that defendant has property within the state.—*Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

The fact that the contract sued on was usurious and that interest and attorneys' fees demanded thereunder could not be recovered will not render the affidavit of attachment false so as to authorize the discharge of the attachment made in a suit on the contract.—*Finney v. Moore*, 9 Idaho, 284, 74 Pac. 866.

Where an affidavit for a writ of attachment on the ground that the debt sued for was not secured was made twenty-eight days before the commencement of the action and issuance of the writ, the attachment should be discharged.—*Murphy, Grant & Co. v. Zaspel*, 11 Idaho, 145, 81 Pac. 301.

Under R. S. 4303, specifying what an affidavit for attachment shall contain, an affidavit for attachment which alleges that the defendant is indebted to the plaintiff in the sum of \$1,750, over and above all legal setoffs and counterclaims, upon an express contract for the direct payment of money, is sufficient to show that the debt is due and that it is for the direct payment of money, and it is not necessary that it contain an express allegation that the "debt is due." *Ross v. Gold Ridge Min. Co.*, 14 Idaho, 687, 95 Pac. 821.

The statements required in the affidavit for an attachment must be in the language of the statute or in language of the same meaning.—*Knutsen v. Phillips*, 16 Idaho, 267, 101 Pac. 596.

Under the rule of liberal construction of the statutes, as provided by R. C. 4, an affidavit for attachment should be held sufficient if it appears that the language therein used is substantially equivalent to that used in R. C. 4303, subdivision 1.—*Knutsen v. Phillips*, 16 Idaho, 267, 101 Pac. 596.

An affidavit for attachment which follows the language of R. C. 4303, subdivision 1, except that it fails to state that the indebtedness or demand "has not been secured by any pledge of personal property," is sufficient.—*Knutsen v. Phillips*, 16 Idaho, 267, 101 Pac. 596.

Under R. C. 4302 and 4303, an attachment may be had against a defendant not residing in this state in an action upon a judgment or upon a contract express or implied, and in

such case it is not necessary to show by the affidavit for attachment that the plaintiff has no security for the debt.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

Editorial Notes.

Requisites of affidavit for foreign attachment: 17 L. R. A. 88.

Amendment of affidavit: 31 L. R. A. 422.

(C) SECURITY.

Liability on bonds and undertakings. See post, X.

Under R. S. 4304, requiring a written undertaking on the part of the plaintiff in attachment suits, the amount of such bond is largely within the discretion of the clerk, and in the exercise of that discretion it is advisable that the clerk should always require an undertaking at least equal to the amount stated in the affidavit.—*Willman v. Friedman*, 3 Idaho, 734, 35 Pac. 37.

The purpose of the undertaking in attachment is to indemnify the defendant, and where it is conclusive that this end has been served, mere clerical errors or the omission or insertion of unimportant words will not vitiate the instrument.—*Simmons Hdw. Co. v. Alturas Com. Co.*, Standard Oil Co. v. Alturas Com. Co., 4 Idaho, 334, 95 Am. St. Rep. 66, 39 Pac. 550.

A second undertaking in attachment may be filed by leave of court to remedy defects in the first undertaking.—*Simmons Hdw. Co. v. Alturas Com. Co.*, Standard Oil Co. v. Alturas Com. Co., 4 Idaho, 334, 95 Am. St. Rep. 66, 39 Pac. 550.

Where plaintiff sues on more than one cause of action, he can make and file affidavit and undertaking on attachment as to such cause of action and have separate attachments to secure each.—*Vollmer v. Spencer*, 5 Idaho, 557, 51 Pac. 609.

Under Laws 1895, page 18, providing a statutory form of undertaking in actions, an undertaking which, after the title of the action, reads "Whereas the plff. desires to give an undertaking in the above entitled cause for an attachment, now, therefore, we the undersigned sureties, do hereby obligate ourselves jointly and severally to debt," etc., is sufficient, though the names of the parties to the suit are not inserted in the body of the undertaking.—*Finney v. Moore*, 9 Idaho, 284, 74 Pac. 866.

The fact that an undertaking on attachment does not provide a penalty equal to the amount of the claim sued for does not render the undertaking void and is not ground for dissolving the attachment.—*Ross v. Gold Ridge Min. Co.*, 14 Idaho, 687, 95 Pac. 821.

IV. WRIT OR WARRANT.

Service of writ and levy thereunder, see post, V.

V. LEVY, LIEN AND CUSTODY AND DISPOSITION OF PROPERTY.

Sale under execution relating back to date of attachment. See Execution, VII.

Where an expense of \$688 was incurred by the sheriff without an order of court, for the removal of attached lumber from the sawmill of defendants, no necessity for such removal being shown, such charge was properly dis-

allowed under R. S. 2126, which provides that the sheriff is allowed for his trouble and expense in taking and keeping possession of attached property such sum as the court may order.—*McConnell v. McCormick*, 3 Idaho, 227, 28 Pac. 421.

Where the record shows that the notice of the levy of an attachment, together with a copy of the writ of attachment and a description of the land attached, was duly filed in the office of the auditor and recorder of the county in which the land was located, the attachment lien is prior to all subsequent liens thereon.—*First Nat. Bank v. Lieuallen*, 4 Idaho, 431, 39 Pac. 1108.

Where the custody and possession of personal property seized under a writ of attachment is such as to enable the officer to hold the property and subject it to the order of the court, the lien of such attachment is prior to the lien of a chattel mortgage executed and filed subsequent to the levy of the writ, but prior to taking actual possession of all the property on which the writ was levied, provided the officer is reasonably diligent in reducing all such property to his actual possession.—*Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322.

Parol evidence is not admissible to help out a defective description in the notice of levy of an attachment required by statute.—*First Nat. Bank v. Sonnelitner*, 6 Idaho, 21, 51 Pac. 993.

Under R. S. 4307, providing that a levy of attachment is made on real estate by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, etc., the following description is so vague and uncertain that it does not identify the property, to wit: "Lots 9 and 10 in block 42; lots 3 and 4, block 31 part section 9, township 2 north of 18 east, about 6 acres; commencing at a stake 260 feet from the north corner of R. & B. streets in the town of H.," etc.—*First Nat. Bank v. Sonnelitner*, 6 Idaho, 21, 51 Pac. 993.

Shares of stock in a corporation can be attached only in the manner prescribed by R. S. 4307, subdivision 4.—*Wells v. Price*, 6 Idaho, 490, 56 Pac. 266.

R. S. 4307, subdivision 3, provides that real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached and a notice that it is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property if there is one, if not, then by posting the same in a conspicuous place on the property attached. Held, that personal service of a copy of the writ, description and notice on the defendant in the action, the land sought to be attached being unoccupied, is not equivalent to the posting of such copies in a conspicuous place on the land.—*Williams v. Olden*, 7 Idaho, 146, 97 Am. St. Rep. 250, 61 Pac. 517.

Failure of defendant to appear and move to discharge a writ of attachment is not a waiver of defects in the levy thereof.—*Will-*

iams v. Olden, 7 Idaho, 146, 97 Am. St. Rep. 250, 61 Pac. 517.

Though the entry of judgment may cure some defects in the issuance of a writ of attachment, it will not cure defects in the levy of the writ and make what was no lien a valid one.—*Williams v. Olden*, 7 Idaho, 146, 97 Am. St. Rep. 250, 61 Pac. 517.

Corporate stock cannot be attached by levy of attachment on the certificates.—*Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157.

R. S. 4304, providing that attaching creditors shall share pro rata in the proceeds of defendant's property where there is not sufficient to pay all the judgments in full against him, has no application to attachments issued out of justice's or probate courts.—*Kimball v. Raymond*, 9 Idaho, 176, 72 Pac. 957.

A sheriff cannot sell attached property as perishable without an order of the court, which order must be predicated upon a sworn statement by the sheriff showing the character of the property claimed to be perishable, and the amount thereof.—*Work Brothers v. Kinney*, 5 Idaho, 716, 51 Pac. 745.

Property in the custody of the sheriff, who places it in the care of a custodian or keeper, is in the absolute control of the sheriff, and the custodian or keeper has no lien thereon for his fees or costs of keeping the same.—*Beck v. Lavin*, 15 Idaho, 363, 97 Pac. 1028.

R. S. 3445, as amended by Laws 1893, page 67, providing that every person who, while lawfully in the possession of an article of personal property, renders any service to the owner thereof, in connection therewith, has a special lien thereon, does not apply to attached property in the custody of a keeper for the sheriff.—*Beck v. Lavin*, 15 Idaho, 363, 97 Pac. 1028.

The notice of the issuance of a writ of attachment required to be given by the clerk under R. C. 4304, is intended for the protection and benefit of other creditors of the defendant, and a failure to give the notice is not available to the defendant in the attachment proceeding and does not enable him to avoid the attachment or subsequent execution sale thereunder.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

The question as to whether or not an excessive levy has been made under a writ of attachment is one to be presented to the court from which the writ issued and in which the action is pending, and cannot be raised by the defendant after an execution sale and in a collateral or independent action.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

Editorial Notes.

Lien of attachment, origin and nature of: 39 Am. Dec. 606.

Levy of attachment on personal property, what sufficient: 21 Am. Dec. 677.

Right to attach at location of corporation shares belonging to nonresident: Ann. Cas. 1912D, 954.

Attachment lien not perfected by judgment during husband's lifetime as prior to widow's share in estate: Ann. Cas. 1913A, 343.

Levy of attachment as subject to collateral attack: Ann. Cas. 1913C, 146.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

Where a debt claimed to be due by one person to another is attached as provided in R. S. 4309, and such person has been examined under R. S. 4310, and denies the existence of the debt, the court or judge has no power to order a judgment against such alleged debtor upon such examination.—*Lindenthal v. Burke*, 2 Idaho, 571, 21 Pac. 419.

Where no personal service is had on a non-resident defendant and his property within the state is attached, the judgment is valid as to the property attached, but void as a personal judgment.—*Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

In attachment cases against nonresident defendants, not personally served, it is proper practice to have the judgment recite the fact of attachment and contain an order for the disposition of the attached property, and recite that the judgment is valid only in so far as the application of the proceeds of the sale of the property paid or satisfied it.—*Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

R. C. 4310c, provides that judgment may be taken against the garnishee for failure to answer, but that there shall be no final judgment against the garnishee until final judgment shall be rendered against the defendant. Held, that the judgment or liability of the garnishee cannot be entered against the garnishee until the plaintiff has proven his case against the defendant and further proved an indebtedness from garnishee to defendant or that the garnishee has property of defendant under his control.—*Eagleson v. Rubin*, 16 Idaho, 92, 100 Pac. 765.

Under R. C. 4310a to 4310u, inclusive, full opportunity is given the garnishee to be heard and to litigate and contest his rights and the procedure is governed by the same rules as in ordinary actions.—*Eagleson v. Rubin*, 16 Idaho, 92, 100 Pac. 765.

While under R. C. 4310f the plaintiff is given three days to except to or deny the answer of the garnishee, yet until his default for want of an answer is filed, the court still possesses the power to permit answer to be made or to extend or enlarge the time to plead.—*Eagleson v. Rubin*, 16 Idaho, 92, 100 Pac. 765.

The default provided for in R. C. 4310c is a default for want of an answer, and does not mean a default judgment, and neither that section nor R. C. 4360 authorizes or empowers the clerk to enter a default judgment against the garnishee for failure to answer interrogatories submitted, as the mere failure of the garnishee to answer the interrogatories does not prove that he is indebted to the defendant in any specific sum, and the case must be heard before the court or judge, and proof made showing the indebtedness of the garnishee to the defendant.—*Shumake v. Shumake*, 17 Idaho, 649, 107 Pac. 42.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

Homestead character of property as affecting motion to dissolve attachment. See *Homestead*, V. For falsity of affidavit or defects therein. See *ante*, III, (B).

A writ of attachment improperly issued should be dissolved on motion.—*Flannagan v. Newberg*, 1 Idaho, 78.

A sheriff has no authority to release property which he has attached and made return of, even if it is exempt by law, but such release should be made by order of the court or judge.—*Roth v. Duvall*, 1 Idaho, 149.

Where it is shown that defendants had issued and levied a second writ of attachment on property levied on under their first writ, and their answer denies abandonment of the levy under their first writ and states as their reason for procuring the second writ that "the said plaintiff had at that time come into more open and notorious assertion of rights and ownership in the said real estate," the burden is on the plaintiff to show an abandonment of the first levy.—*Wright v. Westheimer*, 3 Idaho, 232, 35 Am. St. Rep. 269, 28 Pac. 430.

Under R. S. 4321, the only ground upon which a court or judge is authorized to discharge an attachment is that it has been improperly or irregularly issued.—*Mason v. Lienallen*, 4 Idaho, 415, 39 Pac. 1117.

A total failure to issue a summons is ground for the dissolution of an attachment issued in an action.—*Ridenbaugh v. Sandlin*, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827.

Where the plaintiff files his complaint and demands of the clerk the issuance of a summons, the fact that the clerk makes such a mistake in the summons as to avoid the process entirely, or to render it defective so as to subject it to a motion to quash, will not avoid a writ of attachment in the action or justify its dissolution.—*Ridenbaugh v. Sandlin*, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827.

Where a complaint fails to state a cause of action because the facts are defectively stated, and it appears from the complaint that a cause of action can be stated under the ordinary rules governing amendments, then on the hearing of a motion to dissolve an attachment, the amendment will be considered as having been made.—*Ross v. Gold Ridge Min. Co.*, 14 Idaho, 687, 95 Pac. 821.

Where a complaint wholly fails to state a cause of action, a motion to dissolve an attachment on the ground that the complaint fails to state facts sufficient to constitute a cause of action may be considered and sustained.—*Ross v. Gold Ridge Min. Co.*, 14 Idaho, 687, 95 Pac. 821.

Editorial Notes.

Irregularities and defects which will avoid attachment: 79 Am. Dec. 164.

Dissolution of attachment by death: 80 Am. Dec. 139.

Proceedings to dissolve attachment: 123 Am. St. Rep. 1028.

Divestiture of attachment lien by subsequent occupation of land for homestead purposes: Ann. Cas. 1913B, 1149.

VIII. CLAIMS BY THIRD PERSONS.

An officer in justifying his right to hold the possession of attached property claimed by a

stranger must allege and prove all of the facts necessary to support the writ, and also that a debt existed in favor of the attaching plaintiff against the defendant therein; and having thus established the fact that the person for whom he acted is a creditor of such defendant, and by his lien upon the property had become in privity with it, he may then attack the title of the person claiming the property so attached.—*Beckstead v. Griffith*, 11 Idaho, 738, 83 Pac. 764.

Where money is deposited in a bank by C. as "Atty.," and the bank has no other or further information as to the ownership of such money than that indicated by the designation "Atty.," the bank will be justified in paying the money over to the officer levying a writ of attachment in an action for the collection of a debt owing by C.—*Cunningham v. Bank of Nampa*, 13 Idaho, 167, 121 Am. St. Rep. 257, 10 L. R. A., N. S., 706, 88 Pac. 975.

Where C. collects money on notes and accounts as an attorney and collecting agent for clients and deposits the same in a bank in his own name with the suffix "Atty.," and the money is thereafter attached and levied upon for the debt of C., C. may bring an action, as trustee, against the bank and the officer levying the writ and recover the money attached for his *cestuis que trustent*.—*Cunningham v. Bank of Nampa*, 13 Idaho, 167, 121 Am. St. Rep. 257, 10 L. R. A., N. S., 706, 88 Pac. 975.

An attorney deposited money of his clients in a bank in his own name as "Atty." and the money was thereafter attached as the property of the attorney. The attorney brought an action to recover the money as trustee for his clients against the bank and the officer levying the writ. Held, that the bank was a proper party defendant.—*Cunningham v. Bank of Nampa*, 13 Idaho, 167, 121 Am. St. Rep. 257, 10 L. R. A., N. S., 706, 88 Pac. 975.

Where an attorney collects money on notes and accounts for his clients and deposits the same in a bank in his own name as "Atty.," and thereafter brings an action as trustee for his clients to collect the money so deposited, the beneficiaries or *cestuis que trustent* are proper parties plaintiff.—*Cunningham v. Bank of Nampa*, 13 Idaho, 167, 121 Am. St. Rep. 257, 10 L. R. A., N. S., 706, 88 Pac. 975.

Where property claimed by a third person is attached in an action against another, the fact that such third person has some other and adequate remedy for the protection of his rights and property is not ground for denying him the right to intervene in the action in which the property was attached.—*Potlatch Lumber Co. v. Runkel*, 16 Idaho, 192, 18 Ann. Cas. 591, 23 L. R. A., N. S., 536, 101 Pac. 396.

Under R. C. 4111, authorizing intervention, the owner or claimant of property attached in an action for debt has such an interest against both parties to the main action as entitles him to intervene for the purpose of asserting his right and title to the attached property.—*Potlatch Lumber Co. v. Runkel*, 16 Idaho, 192, 18 Ann. Cas. 591, 23 L. R. A., N. S., 536, 101 Pac. 396.

Editorial Notes.

Right of claimant of attached property to intervene: 18 Ann. Cas. 594.

Where M. & P. have an acknowledged and admitted debt, due them from a railroad company for rebates upon freight, and M. & P. assign and transfer said claim to T. for valuable consideration, prior to the time notice of garnishment is served upon the railroad company in an action of J. P. against M. & P., such debt becomes a debt of the railroad company to T., and is not subject to garnishment in an action of J. P. against M. & P.—Porter v. Title Guaranty & S. Co., 21 Idaho, 312, 121 Pac. 548.

The prorating statute does not apply to attachments issued out of justice's or probate courts.—Kimball v. Raymond, 9 Idaho, 176, 72 Pac. 957.

Editorial Notes.

Prorating proceeds of attached property among creditors: Ann. Cas. 1913C, 285.

Under R. C. 4304, which provides for prorating the proceeds of attached property among all creditors who "commence and prosecute to final judgment" their actions "within sixty days after the first posting and publication" of the notice of such attachment, no creditor will be entitled to pro-rate in the proceeds of such attached property, unless he both commences his action and procures his judgment within the sixty-day period prescribed by the statute.—Howard v. Grimes Pass Placer Min. Co., 21 Idaho, 12, Ann. Cas. 1913C, 284, 120 Pac. 170.

Where S. issues a check against his general account on deposit at a bank, such check is not an equitable assignment of the fund standing to the credit of S. in the bank, notwithstanding the fact that S. made the deposit for the purpose of paying such check, and a garnishment of the bank in a suit against S. before such check is presented creates a lien on the deposit superior to that of the payee of the check.—Kaesemeyer v. Smith, 22 Idaho, 1, 123 Pac. 943.

IX. RETURN.

It is in the discretion of the court to permit the return on a writ of attachment to be amended so as to conform to the facts.—McConnell v. Langdon, 3 Idaho, 157, 28 Pac. 403.

Editorial Notes.

Return, sufficiency of: 20 Am. St. Rep. 808.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

Form and requisites of undertakings. See ante, III, (C).

Sureties on an undertaking given for the release of attached property cannot go behind the judgment to set up any matter of defense to their liability which might have been pleaded in the original action.—Guthrie v. Fisher, 2 Idaho, 111, 6 Pac. 111.

In an action on a bond given to procure the release of an attachment, the affidavit for attachment may be introduced in evi-

dence for the purpose of showing that it was defective or false.—Murphy v. Montandon, 3 Idaho, 325, 35 Am. St. Rep. 279, 29 Pac. 851.

Where an affidavit for attachment is defective in not stating all that the statute requires, or if it is false, the obligors on the bond given to procure the release of the attachment may, under proper pleadings, prove such fact in defense of a suit on the bond.—Murphy v. Montandon, 3 Idaho, 325, 35 Am. St. Rep. 279, 29 Pac. 851.

In an action brought on a release bond in an attachment suit, the judgment-roll in the attachment suit was introduced in evidence. Held, that on appeal the court could not review the record in the attachment suit for the purpose of considering any alleged errors therein.—Murphy v. Montandon, 4 Idaho, 320, 39 Pac. 195.

Editorial Notes.

Attorneys' fees, recovery of on bonds given in attachment: 77 Am. Dec. 155.

XI. WRONGFUL ATTACHMENT.

Right of married woman to recover prospective profits on wrongful attachment. See Husband and Wife, IV.

A sheriff levied an attachment on property which he held under a prior attachment. Before a sale on either attachment, a third person claimed the property and the second attaching creditor indemnified the sheriff against any loss under the second attachment. The sheriff sold under execution in the first attachment suit and paid all the proceeds to the first attaching creditor. The claimant of the property recovered judgment against the sheriff for the value of the property sold. Neither the pleadings nor proof showed that after the levy the sheriff did any act under the second attachment. Held, that the second attaching creditor was not liable to the sheriff.—Fury v. White, 2 Idaho, 662, 23 Pac. 535.

Plaintiff sued out a writ of attachment at the time of filing his complaint, which writ was on motion of defendant dissolved, as having been wrongfully issued. Defendant then answered the original complaint, and at the same time filed a cross-complaint setting up a claim for damages by reason of the wrongful issuance of the writ of attachment. Held, that damages arising from the wrongful issuance of the attachment were proper matter for cross-complaint.—Willman v. Friedman, 4 Idaho, 209, 95 Am. St. Rep. 59, 38 Pac. 937.

Editorial Notes.

Wrongful attachment, actions for and defenses thereto: 81 Am. Dec. 467.

Damages for wrongful or malicious attachment: 68 Am. St. Rep. 266.

Attachment, abuse of, what is and liability for: 86 Am. St. Rep. 400.

Termination of attachment proceedings as condition to maintenance of action for wrongful attachment: Ann. Cas. 1912A, 445.

Exemplary damages for suing out attachment for collection of debt only: 29 L. R. A., N. S., 275.

ATTEMPT.

See cross-references, Criminal Law, I.

To commit arson. See Arson.

To commit violent injury. See Assault and Battery.

ATTORNEY AND CLIENT.

I. THE OFFICE OF ATTORNEY.

II. RETAINER AND AUTHORITY.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

IV. COMPENSATION AND LIEN OF ATTORNEY.

See Champerty and Maintenance.

Admissibility of advice of counsel in prosecution for embezzlement. See Embezzlement.

Attachment of funds of client on deposit in attorney's name, as attorney. See Attachment and Garnishment, VIII.

Omission of attorney's name on summons. See Process, I.

Prosecuting attorneys. See District and Prosecuting Attorneys.

Right of appeal from order changing attorneys. See Appeal and Error, III, (D).

Service of pleadings on. See Pleading, X.

Sufficiency of service of notice of appeal. See Appeal and Error, VII, (D), 2.

Confidential relations and privileged communications. See Witnesses, II, (D).

I. THE OFFICE OF ATTORNEY.

Evidence held sufficient to support an information under R. S., title 4, page 429, for the disbarment of an attorney.—In re Badger, 4 Idaho, 66, 35 Pac. 839.

Where an indictable crime is charged against an attorney in disbarment proceedings, the court will not proceed therein until criminal proceedings have been taken in the district court, or until sufficient time has elapsed to afford the grand jury or the proper authorities opportunity to examine into the matter and prosecute the accused.—In re Tipton, 4 Idaho, 513, 42 Pac. 504.

In an application for the disbarment of an attorney, it is not proper for the court to deprive the accused of his rights as an attorney, pending the investigation and trial of the case.—State v. Goode, 4 Idaho, 730, 44 Pac. 640.

Where an attorney purchased a note and securities at the request of one of the makers of the note and upon the agreement of such maker to fully reimburse him for the money advanced, such transaction is not obnoxious to R. S. 6524, which provides that an attorney buying any evidence of debt or thing in action with intent to bring suit thereon is guilty of a misdemeanor.—Bryan v. Montandon, 5 Idaho, 352, 55 Pac. 650.

On a writ of review to review an order disbarring an attorney from practice, made without application therefor and without notice to such attorney and with no opportunity of presenting his defense, such order will be annulled.—Goode v. Steele, 8 Idaho, 538, 69 Pac. 319; McNamee v. Steele, 8 Idaho, 539, 69 Pac. 319.

A person who secures his admission to practice as an attorney and counselor in the courts of this state by fraud or misrepresentation will be disbarred when such facts come

to the knowledge of this court.—In re Bradley, 14 Idaho, 784, 96 Pac. 208.

An applicant who makes a false affidavit, stating his admission to the highest court of another state, and, upon such affidavit, procures his admission to practice in the courts of this state, will be disbarred and his name stricken from the roll of attorneys of this court, when it is shown to this court that such affidavit was false and that the applicant had not been admitted to the highest court of such state.—In re Bradley, 14 Idaho, 784, 96 Pac. 208.

The fact that a statute authorizes the disbarment of an attorney for and on account of his conviction of a felony or misdemeanor involving moral turpitude does not amount to a violation of any constitutional rights prohibiting the infliction of cruel and unusual punishments, nor is it an additional punishment to that inflicted by the judgment of conviction.—In re Henry, 15 Idaho, 755, 21 L. R. A., N. S., 207, 99 Pac. 1054.

Under R. S. 4003, subdivision 1, providing that an attorney may be disbarred on account of conviction of a felony or misdemeanor involving moral turpitude, an attorney who has been convicted in a justice's court of the crime of petit larceny, may be disbarred therefor.—In re Henry, 15 Idaho, 755, 21 L. R. A., N. S., 207, 99 Pac. 1054.

That plaintiff was an attorney at law did not prevent him from purchasing an alleged tax title from the county, and prosecuting an action to establish title based thereon.—Griffith v. Anderson, 22 Idaho, 323, 125 Pac. 218.

Editorial Notes.

Disbarment of attorneys, causes and proceedings therefor and the power of courts to disbar: 95 Am. Dec. 333; 45 Am. St. Rep. 71.

Disbarment, crimes and other misconduct which are causes for: 42 Am. Rep. 557.

Summary jurisdiction of courts over attorneys: 2 Am. St. Rep. 847.

Disbarment of attorneys by courts as the result of summary proceedings: 2 Am. St. Rep. 850.

Disbarment of attorneys for criminal acts in advance of their conviction: 114 Am. St. Rep. 839, 8 Ann. Cas. 847.

Reinstatement of disbarred attorney: Ann. Cas. 1912A, 813.

Right to jury trial in disbarment proceeding: Ann. Cas. 1913D, 1162.

Disbarment of attorney, for act committed in another jurisdiction: 17 Ann. Cas. 599.

Wrongful retention of money by attorney as ground for disbarment: 17 Ann. Cas. 692.

Disbarment of attorney for fraud in procuring license to practice: 20 Ann. Cas. 212.

Disbarment for withholding client's money or property: 19 L. R. A., N. S., 401.

II. RETAINER AND AUTHORITY.

Death of party as affecting right of attorney to prosecute appeal. See Appeal and Error, VI.

Privileged communications. See Witnesses.

A party to an action has no right arbitrarily to change his attorney without paying or securing fees earned, and the original attorney is not bound to consent to a substitution, or deliver papers upon which he has a lien, until the amount of his just demands is ascertained by a court or referee, and paid or secured.—*Curtis v. Richards*, 4 Idaho, 434, 95 Am. St. Rep. 134, 40 Pac. 57.

After final judgment, a party who appeals may employ new counsel or change his attorney without notice, R. S. 3999, 4000, relating to change of attorneys, not applying to such case.—*Lydon v. Piper*, 5 Idaho, 541, 51 Pac. 101.

Editorial Notes.

Presumption in favor of authority of attorney: 16 Am. Dec. 98.

Authority of the former to bind the latter: 76 Am. Dec. 256; 30 Am. Rep. 358.

Rights and powers of respectively to manage the action: 87 Am. Dec. 166.

Attorney and client, authority of attorney to satisfy judgment on payment of a sum less than that due: 41 Am. Rep. 847.

Right of attorney to appear for the party whom he assumes to represent, presumption of such authority, and methods of questioning: 126 Am. St. Rep. 33.

Control of cause, extent to which client may exercise: 93 Am. St. Rep. 169.

Implied authority of attorney in conducting litigation: 132 Am. St. Rep. 148.

Authority of attorney to incur expenses incident to suit for client: Ann. Cas. 1912D, 313.

Power of attorney having claim for collection to extend time of payment: Ann. Cas. 1913B, 1295.

Implied power of attorney to bind client for expenses incidental to trial including associate counsel fees: 23 L. R. A., N. S., 702.

Implied power of attorney to compromise cause of action: 31 L. R. A., N. S., 523.

Power of attorney to withdraw answer: 33 L. R. A. 515.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

(No paragraphs.)

IV. COMPENSATION AND LIEN OF ATTORNEY.

In action for divorce. See *Divorce*.

In action for foreclosure of mortgages. See *Chattel Mortgages*; *Mortgages*.

In action for foreclosure of mechanics' liens. See *Mechanics' Liens*, VII.

In action for receiver. See *Receiver*, VII.

In action on negotiable instruments. See *Bills and Notes*, II.

Constitutionality of law authorizing attorney's fee in lien case. See *Constitutional Law*, X.

Act of Congress, March 3, 1891 (Supplement to U. S. Rev. Stats. 1874-91, sec. 9, p. 916), providing for the allowance of compensation to attorneys for services in prosecuting claims for Indian depredations, is con-

clusive as to the amount of attorneys' compensation in such cases, and where the amount of an attorney's compensation has been settled and allowed by the court of claims, no other or further compensation can be collected, any contract to the contrary notwithstanding.—*Mullan v. Clark*, 4 Idaho, 186, 38 Pac. 247.

In the absence of notice that the attorney's fees have not been paid and that the attorney claims a lien on the judgment for that purpose, the judgment debtor is authorized to and protected in paying the entire judgment to, or settling it with, the judgment creditor. *Dahlstrom v. Featherstone*, 18 Idaho, 179, 110 Pac. 243.

Where a judgment has been satisfied of record in conformity with the provisions of R. C. 4461, the attorney who procured the judgment and who has failed and neglected to take any steps for the purpose of fastening the equity of his lien upon the judgment cannot bring the parties into court by the service of a notice and motion on the attorneys who represented the respective parties in the original action and by service of a notice through the mails on his quondam client.—*Dahlstrom v. Featherstone*, 18 Idaho, 179, 110 Pac. 243.

Where an attorney who has not been paid his fees for procuring a decree of foreclosure of a mortgage seeks to have the satisfaction of the judgment vacated and set aside and execution issue in his favor for the amount of his unpaid fees, on the ground that such judgment was satisfied through fraud and collusion between the judgment debtor and judgment creditor for the purpose of defrauding him out of his fees, he is under the necessity of establishing the amount of fees still due him as against the client and of establishing the charge of fraud and collusion as against both his client and the judgment debtor, and the parties are entitled to their day in court for the purpose of joining issue and having a hearing thereon.—*Dahlstrom v. Featherstone*, 18 Idaho, 179, 110 Pac. 243.

Attorneys' fees cannot be recovered in an action unless authorized by statute or by express agreement of the parties, except in extreme cases where there is willful wrong, gross neglect, or fraud.—*Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463.

Prior to Laws 1911, page 563, there was no law of this state which provided for a lien for attorneys' fees; but this act provides that from the commencement of an action or the service of an answer containing a counterclaim the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor, and cannot be affected by any settlement between the parties before or after judgment.—*Kerns v. Washington Water Power Co.*, 24 Idaho, 525, 135 Pac. 70.

The judgment entered belongs to the judgment creditor, and may be paid to him, and he may satisfy the same; he may compromise the judgment, or, if he sees fit to do so, he may give it to the judgment debtor and he may so do without notice to his attorney, but this does not release the client from the obligation to pay the attorney any fee that he

may owe him for the service. The obligation and liability of the client to the attorney, if not otherwise secured, is merely a personal liability of the client to the attorney.—*Kerns v. Washington Water Power Co.*, 24 Idaho, 525, 135 Pac. 70.

Editorial Notes.

Lien of attorney for compensation and costs: 31 Am. Dec. 755.

Lien of attorneys: 51 Am. St. Rep. 251.

Constitutionality of statutes allowing attorneys' fees: 79 Am. St. Rep. 178.

Compensation, right of attorney to recover: 127 Am. St. Rep. 841.

Right to compensation of attorney who takes claim to collection for percentage where client takes claim out of his hands: Ann. Cas. 1912C, 741.

When statute of limitations begins to run against action by attorney to recover for services: Ann. Cas. 1913A, 416.

Constitutionality of statute giving attorney lien on cause of action: Ann. Cas. 1913C, 69; 8 Ann. Cas. 709.

Right to compensation of attorney who compromises action against client's directions: Ann. Cas. 1913D, 410.

Voluntary withdrawal by attorney from action as forfeiting his lien: Ann. Cas. 1913E, 540.

Effect on attorney's lien of collusive settlement after verdict: Ann. Cas. 1913E, 646.

Propriety and effect of attorney acting for party adverse to former client in same general matter: Ann. Cas. 1912B, 212.

What is sufficient ground for abandonment by attorney of contract of employment with client: Ann. Cas. 1912D, 640.

Death of client or dissolution of corporation as terminating relation of attorney and client: Ann. Cas. 1913A, 712.

Validity of stipulation in contract of employment between attorney and client from settling litigation without consent of attorney: Ann. Cas. 1913D, 306.

Right to compensation of attorney assigned by court to defend indigent accused: Ann. Cas. 1913E, 206.

Power of court to investigate authority of attorney to appear in cause: Ann. Cas. 1912C, 1106.

Purchase by attorney of subject matter: 23 L. R. A., N. S., 679.

Assignment of judgment as affecting attorney's lien thereon: 37 L. R. A., N. S., 226.

ATTORNEY GENERAL.

Right of county attorney to take appeal in suit to recover road poll tax. See District and Prosecuting Attorneys.

Necessity of service on attorney general of notice of appeal and other papers in criminal cases. See Criminal Law, XV, (C), (D), 2.

AUCTIONS AND AUCTIONEERS.

Though an auction is defined as a sale by consecutive bidding intended to reach the highest price of the article by exciting competition for it, property may be sold at public auction to the highest bidder and for the maximum possible amount, though a like public auction under other conditions and at other times might bring many times more, and consequently a much higher maximum possible amount.—*Pike v. State Board of Land Commrs.*, 19 Idaho, 268, 113 Pac. 447; *State v. Hoover*, 19 Idaho, 299, 113 Pac. 455.

Editorial Notes.

Auctions and auctioneers, competition, agreement to stifle: 2 Am. Dec. 138.

Sales at and by, and their effect: 96 Am. Dec. 264.

The law of auction sales: 131 Am. St. Rep. 479.

Conditions of sale at auction: Ann. Cas. 1912A, 1128.

Relief from purchase at auction on ground of mistake: 34 L. R. A., N. S., 927.

AUDITOR.

See Clerk of Court, Auditor, and Recorder.
State auditor. See States.

BAIL AND RECOGNIZANCE.

A recognizance was executed and delivered to the clerk of the court in which defendant was to appear. The sureties thereto justified on the recognizance before the judge of the court and the bond was approved by such judge at the time. Held, to justify a finding that the signatures were genuine and that the execution of such bond was sufficiently proven.—*People v. Bugbee*, 1 Idaho, 88.

The fact that a name appears in the body of a bond that is not subscribed to it, or that some or all the names subscribed to such bond do not occur in the body of the bond, does not affect the liability of those who executed and delivered it.—*People v. Bugbee*, 1 Idaho, 88.

The people have the legal capacity to sue upon breaches of bonds given by defendants in criminal actions.—*People v. Bugbee*, 1 Idaho, 88.

The initials "U. S." in the title of an action by the people on a recognizance given in a criminal proceeding is a technical defect, which does not affect the merits of the case, and hence should be disregarded.—*People v. Sloper*, 1 Idaho, 158.

Where a recognizance is joint, and not joint and several, all the sureties must be made defendants in an action thereon.—*People v. Sloper*, 1 Idaho, 158.

An undertaking taken for a purpose not authorized by statute is void.—*People v. Sloper*, 1 Idaho, 158.

A recognizance need not set out the offense charged with the same technical particularity required in an indictment, but it will be sufficient if the offense be substan-

tially described.—*People v. Sloper*, 1 Idaho, 158.

If a recognizance attempts to recite a specific charge, it must be such a charge as will support an indictment therefor.—*People v. Sloper*, 1 Idaho, 158.

Sureties on an undertaking for the appearance of a party to answer to a criminal charge can only be held responsible in default of the appearance of the principal, in the event an indictment should be found for the particular offense set forth in the undertaking.—*People v. Sloper*, 1 Idaho, 158.

An allegation in a complaint that "a recognizance was made and duly delivered" must be held to mean that it was returned to the clerk of court, as required by law; and such allegation is sufficient.—*People v. Myers*, 1 Idaho, 355.

A recognizance in a criminal action executed to "the people of the territory of Idaho" is a substantial compliance with criminal practice act, section 503, and an action may be maintained thereon, in the name of the people of the United States in the territory of Idaho.—*People v. Myers*, 1 Idaho, 355.

In an action upon a recognizance in a criminal case, the sureties in the recognizance cannot attack the jurisdiction of the grand jury which found the indictment.—*Dilley v. State*, 3 Idaho, 285, 29 Pac. 48.

In an action upon a recognizance in a criminal case, the sureties in the recognizance cannot attack the jurisdiction of the magistrate who took the bond.—*Dilley v. State*, 3 Idaho, 285, 29 Pac. 48.

In an action upon a recognizance in a criminal case, the fact that no order of the magistrate directing the release of the prisoner after the giving of the recognizance appears in the record is no defense.—*Dilley v. State*, 3 Idaho, 285, 29 Pac. 48.

Where a charge against defendant has been ignored by the grand jury, and there is no showing that evidence other than that considered by the grand jury can or will be presented to another grand jury nor any showing that additional evidence against defendant can be produced nor that there was improper conduct on the part of the grand jury or anyone else, tending to prevent the presentment of an indictment, it is error to hold the person accused to bail to answer a charge of felony.—*In re Moragne*, 6 Idaho, 82, 53 Pac. 3.

The right of admission to bail after conviction of a felony does not necessarily follow the right to have a certificate of probable cause issue.—*In re Neil*, 12 Idaho, 749, 87 Pac. 881.

If a bail bond is accepted without justification of sureties, the sureties cannot escape liability because of that fact.—*State v. Baird*, 13 Idaho, 126, 89 Pac. 298.

R. S. 8108, providing that bail is put in by a written undertaking executed by two sufficient sureties and acknowledged before the court or magistrate, does not prohibit the justification of the sureties before a

notary public, if the magistrate is willing to approve the bond so acknowledged.—*State v. Baird*, 13 Idaho, 126, 89 Pac. 298.

Where, in an action on a bail bond, the state shows that no changes were made in the instrument after it was delivered to the committing magistrate and it also appears from the evidence how and under what circumstances the changes in the instrument were made, the bond is admissible under R. S. 6030.—*State v. Baird*, 13 Idaho, 126, 89 Pac. 298.

Consent of the parties to a bail bond to alteration thereof may be proved by parol.—*State v. Baird*, 13 Idaho, 126, 89 Pac. 298.

A material alteration in a bail bond made by authority or with the consent of the parties thereto does not avoid the bond.—*State v. Baird*, 13 Idaho, 126, 89 Pac. 298.

Const., article 1, section 6, which provides that "all persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great," has reference only to those cases in which the party has not yet had a trial, and applies to all persons prior to conviction, but does not refer to cases wherein a conviction has been had in a court of competent jurisdiction.—*In re Schriber*, 19 Idaho, 531, 37 L. R. A., N. S., 693, 114 Pac. 29.

Under R. C. 8104, a defendant who has appealed to the supreme court from a judgment imposing a fine only is entitled to bail as a matter of right; but where a defendant appeals from a judgment which imposes a term of imprisonment, admission to bail is a matter of discretion.—*In re Schriber*, 19 Idaho, 531, 37 L. R. A., N. S., 693, 114 Pac. 29.

Editorial Notes.

Bonds taken without authority: 14 Am. Dec. 103.

Bail, admission to after indictment for murder: 81 Am. Dec. 87.

Misdemeanors, security not to commit: 90 Am. St. Rep. 797.

Necessity for appearance of name of surety in body of bail bond: Ann. Cas. 1912A, 695.

Deposit of money in lieu of bail in criminal cases: Ann. Cas. 1913D, 194.

Description of offense in bail bond: 38 L. R. A., N. S., 310.

BAILMENT.

See Depositaries; Pledges.

Under R. S. 3252, providing that after personal property has been sold and until the delivery is completed the seller has the rights and obligations of a depository for hire, except that he must keep the property without charge, until the buyer has had a reasonable opportunity to remove it, the seller of personal property is bound to keep the same with at least ordinary care until delivery to the buyer, and is responsible for the loss thereof unless such loss occurred without his fault.—*Strong v. Morgan*, 8 Idaho, 269, 67 Pac. 1123.

Under R. S. 3445, as amended by Laws 1899, page 181, one who renders services in the care of personal property has a lien thereon for his pay dependent on his possession.—*Williamson v. Moore*, 10 Idaho, 749, 80 Pac. 227.

A bailee who receives property as a deposit for safekeeping is bound to deliver it to the bailor upon demand, unless he has a lien on it, or is prevented from so doing by the real owner, or act of law.—*Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277.

In an action against a depository, the burden is on the depositor to prove the bailment and failure or refusal to return the property on demand. If that is shown, it then becomes incumbent upon the depository to return the same, or show sufficient circumstances or facts that would excuse him in law for refusing.—*Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277.

Editorial Notes.

Liability of bailee for misuser: 12 Am. Dec. 619.

Gratuitous bailee, liability of: 23 Am. Dec. 322; 38 Am. St. Rep. 779. Difference between and a sale: 10 Am. Dec. 490; 2 Am. St. Rep. 711; 94 Am. St. Rep. 216.

Liability of hirer of personal property to third persons: 92 Am. St. Rep. 547.

Mutual rights and liabilities of owner and lessee of safe deposit box: Ann. Cas. 1912B, 441.

Right of bailee to recover for injury to or loss of property: Ann. Cas. 1912D, 79.

Necessity of demand to support action of trover or conversion where personalty is in possession of defendant as bailee: Ann. Cas. 1913A, 1105.

Rule that burden of proof is on bailee to explain loss of goods as applicable when bailee does not have exclusive possession: Ann. Cas. 1913D, 947.

Assertion of third person's adverse title by bailee: 33 L. R. A., N. S., 681.

BANKRUPTCY.

Waiver of tort and suit in assumpsit by trustee in bankruptcy. See *Action*, II.

Involuntary bankruptcy under state law. See *Assignments for Benefit of Creditors*.

A complaint in an action on the bond of an assignee in bankruptcy containing a concise statement of the proceedings in bankruptcy leading up to and constituting the alleged breach of the conditions of the bond, is not demurrable.—*First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302.

In an action on the bond of an assignee in bankruptcy, the court found that there came into the hands of the assignee property of the appraised value of \$2,005; that the whole amount accounted for by the assignee was \$857; that the total amount of claims presented against the estate was \$600, or thereabouts; that no dividends were ever paid by the assignee to any of the creditors.

Held, sufficient to show liability on the bond.—*First Nat. Bk. v. Martin*, 6 Idaho, 204, 55 Pac. 302.

In an action by a trustee in bankruptcy, the complaint alleged conversion of personal property by defendant on a date subsequent to plaintiff's appointment as trustee. Defendant's demurrer to the complaint was overruled. The proof showed a conversion prior to the date of plaintiff's appointment as trustee. Held, that the variance between the pleading and the proof could not be considered on an objection raised by the demurrer, but should have been raised by objection to the evidence.—*Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

Though a conversion of goods belonging to a bankrupt occurred some days prior to the adjudication in bankruptcy and the appointment of the trustee, the trustee has the same right to recover for the conversion as had the bankrupt.—*Ryan v. Rogers* (on rehearing), 14 Idaho, 309, 94 Pac. 427.

The filing of a petition in bankruptcy, followed by an adjudication, is a seizure of the property by the law which is equal in rank to seizure on attachment or execution, and with respect to the right to attack transfers or encumbrances by the bankrupt as either actually or constructively fraudulent the trustee stands in the same position as an attachment or execution creditor. *Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

In a suit by a trustee in bankruptcy against the mortgagee and sheriff to recover the value of property seized and sold in foreclosure proceedings of a chattel mortgage executed by the bankrupt, it was stipulated that the value of the property should be found by the jury, and that in case the court found the mortgage to be void against the plaintiff, judgment should be entered in his favor for the full amount of the value found by the jury, otherwise judgment to be entered for the defendants. The jury found the value and the court found the mortgage valid. Held, that judgment should have been entered for defendants.—*Ryan v. Rogers*, 12 Idaho, 404, 86 Pac. 524.

The filing of a petition in bankruptcy is notice to the world of the pendency of the proceedings, and operates as an attachment of the bankrupt's property and also as an injunction restraining all persons from intermeddling therewith, and one who subsequently seizes the property on attachment or execution is liable in tort or assumpsit for the goods or value thereof.—*Dittemore v. Cable Milling Co.*, 16 Idaho, 298, 133 Am. St. Rep. 98, 101 Pac. 593.

Section 67f of the bankruptcy act of July 1, 1898 (30 Stat. 565, c. 541 [U. S. Comp. Stats. 1901, p. 3450]), provides that attachments and other liens obtained against an insolvent within four months prior to the petition in bankruptcy against him shall be void in case he is adjudged a bankrupt, and the property affected by such attachment or lien shall be released from the same and pass to the trustee as a part of the estate of the bankrupt, unless the court shall on due notice order the lien to be preserved for the

benefit of the estate.—*Corey v. Blackwell Lumber Co.*, 24 Idaho, 642, 135 Pac. 742.

The effect of the amendment of 1910 to section 47 of said bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. Stats. 1901, p. 3438], as amended by Act June 25, 1910, sec. 10, 36 Stat. 840 [U. S. Comp. Stats. Supp. 1911, p. 1500]), is that the trustee may now challenge any security or conveyance that a lien or judgment creditor might have challenged had the bankruptcy not intervened.—*Corey v. Blackwell Lumber Co.*, 24 Idaho, 642, 135 Pac. 742.

In an action by a trustee in bankruptcy to have a certain alleged assignment of a claim against defendant lumber company adjudged fraudulent as to creditors, the complaint alleged the assignment made by the bankrupt to his former wife was fraudulent in fact; that it was intended as a preference, made within four months of the adjudication of the insolvency of the bankrupt, and while the bankrupt was insolvent, and knew himself to be insolvent, and was accepted by his former wife as a preference; that a certain attaching creditor secured a lien of attachment and garnishment prior to the pretended assignment from the bankrupt to his former wife and that the trustee is entitled to be subrogated to the rights of such attaching creditor and to enforce its lien for the benefit of the estate of said bankrupt. Held, not demurrable.—*Corey v. Blackwell Lumber Co.*, 24 Idaho, 642, 135 Pac. 742.

Editorial Notes.

Passage of United States bankruptcy act, effect of on state insolvency laws: 41 Am. Dec. 447.

Judgments recovered against bankrupt after petition and before discharge: 53 Am. Dec. 296.

Fiduciary debts, what are within the meaning of bankruptcy and insolvency laws: 77 Am. Dec. 384; 39 Am. Rep. 722.

New promise to revive debt discharged by bankruptcy: 36 Am. Rep. 197.

Promise by bankrupt before his discharge to pay debt after: 42 Am. Rep. 60.

Discharge in bankruptcy, when releases judgments recovered after the commencement of the bankruptcy proceedings: 46 Am. Rep. 577.

New promise sufficient to revive debt barred by discharge in bankruptcy: 53 Am. Rep. 543.

Revival of debt discharged by bankruptcy: 135 Am. St. Rep. 377.

Effect of discharge in bankruptcy on claim omitted from schedule of debts: Ann. Cas. 1912A, 547.

Right to jury trial in action by trustee in bankruptcy to recover property fraudulently transferred by bankrupt: Ann. Cas. 1912B, 126.

Effect of discharge in bankruptcy on indebtedness of officer of private corporation, created by misappropriation

of corporate funds: Ann. Cas. 1912D, 218.

Discharge of corporation in bankruptcy as releasing director's or stockholder's liability: Ann. Cas. 1913A, 723.

Unconditional promise sufficient to revive debt discharged in bankruptcy or insolvency: Ann. Cas. 1913C, 742.

Effect of bankruptcy proceedings under federal act on lien of real property mortgage: Ann. Cas. 1913E, 850.

BANKS AND BANKING.

I. CONTROL AND REGULATION IN GENERAL.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

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(A) Banking, Franchises and Powers and Their Exercise in General.

(B) Representation of Bank by Officers and Agents.

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Bank checks in hands of third persons. See Bills and Notes.

— As subject to embezzlement. See Embezzlement.

Banks as depository of public moneys. See Depositaries.

Effect of a given check on bank deposit. See Assignments.

— Taxation of capital, stock, or property of banks. See Taxation.

Payment by bank of taxes on shares of stock. See Taxation, VII.

Rights, duties and liabilities of banks in respect of escrows. See Escrows.

Rights and liabilities as to funds of partnership deposited in bank. See Partnership, IV.

I. CONTROL AND REGULATION IN GENERAL.

B. S. 1644, requiring persons engaged in banking, loaning money at interest, buying or selling notes, bonds, stocks, gold or silver, etc., to pay a specific license tax, to be retained by the county collecting it, is restricted to licenses and hence is not in conflict with Const., article 7, section 6, prohibiting the legislature from imposing taxes for county, city or town purposes, since this clause applies only to property taxes.—*State v. Union Cent. Life Ins. Co.*, 8 Idaho, 240, 67 Pac. 647.

Editorial Notes.

Right of state to control number of banking corporations in particular locality: Ann. Cas. 1913A, 261.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

Appealability of order affecting priorities to funds of insolvent bank. See Appeal and Error, III, (D).

Receiver of insolvent bank chargeable with notice of fraud in procurement of note by manager of bank. See Bills and Notes, V, (D).

In an action by a depositor against a bank which has failed, the failure to allege and prove a demand is not ground for reversing a judgment in favor of plaintiff, where the record shows that such demand would have been fruitless and unavailing.—*Wheeler v. Commercial Bank of Moscow*, 5 Idaho, 15, 46 Pac. 830.

In an action by a depositor against a bank to recover the amount of his deposit, including the amount of two drafts, issued to him shortly prior to the bank's failure, the failure to present the drafts for payment and have them duly protested is no defense in the absence of proof that the bank was damaged by such failure, the record affirmatively showing that such presentation would have been useless.—*Wheeler v. Commercial Bk. of Moscow*, 5 Idaho, 15, 46 Pac. 830.

In an action against a bank in which a receiver is appointed for the bank, the receiver has no right to appeal from an order or judgment without first obtaining leave of court, since he has no personal interest in the matter.—*First Nat. Bank v. Bunting*, 7 Idaho, 27, 59 Pac. 929, 1106.

Where the receiver of an insolvent bank appeals from an order or judgment without first obtaining leave of court, the receiver, and not the insolvent estate, is liable for the costs and expenses of the appeal.—*First Nat. Bank v. Bunting*, 7 Idaho, 27, 59 Pac. 929, 1106.

R. C. 2976, prohibiting a bank from accepting as collateral its own capital stock, except in cases where the taking of such collateral shall be necessary to prevent loss upon a debt previously contracted in good faith, fails to impose any penalty or forfeiture for its violation, and the creditors of the bank should not be punished and the purchaser of stock rewarded by permitting him to avoid the contract, for the reason that it is prohibited by the statute.—*Meholin v. Carlson*, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Certain instructions offered on behalf of the defendant and refused by the court considered, and instruction given by the court approved, to the effect that if at the time the deposit in question was received said bank was kept open with the knowledge and consent and under the general authority of the defendant as an officer of said bank for the doing of business and the reception of deposits, and said defendant knew that deposits were being received, though not personally receiving the same, then said deposit in question was received by defendant as an officer of said bank, within the meaning of the statute.—*State v. Cramer*, 20 Idaho, 639, 119 Pac. 30.

Where the vice-president and business manager of a bank, with full knowledge that

his banking institution is insolvent and will not be able to meet its obligations and repay its depositors in the ordinary and due course of business, permits or consents to such banking institution continuing to receive deposits through its regular employees, he is criminally liable under R. C. 2985.—*State v. Cramer*, 20 Idaho, 639, 119 Pac. 30.

R. C. 2985 makes an officer of a bank liable as a principal and not as an accessory. Under the evidence in this case, the defendant was properly convicted as a principal, and even if any distinction between principals and accessories were recognized in this state, it would not apply in the case at bar under the provisions of said section 2985.—*State v. Cramer*, 20 Idaho, 639, 119 Pac. 30.

The word "insolvent," as used in R. C. 2985, prescribing a punishment for receiving deposits when a bank is insolvent, means that a bank is insolvent when its assets and property are of such a character and value or in such a condition that it is unable to meet the demands made upon it in the usual and ordinary course of banking business.—*State v. Cramer*, 20 Idaho, 639, 119 Pac. 30.

Where money is loaned by one bank to another upon false representations which amount to fraud upon the bank loaning the money, the contract of loan may be rescinded upon the ground of fraud, and such loan becomes a trust fund in the hands of the bank or its assignee, and, like any other fund, if it can be traced and is capable of identification, it may be recovered from the assignee of the bank, and is a prior claim as against the general creditors.—*Bellevue State Bank v. Coffin*, 22 Idaho, 210, 125 Pac. 816.

Where it is shown that I. S. Bank borrows money from B. S. Bank upon false representations, and at a time when the I. S. Bank was insolvent, and used said money so borrowed in the ordinary course of business in paying checks, and the evidence fails to show that the estate of the bank was in any way bettered or augmented by reason of the application of such borrowed money, and in the absence of a showing that such money can be traced into specific property or money, such B. S. Bank cannot have its claim against the estate of I. S. Bank in the hands of the receiver declared a prior claim to other general creditors.—*Bellevue State Bank v. Coffin*, 22 Idaho, 210, 125 Pac. 816.

Where an insolvent bank procures a loan from another bank upon false representations, and such money is to be used in the ordinary course of business of the insolvent bank, and the transaction results in nothing more than an exchange of creditors or the mere cancellation of one liability and the assumption of another, and the money is used in the discharge of an indebtedness, such facts alone are not sufficient to show that the assets of the bank borrowing such money have in any way been increased, or that there has been a betterment of the estate or its assets, or that such estate or

its assets have in any way been improved or rendered more valuable.—*Bellevue State Bank v. Coffin*, 22 Idaho, 210, 125 Pac. 816.

Where B. S. Bank pays I. S. Bank, upon solicitation of I. S. Bank, a sum of money to be used by the latter in the ordinary course of business, to be paid back in the future upon the latter bank receiving a shipment of money from another source, such payment of money is a loan, and such transaction creates the relation of debtor and creditor between such banks.—*Bellevue State Bank v. Coffin*, 22 Idaho, 210, 125 Pac. 816.

A complaint against the directors of an insolvent bank alleged the illegal payment of dividends, the making and publishing of false reports, the unlawful permitting of excessive loans, and that plaintiff made deposits while the bank was insolvent under circumstances whereby defendants could have known of the insolvency of the bank had they exercised proper diligence. Held, that in case of recovery on all or either of the grounds of recovery alleged in the complaint, the amount recovered would be an asset of the bank, and in this case the action should be brought by the receiver and not by the depositor.—*McTamany v. Day*, 23 Idaho, 95, 128 Pac. 563.

R. C. 2745, as amended by Laws 1909, page 160, providing that each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him, and any creditor of the corporation may institute an action against any of the stockholders, jointly or severally, and in such action the court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount does not apply to banking corporations, as the organization, internal management and supervision of banks are provided for by R. C. 2968 et seq.—*McTamany v. Day*, 23 Idaho, 95, 128 Pac. 563.

If the board of directors of an insolvent bank has declared and paid illegal dividends, the amount paid, if recovered, would be a part of the assets of the bank.—*McTamany v. Day*, 23 Idaho, 95, 128 Pac. 563.

Where the receiver of an insolvent bank has failed to do his duty, proper application should be made to the court to compel him to do so or to remove him, as the receiver ought diligently to proceed and recover all of the assets of the bank, and distribute them as provided by law.—*McTamany v. Day*, 23 Idaho, 95, 128 Pac. 563.

Where a cashier has voluntarily signed such a report as is referred to in R. C. 7128, knowing what it was, such making of said report was "knowingly" done; and he is responsible for the truth of the statements therein, unless he can show that he was himself deceived, without undue fault or negligence on his part.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

Where a report, purporting to show the true condition of a state bank, is prepared in typewritten form ready for the signature of the cashier of the bank, by other officers or clerks, and the cashier thereupon signs said report and delivers it to another person, said cashier has "made" such report, in contemplation of R. C. 7128.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

It is no defense to an information charging a cashier of a state bank with the making of a false report of its condition that he signed the report at the request of a superior officer of such bank, without knowledge or investigation on his part as to the truth of the facts therein stated.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

Evidence in a prosecution of a bank cashier for making a false report held sufficient to sustain the verdict, especially inasmuch as the defendant admits signing the report charged in the information to be false, and evidence to the effect that such report was false is uncontradicted, and it appears clearly that the defendant signed said report without examining it, and in entire disregard of whether it was true or false.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

Entries in the books of a state bank connected with or related to the portions of a report of the condition of such bank alleged in an information to be false are admissible in evidence against the cashier of such bank who assists in or supervises the keeping of such books, when the cashier is on trial charged with making such false report, without the necessity of any foundation being laid relative to their accuracy.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

Oral testimony regarding the contents of bank books is not properly admissible in evidence before the portions of such books connected with the subject of inquiry are identified and admitted in evidence.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

In a prosecution of a bank officer for making a false report there was no error in admitting the books of other banks and receiving oral testimony with relation thereto for the purpose of showing the falsity of certain statements in the report, which covered transactions between said banks and defendant's bank.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

Under R. C. 7128, providing, among other things, that: "Any person who knowingly makes or publishes in any way whatever, or permits to be so made or published, any report, statement, exhibit or other publication which shall contain any statement which is false or willfully exaggerated shall be deemed guilty of a felony, the word 'makes' means not only the signing but the passing or issuing of said report.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

An indictment of a bank president for making a false report in violation of R. C. 7128 held to conform substantially to R. C. 7677, 7679, specifying the requisites and form of indictments.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

Editorial Notes.

Criminal liability of officer of insolvent bank for receiving deposit therein as dependent on his actually receiving deposit in person: *Ann. Cas. 1912B, 316.*

III. FUNCTIONS AND DEALINGS.**(A) BANKING FRANCHISES AND POWERS AND THEIR EXERCISE IN GENERAL.**

(No paragraphs.)

(B) REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

Criminal responsibility for receiving deposits while bank is insolvent. See ante, II.

Of national banks. See post, IV.

Criminal responsibility for making false reports. See ante, II.

Where a deposit is made in escrow with the cashier of a bank, and it is shown that it was customary for the bank to receive escrow agreements through its cashier and that the officers of the bank never made objection thereto, and the cashier signs an escrow agreement as cashier of the bank, it will be liable for the delivery of the escrow papers and money contrary to the terms of the escrow.—*Brown v. Citizens' State Bank, 17 Idaho, 716, 107 Pac. 405.*

Editorial Notes.

Cashier, note payable to, who may sue upon: 42 Am. Dec. 378.

Cashiers, implied powers of: 77 Am. Dec. 759.

Cashiers, authority of: 12 Am. Rep. 75.

Fraud of officers, liability of bank for: 39 Am. Rep. 760.

Directors, liability of to depositors for negligence and false statements of solvency: 8 Am. St. Rep. 605.

Power of cashier to mortgage bank property: *Ann. Cas. 1912A, 95.*

Power of cashier to lease bank property: *Ann. Cas. 1912A, 99.*

(C) DEPOSITS.

Insolvency. See ante, II.

Receiving deposits while bank insolvent, criminal liability. See ante, II.

Where, in an action against a bank by a depositor, the bank introduces an expert witness to prove the custom of banks in paying out money and keeping accounts, expert evidence in rebuttal should be confined to the same state of facts as is the evidence of custom which is sought to be rebutted.—*Rice v. Bank of Camas Prairie, 5 Idaho, 39, 47 Pac. 856.*

In an action by a partnership against a bank for the amount of a deposit, claimed by the bank to have been paid to one of the partners on a certain date, it was not prejudicial error to permit evidence to show that such partner was not at the bank at such time even though the cashier admitted that he might be mistaken as to the date and had made statements to others that the money was paid at different dates from the date

claimed.—*Rice v. Bank of Camas Prairie, 5 Idaho, 39, 47 Pac. 856.*

Where a partnership deposits money in a bank, which thereafter pays the money to one of the firm, who had authority to draw the money, but no receipt, order, check or authority was given therefor by the firm or any of its members in the usual course of business, such payment, if actually shown to have been made, absolves the bank from further liability.—*Rice v. Bank of Camas Prairie, 5 Idaho, 39, 47 Pac. 856.*

One who deposits money in a bank on general deposit voluntarily becomes a creditor of such bank, and, impliedly at least, agrees that the bank may commingle such money with its own, and use it till called for by such depositor.—*State v. Thum, 6 Idaho, 323, 55 Pac. 858.*

Where a person deposits money in a bank in the name of his daughter with the agreement that the money may be drawn out on checks signed by him, and the money is so drawn out, the daughter cannot hold the bank therefor.—*Green v. Bank of Camas Prairie, 7 Idaho, 576, 64 Pac. 888.*

Where a person deposits money in a bank in the name of his daughter with the agreement that the money may be drawn out on checks signed by him, and the money is so drawn out, it is not error to permit the cashier of the bank to testify as to the terms of such agreement in a suit brought by the daughter after her father's death to recover from the bank the amount of such deposit.—*Green v. Bank of Camas Prairie, 7 Idaho, 576, 64 Pac. 888.*

Where C. deposits money in a bank in his own name with the designation "Atty." following, the bank is liable to pay the money so deposited to C. on his check, and he occupies the same relation as any other general depositor.—*Cunningham v. Bank of Nampa, 13 Idaho, 167, 121 Am. St. Rep. 257, 10 L. R. A., N. S., 706, 88 Pac. 975.*

Where a bank or banker receives property upon deposit, there results an implied contract that he will return it to the depositor upon demand.—*Bates v. Capital State Bank, 18 Idaho, 429, 110 Pac. 277.*

Under R. C. 4059, where an action is brought to recover money or property deposited with a bank or banker, the statute of limitations does not begin to run until after demand by the depositor.—*Bates v. Capital State Bank, 18 Idaho, 429, 110 Pac. 277.*

Where S. drew a check and post-dated it, and then had the bank on which it was drawn certify the same, the liability of the bank attached from the time of certification, irrespective of the date the check bore.—*Smith v. Field, 19 Idaho, 558, Ann. Cas. 1912C, 354, 114 Pac. 668.*

Where S. deposits in a bank the sum of \$1,500, and thereafter personally demands and receives payment of \$700 of said sum, and at the time such payment is made furnishes the bank with a statement of checks issued by S. against the balance of the deposit fund, and at such time makes no ar-

rangement with the bank that such balance is to be a special deposit, and the bank does not accept such deposit as a special deposit, such deposit remains a general deposit and is subject to attachment.—*Kaesemeyer v. Smith*, 22 Idaho, 1, 123 Pac. 943.

The relation existing between a bank and its depositor is that of debtor and creditor, and, before the bank can charge the account of its depositor with a check drawn by someone else, it must show authority or ratification by the depositor.—*Crab v. Citizens' State Bank*, 22 Idaho, 408, 126 Pac. 520.

The principle of law, established by the authorities, that a depositor will be estopped by his laches in failing to promptly notify the bank of the forgery of a check which it has paid out of his account, or that such check was unauthorized, is not applicable to the facts of this case, for the reason that the bank had notice, at the time it paid the checks, that such checks were drawn without authority and were not to be paid out of the private account of the appellant, Crab, but were to be paid out of the account of the Atlanta Mercantile Company, a corporation. *Crab v. Citizens' State Bank*, 22 Idaho, 408, 126 Pac. 520.

Evidence examined and considered, and held, that it clearly establishes the fact that the bank had notice that the checks cashed by it were not to be paid out of the private account of appellant, and that the drawer of such checks had no authority to check on appellant's account.—*Crab v. Citizens' State Bank*, 22 Idaho, 408, 126 Pac. 520.

Editorial Notes.

Special deposits, liability for: 9 Am. Dec. 183; 32 L. R. A. 769.

Relation of the depositor to the bank: 19 Am. Dec. 418.

Right of bank to pay indebtedness out of a deposit: 23 Am. Rep. 50.

Deposits made by a fiduciary: 42 Am. Rep. 168.

Deposits in name of "trustee": 82 Am. St. Rep. 520.

Title to money deposited with or collected by, when does not vest in, and the right to recover on insolvency: 86 Am. St. Rep. 775.

Rights of parties where person makes deposit in bank of certificate of deposit issued by another bank, and certificate is placed to depositor's credit: Ann. Cas. 1913D, 425.

What is special, as distinguished from general, deposit in bank: Ann. Cas. 1913E, 45.

Bank's lien or setoff against deposit for debt due it by depositor: 2 Ann. Cas. 206; 19 Ann. Cas. 487.

(D) COLLECTIONS.

Where a bank of another state wired a bank of this state that a certain sum had been deposited to the local bank's credit for the use of B., which telegram was received after banking hours and the order was coun-

termanded the following day before credit had been given therefor and before any rights or liabilities of B. or other persons had been incurred in regard thereto, the local bank was not liable to B. for such deposit.—*Brinton v. Lewiston Nat. Bk.*, 11 Idaho, 92, 81 Pac. 112.

Where the only indorsers on a note are the owners thereof and they have indorsed it only for collection, a bank to which the note is sent for collection is not liable for failure to protest the note on nonpayment.—*First Nat. Bank v. Carter*, 8 Idaho, 391, 69 Pac. 123.

Editorial Notes.

Liability of bank as agent for collection: 34 Am. Dec. 307.

Collecting bank, negligence for which liable: 37 Am. Rep. 716.

Liability of collecting banks for acts of their subagents: 41 Am. Rep. 114.

Correspondent bank, right of to hold proceeds of paper received for collection as against the owner in the event of the insolvency of the forwarding bank: 14 Am. St. Rep. 583.

Collecting agencies, liability of banks acting as: 77 Am. St. Rep. 613.

Liability of bank sending paper to drawee bank for collection: Ann. Cas. 1912B, 123.

(E) LOANS AND DISCOUNTS.

Loan to insolvent bank on false representations. See ante, II.

(F) EXCHANGE, MONEY, SECURITIES AND INVESTMENTS.

(No paragraphs.)

(G) CIRCULATING NOTES.

(No paragraphs.)

(H) ACTIONS.

Demurrer to complaint on check showing laches in presenting to bank before insolvency thereof. See Bills and Notes, VIII, (D).

Against insolvent bank. See ante, II.

Bank a proper party in action by attorney to recover deposit in attorney's name, as attorney, belonging to his clients. See Attachment and Garnishment, VIII.

Liability on check given for gambling purposes. See Gaming, I.

IV. NATIONAL BANKS.

Power of state to tax national banks and bank shares. See Taxation, I.

In contemplation of law, the leasing of property belonging to a national banking association is not within the ordinary powers and duties of the cashier of the bank.—*Spongberg v. First Nat. Bank of Montpelier*, 18 Idaho, 524, Ann. Cas. 1912A, 95, 110 Pac. 716.

The cashier of a national bank entered into a contract to lease certain of the bank property for a term of years. No express author-

ity from the board of directors to do so was shown, but the contract signed by the cashier and the lessee was in possession of the bank for eighteen months, and a majority of the directors of the bank had knowledge of the contract and its terms and conditions. The cashier was exercising the power and authority of leasing the bank property, and especially vacant rooms in the bank building, and the bank's building committee or its board of directors made changes in the plans and specifications of its building on the suggestion of the lessee and incorporated the same in the building as erected and finished the room to be occupied by the lessee in accordance with his request and suggestions. The board of directors never repudiated the contract or notified the lessee that they would not live up to the same until after the expiration of eighteen months and the completion of the building. Held, that such acts and conduct on the part of the board of directors amounted to a ratification of the action of the cashier, and rendered the contract entered into by him the contract of the bank.—*Sponberg v. First Nat. Bank of Montpelier*, 18 Idaho, 524, Ann. Cas. 1912A, 95, 110 Pac. 716.

Where the president of a national bank borrowed trust funds with knowledge of their trust character and the trustee understood that the funds were to be invested in a purely personal transaction of the president, the fact that the money borrowed was mingled with the money of the bank did not make the bank responsible as a trustee of such funds.—*Netherlands etc. Bank v. Conaway*, 7 Idaho, 109, 61 Pac. 590.

Under U. S. Rev. Stats. 5242, providing that "no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court," an injunction by a state court against a national banking association is prohibited.—*Meyer v. First Nat. Bank*, 10 Idaho, 175, 77 Pac. 334.

Editorial Notes.

National banks, liability of for special deposits: 36 Am. Rep. 592.

V. SAVINGS BANKS.

(No paragraphs.)

VI. LOAN, TRUST, AND INVESTMENT COMPANIES.

(No paragraphs.)

VII. CLEARING-HOUSES.

(No paragraphs.)

Editorial Notes.

Customs and usages of banks and their effect: 50 Am. Dec. 97.

Forged check, payment of, effect of on rights of party defrauded: 39 Am. Dec. 519.

Certified checks, liability of upon "raised": 14 Am. Rep. 237.

Certified checks raised before certification: 26 Am. Rep. 96.

Certified checks, effect of: 69 Am. Dec. 691; 89 Am. Dec. 442.

Certified checks, law of: 128 Am. St. Rep. 691.

Certificates of deposit: 42 Am. Dec. 576; 75 Am. St. Rep. 42.

Checks, unaccepted, liability of drawees of: 45 Am. Rep. 355.

Checks, forged, rights and remedies of the several parties after payment of: 17 Am. St. Rep. 889; 10 L. R. A., N. S., 49; 25 L. R. A., N. S., 1308; 29 L. R. A., N. S., 100.

Checks, whether operate as assignments of the fund: 19 Am. St. Rep. 609; Ann. Cas. 1913D, 418.

Check indorsed for deposit, effect of: 47 Am. St. Rep. 389.

Liability of banker for not honoring checks: 80 Am. St. Rep. 865.

Liability for receiving payment of a check under a forged indorsement: 94 Am. St. Rep. 641.

Acceptance of check, what amounts to: 118 Am. St. Rep. 348.

Memorandum on check as notice to bank: Ann. Cas. 1913B, 1342.

Damages recoverable by depositor for wrongful dishonor of check: Ann. Cas. 1913A, 1001.

Savings banks, duties of to their depositors: 105 Am. St. Rep. 728.

Liability of savings bank officers or trustees to depositors for mismanagement: Ann. Cas. 1913B, 424.

Lien of bankers not founded on contract: 111 Am. St. Rep. 419.

Right of bank to recover money paid by mistake: Ann. Cas. 1912D, 494.

BATTERY.

See Assault and Battery.

BAWDY-HOUSE.

See Disorderly House.

BEEES.

Salary of deputy bee inspector. See States, II, (C).

BENEFICIAL ASSOCIATIONS.

See Associations.

BIGAMY.

Associations teaching bigamy or polygamy. See Associations.

In an indictment under act of Congress, March 22, 1882, chapter 47, section 3, entitled, "An act to amend U. S. Rev. Stats. 5352, in reference to bigamy and for other purposes," the use of the word "cohabit" is sufficient, and it is not necessary to set out at large in the indictment the meaning or definition of the word itself.—*United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407; *United States v. Cozzens*, 2 Idaho, 486, 21 Pac. 409.

In a prosecution for bigamy, the court instructed the jury: "In determination of this, you will consider whether, under the facts as proved, the acts of defendant have been such as to lead the public to believe that the relations of husband and wife still continued. If they have been such as to induce others to believe, or the public to believe, that the marital relations still continue, then the acts of defendant are unlawful." Held, error.—*United States v. Langford*, 2 Idaho, 561, 21 Pac. 409.

In a prosecution for bigamy, it was improper to permit evidence as to the general repute in the community as to the relation existing between defendant and one of the women with whom it was claimed he cohabited, since the facts themselves should be proven and the jury permitted to draw their inference therefrom.—*United States v. Langford*, 2 Idaho, 561, 21 Pac. 409.

In a prosecution for bigamy, the government must show that the defendant cohabited with more than one woman, or did dwell or live together with more than one woman as husband and wife.—*United States v. Langford*, 2 Idaho, 561, 21 Pac. 409.

Celestial and patriarchal marriages to be participated in in the next world or the future life are not crimes here, but where, under such designation or name, a man marries or has more than one wife during the same period of time, such marriages become bigamous or polygamous and are prohibited by the organic law of the state.—*Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

By the words "bigamous," "polygamous," "plural" and "celestial" marriages as used in Const., article 6, section 3, it was intended to prohibit and forbid a man having more than one wife at one time under whatever name or designation he might choose to style his marriage, that is, to prohibit bigamous and polygamous marriages.—*Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Editorial Notes.

What constitutes bigamy: 93 Am. Dec. 252.

Nature and elements of bigamy: 126 Am. St. Rep. 201.

Bigamy, proof of former marriage in prosecutions for: 47 Am. St. Rep. 228; 106 Am. St. Rep. 768.

Presumptions and burden of proof in prosecution for bigamy: Ann. Cas. 1913E, 268.

BILLIARDS.

License tax on billiard-tables. See Licenses, I.

BILL OF EXCEPTIONS.

See Exceptions, Bill of; Appeal and Error.

BILL OF PARTICULARS.

See Pleading, IX.

Power of court of equity to order. See Equity, IV.
In criminal action. See Indictment and Information, V.

BILLS AND NOTES.

I. REQUISITES AND VALIDITY.

II. CONSTRUCTION AND OPERATION.

III. MODIFICATION, RENEWAL AND RESCISSION.

IV. NEGOTIABILITY AND TRANSFER.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

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VI. PRESENTMENT, DEMAND, NOTICE AND PROTEST.

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(H) Appeal.

Attachment on note for purchase price of goods sold, reserving title, etc. See Attachment and Garnishment.

Bills and notes by particular classes of persons. See Infants; Insane Persons; Corporations; Partnership; Guardian and Ward, etc.

Bank checks as subject of embossment. See Embossment.

Guaranty or security for payment. See Guaranty; Principal and Surety; Mortgages; Chattel Mortgages.

Guaranty of negotiable instruments. See Guaranty. Liability and rights of surety. See Principal and Surety.

Liability of bank for failure to protest. See Banks and Banking, III, (D).

Rights and liabilities of bankers and depositors in respect of bank checks. See Banks and Banking. Right of attachment against indorser or guarantor. See Attachment and Garnishment.

Authority of corporate officer as to negotiable instruments. See Corporations, VI, (B); VII, (B). Of partners. See Partnership, IV.

I. REQUISITES AND VALIDITY.

A statement of a proposition of law which proves to be false cannot be urged as a false representation which will be sufficient to defeat an action on a note given partly in consideration of such statement.—*Smith v. Smith*, 4 Idaho, 1, 35 Pac. 697.

Where it appears that plaintiff, in whose favor a check was executed, performed services in caring for G., who executed the check, and in taking him into her home, which she would not have performed except for promise made by G. that he would either buy her a farm or compensate her by money consideration, a consideration is shown for the execution and delivery of a check from G. to plaintiff on which action is subsequently brought.—*Coe v. McGran*, 23 Idaho, 582, 131 Pac. 1110.

Preference and goodwill from one toward another, growing out of kindnesses and atten-

tions paid an aged person, are not sufficient to show undue influence, in the absence of proof of imposition or fraud practiced by the one upon the other.—*Coe v. McGran*, 23 Idaho, 582, 131 Pac. 1110.

Editorial Notes.

Signed through belief that they were other writings, induced by false representations, effect of in the hands of bona fide holders: 4 Am. Rep. 240.

Signed through fraudulent representation as to character of instrument signed: 11 Am. Rep. 449; 1 L. R. A., N. S., 1075.

II. CONSTRUCTION AND OPERATION.

Under R. S. 12, where a note due one day after date is made on Saturday, the maker has until the close of business hours on Monday in which to pay the same.—*Sabin v. Burke* (on rehearing), 4 Idaho, 179, 37 Pac. 352.

A stipulation to pay bank exchange on borrowed money is not usurious unless it appears that such stipulation is a device to cover a usurious contract and it was not intended that the money should be remitted to the place to which exchange is provided.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

Where it is stipulated in a promissory note that "the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of the note" if payment of interest and principal installments are not made when due, such stipulation is a penalty, and will not be enforced as to the interest not yet earned on the principal.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

Under R. C. 3459, subdivision 5, an attorney's fee may be legally stipulated for in case payment shall not be made at maturity, and such stipulation is not a usurious contract.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

A promissory note provided, "and hereby authorize said bank to sell the whole or any part of said collateral security . . . and after deducting all expenses, including all for legal services arising from or incidental to the sale, realization or collection of any of said collateral security . . . or of any of said demands, including this note, to apply the residue of the proceeds to pay any or all of said demands in whole or in part, due or not due, including this note, making a rebate of interest upon demands not matured by their terms." Held, that the stipulation for attorneys' fees for legal services contemplated services in connection with the collateral notes and did not contemplate attorneys' fees for collection of the principal note.—*Chase Nat. Bank v. Meholin*, 18 Idaho, 308, 109 Pac. 510.

Where the provisions of a promissory note, secured by mortgage, vary from the terms of the mortgage, the provisions of the note must control.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

Where a promissory note is executed and delivered to a bank by two persons, and the

note upon its face contains the following language: "We promise to pay"—such note upon its face is a joint and several liability, and such note is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.—*Tritthart v. Tritthart*, 24 Idaho, 186, 133 Pac. 121.

Editorial Notes.

Payable on demand: 80 Am. Dec. 250.

III. MODIFICATION, RENEWAL AND RESCISSION.

Where defendant signed a note and subsequently such note was surrendered to him in consideration of the giving of a new note, the defense of failure of consideration of the first note cannot be brought against the second note.—*Smith v. Smith*, 4 Idaho, 1, 35 Pac. 697.

Editorial Notes.

Reissue, payment or acceptance to prevent: 92 Am. Dec. 575.

Reissue of after payment: 95 Am. Dec. 587.

Renewal of or promise to renew note as waiver of notice of dishonor: Ann. Cas. 1912A, 442.

IV. NEGOTIABILITY AND TRANSFER.

A promissory note containing a stipulation, "no extension of time of payment, with or without our knowledge, by the receipt of interest or otherwise, shall release us or either of us from the obligation of payment," is non-negotiable under Laws 1903, page 380, the negotiable instrument law.—*Union Stockyards Nat. Bank v. Bolan*, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508.

A recital in a title-retaining note that the title to the property for which it is given shall remain in the payee and that he shall have the right to take possession of it whenever he may deem himself insecure, even before the maturity of the note, renders such note non-negotiable under Laws 1903, page 380, sections 1, 5.—*Kimpton v. Studebaker Bros. Co.*, 14 Idaho, 552, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126, 94 Pac. 1039.

A bank check is an instrument by which a depositor seeks to withdraw funds from a bank, and as between the drawer and the payee it is an evidence of indebtedness, and in commercial transactions, as well as in law, it is equivalent to the drawer's promise to pay, and an action may be brought thereon, as upon a promissory note.—*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 128 Am. St. Rep. 81, 21 L. R. A., N. S., 703, 99 Pac. 833.

A bank N. transmitted a promissory note owned by it to another bank, and guaranteed the payment thereof. The transferee bank thereupon pays the face value of such note, with the further agreement that the transferee shall receive eight per cent interest on the same, and that the forwarding bank shall receive the difference between eight per cent

and the rate of interest which the note bears. When installments of interest fall due, the transferee bank charges the same to bank N., and draws for the amount, and bank N. responds by paying the same and collects from the maker of the note, and thereafter and prior to the payment of the principal the transferee bank sells and transfers the note to plaintiff. Held, that the title to the note had passed to the transferee, and that it had a right to sell and transfer the note, and that the holder thereof may maintain its action for the collection of the same.—*Home Land Co. v. Osborn*, 19 Idaho, 95, 112 Pac. 764.

Editorial Notes.

Negotiable instruments, what are: 14 Am. Dec. 421; Ann. Cas. 1912D, 4; 30 L. R. A., N. S., 40.

Indorsement "without recourse": 87 Am. Dec. 389.

Negotiability, attorney's fee, effect of provision for payment of: 21 Am. Rep. 212; Ann. Cas. 1912B, 165; 20 Ann. Cas. 1371.

Negotiability of bill or note containing provision authorizing confession of judgment: Ann. Cas. 1913A, 206.

Negotiability of instrument referring to particular fund or account: Ann. Cas. 1913C, 932; 11 Ann. Cas. 599.

Accommodation paper, rights and liabilities of makers and indorsers: 31 Am. St. Rep. 745.

Discharge of accommodation party under negotiable instruments law by extension of time to principal debtor: Ann. Cas. 1913C, 527; 13 Ann. Cas. 999.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

Liability on check given for gambling purposes. See Gaming, I.

Purchase by attorney of note at request of one of the makers. See Attorney and Client, I.

Waiver of protest, presentment and notice. See post, VI.

(A) INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.

The undertaking of an indorser is conditional; that is, he promises to pay, provided payment shall be demanded of the maker and due notice of his neglect or refusal to pay shall be given.—*Ankeny v. Henry*, 1 Idaho, 229.

A surety, guarantor or indorser of a promissory note is deemed to contract that the principal maker is in every way competent to contract in the way he has done.—*Caldwell v. Buddy*, 2 Idaho, 1 (5), 1 Pac. 339.

The payee of a bank check may look to the drawer thereof for its collection, and is not required to apply money in its hands on deposit in the name of an indorser, in payment of such check.—*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 128 Am. St. Rep. 81, 21 L. R. A., N. S., 703, 99 Pac. 833.

One who signs his name on the back of a note prior to its delivery, without making

any further indorsement indicating his intention to be bound otherwise, must be held as an indorser under R. C. 3520.—*Bank of Montpelier v. Montpelier etc. Co.*, 16 Idaho, 730, 102 Pac. 685.

Where the maker of a promissory note subsequent to the maturity thereof executes a mortgage in favor of the payee, and thereafter the payee, with the consent of the mortgagor, sells and disposes of the property at private sale and applies the proceeds toward the payment of the debt and the indorsers are sued for the balance due, the fact that such sale was not made under legal process, as prescribed by the statute for the foreclosure of mortgages, is not available as a defense to the indorsers upon such paper, where their indorsement was made prior to the delivery of the paper and without reference to the mortgage.—*Bank of Montpelier v. Montpelier etc. Co.*, 16 Idaho, 730, 102 Pac. 685.

Editorial Notes.

Indorsement by one not a payee: 3 Am. Dec. 571; 56 Am. Dec. 359.

Indorser before delivery, liability of: 27 Am. Rep. 580; 39 Am. Rep. 557; 72 Am. St. Rep. 676; 18 L. R. A. 33.

Indorsement in blank by a person other than the payee or holder: 29 Am. St. Rep. 297.

(B) INDORSEMENT FOR TRANSFER.

The person receiving a note by indorsement contracts with the indorser whom he expects to hold that he will present it to the maker at maturity, for payment, and if not paid that he will give notice of nonpayment without delay.—*Aukeny v. Henry*, 1 Idaho, 229.

Where a note payable to A., as agent, has been indorsed and transferred by A. as an individual before maturity and for a valuable consideration, the indorsee may sue thereon. *Yates v. Spofford*, 7 Idaho, 737, 97 Am. St. Rep. 267, 65 Pac. 501.

Under R. C. 3508, the holder of a negotiable instrument may sue thereon in his own name even though he is only a holder for collection.—*Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393.

Editorial Notes.

Bills and notes procured by frauds, rights of bona fide purchasers of: 41 Am. Rep. 607.

Indorsement without recourse: 134 Am. St. Rep. 993.

(C) ASSIGNMENT OR SALE.

Discharge in insolvency as bar to notes held by nonresident assignee thereof. See Insolvency.

The assignee of a note takes it subject to any defense which the maker had against the original payee at the time of the assignment.—*First Nat. Bank v. Williams*, 2 Idaho, 670 (618), 23 Pac. 552; *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

The indorsee of a non-negotiable instrument holds it subject to all the defenses,

equities and counterclaims existing between the maker and the original payee.—*Union Stockyards Nat. Bank v. Bolan*, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508; *Kimpton v. Studebaker Bros. Co.*, 14 Idaho, 552, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126, 94 Pac. 1039.

Where a note was transferred by indorsement long before the assignment of a mortgage given to secure payment of the note, such assignment of the mortgage would not have the effect of placing the purchaser in the position of one taking title by assignment.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

(D) BONA FIDE PURCHASERS.

Plaintiff was the agent and manager of a foreign insurance company, which was doing business in this state without having first complied with the requirements of Const., article 11, section 10, and R. S. 2653, as amended by Laws 1903, page 49, making it unlawful for any foreign corporation to transact business in this state without having designated a statutory agent and filed its articles of incorporation. A solicitor for such company took defendant's promissory note in payment of a premium on a policy of life insurance, and thereafter assigned such note to plaintiff, who advanced to the solicitor the amount of his commission, the solicitor agreeing to repay the plaintiff in case the defendant failed to pay the note. Held, that plaintiff was not an innocent purchaser of the note for value.—*Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873.

Under R. C. 3513, mere suspicious circumstances are not sufficient to charge the purchaser of a promissory note with bad faith and notice of equities and defenses, but in order to charge the paper in his hands with prior equities and defenses, his notice must be actual, either of the facts constituting the equities and defenses or of such circumstances that his action in taking the paper in the face of such knowledge amounts to bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative issues as to diligence or negligence.—*Winter v. Nobs*, 19 Idaho, 18, Ann. Cas. 1912C, 302, 112 Pac. 525.

The mere failure to pay a periodical installment of interest does not amount to a dishonor of a negotiable instrument, and that fact alone will not charge the purchaser with notice of any fraud or misrepresentation in the contract out of which the note arose, or in the issuance and circulation of the note.—*Winter v. Nobs*, 19 Idaho, 18, Ann. Cas. 1912C, 302, 112 Pac. 525.

An instruction, which directs the jury that the presence of suspicious circumstances means bad faith, is erroneous. The existence of suspicious circumstances alone will not destroy the good faith of a transaction, but it is such circumstances as would charge the purchaser of a note, as an ordinarily prudent man, with bad faith or notice of

the infirmity in the instrument, or defect in the title of the person from whom he makes the purchase.—*Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52.

Where action is brought upon a promissory note, and it is alleged that the plaintiff purchased the note before maturity in due course of business and paid therefor a consideration, and an answer is made denying the transfer before maturity, or at all, for value or otherwise, and that the note was fraudulent from its inception, the jury may take into consideration all the circumstances surrounding the transaction in determining whether the purchase was made in good faith, and whether such circumstances were sufficient to give notice to the plaintiff or to lead an ordinarily prudent man to make inquiry as to whether the note possessed any infirmities which would affect its collection, and if the jury conclude that the circumstances surrounding the purchase of the note were sufficient to cause an ordinarily prudent man to make inquiry or investigate the circumstances under which the note was executed, and the plaintiff refrained from making such inquiry, then and in such case such facts were sufficient to authorize a jury to find that such holder was not a holder in good faith and without notice.—*Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52.

Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than is chargeable to those who purchase such paper in due and regular course of business.—*Vaughn v. Johnson*, 20 Idaho, 669, 37 L. R. A., N. S., 816, 119 Pac. 879.

The purchaser of negotiable paper in due course, and before maturity, is under no duty to make inquiry as to the title to such paper, fair and regular on its face, nor is he under any duty to inquire into the consideration given for the note or of the transaction out of which it arose. He is only chargeable with facts which actually come to his knowledge; that is, actual knowledge of a defect in the title, want of consideration, or such facts as would constitute a defense to the note as between the maker and original payee, or actual knowledge of such facts and circumstances as would lead an honest and fair business man to make further inquiry and which inquiry if made would lead to the discovery of the fraud, defect and defenses.—*Vaughn v. Johnson*, 20 Idaho, 669, 37 L. R. A., N. S., 816, 119 Pac. 879.

The mere fact of the purchase, by one who invests his money in commercial paper, of a promissory note, fair and regular on its face, from a person who has lawsuits over the collection of other notes, or who has a shady reputation as to his business transactions, is not of itself sufficient to put an otherwise bona fide purchaser on notice that there was fraud practiced in the procurement of the note.—*Vaughn v. Brandt*, 21 Idaho, 628, 123 Pac. 591.

The principal owner in a bank, who was vice-president and general manager thereof, was indebted to the bank on unsecured notes

in the sum of \$76,000 at the time it became insolvent and went into the hands of a receiver. While the receiver was in charge thereof such managing agent procured one of the principal depositors in the bank, who held a certificate of deposit for \$61,000, and to whom he had for many years sustained a confidential relation, to surrender up to the receiver such certificate of deposit and give her promissory notes for the difference between the amount of such certificate of deposit and the vice-president and managing agent's promissory notes. Such transaction was procured through fraudulent practices and fraudulent representations by the managing agent, and the receiver had no actual knowledge of the fraudulent practices and representations, but had knowledge of the relation such officer had previously sustained to the bank and of his indebtedness thereto, and with this knowledge surrendered up the notes, amounting to \$76,000, and received the certificate of deposit from the depositor and her promissory notes for the difference, and received all the stock held by the managing agent in such institution. Held, that the receiver, as the representative and trustee of the depositors of such institution and of such insolvent institution, is chargeable with notice of the fraud practiced in procuring such note; and the defense of fraud in the inception thereof is a good defense against the receiver as the payee of such note.—*Brown v. Miller*, 22 Idaho, 307, 125 Pac. 981.

Where fraud has been practiced by a third party in procuring the maker of a note to execute such note in favor of the payee, and, although the payee does not have actual notice of such fraud, if he participates in the transaction and gives a part of the consideration therefor, and receives advantages and benefits therefrom, the law will put him on notice as to the whole consideration and circumstances under which such note was executed.—*Brown v. Miller*, 22 Idaho, 307, 125 Pac. 981.

The payee of a bank check prior to obtaining the same represented and promised to deposit certain securities with the drawer as security for the debt for which the check was given. The payee then indorsed the check to plaintiff for a valuable consideration. Both plaintiff and the drawer of the check heard the statements and representations made by the payee but neither of them knew that such representations were false and made for a fraudulent purpose. A written contract was made between the drawer and the payee of the check as to the deposit of the securities and it was upon that instrument that the drawer delivered the check. Held, that plaintiff was a bona fide holder of the check.—*Nelson v. Hudgel*, 23 Idaho, 327, 130 Pac. 85.

Under R. C. 3514, fraud, misrepresentations, and no consideration are not available as a defense, where the evidence clearly shows, and is in no way contradicted, that the plaintiff is the holder of the note sued upon, free from any defect of title of prior parties, and free from defenses available to prior parties among themselves.—*South-*

west Nat. Bank v. Baker, 23 Idaho, 428, 130 Pac. 799.

Editorial Notes.

Negotiable instruments, bona fide holder of, who is: 3 Am. Dec. 235; 9 Am. Dec. 272; 44 Am. Dec. 698.

Negotiable, bona fide holder's right to recover on: 26 Am. Dec. 156.

Bona fide purchaser, transferee in payment of an antecedent debt, whether is a: 35 Am. Rep. 688; 1 Ann. Cas. 275; 31 L. R. A., N. S., 288.

Fraud in inception of negotiable, does not prejudice a bona fide holder: 11 Am. St. Rep. 309.

VI. PRESENTMENT, DEMAND, NOTICE AND PROTEST.

Liability of bank for failure to protest. See Banks and Banking, III, (D).

The language of the statute concerning the damages to be allowed on protested bills of exchange clearly imports that it was not the intention of the legislature to restrict such damages to bills drawn by one person or corporation here on another corporation or person elsewhere.—*Hazard v. Cole*, 1 Idaho, 276.

Where a note is payable in bank, there is no necessity that a demand of payment be made prior to suing on the note.—*Sabin v. Burke*, 4 Idaho, 28, 37 Pac. 352.

Under R. S. 3546, the holder of a check or bill of exchange payable at sight or on demand is entitled to ten days after the time in which it could, with reasonable diligence, be transmitted for presentment.—*Chambers v. Custer County*, 8 Idaho, 724, 71 Pac. 113.

The word "protest" in its popular sense, as generally and ordinarily used in commercial transactions, covers and includes all those acts and things necessary to be done in order to bind the indorser for the payment of the debt evidenced by the paper indorsed.—*Bank of Montpelier v. Montpelier etc. Co.*, 16 Idaho, 730, 102 Pac. 685.

One who indorses a promissory note and at the same time writes above his signature the words "protest and notice of protest waived," thereby waives presentment and demand for payment and all steps necessary to be taken to bind an indorser on commercial paper.—*Bank of Montpelier v. Montpelier etc. Co.*, 16 Idaho, 730, 102 Pac. 685.

Under the negotiable instrument law, a waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver, not only of a formal protest, but also of a presentment and notice of dishonor.—*Bank of Montpelier v. Montpelier etc. Co.*, 16 Idaho, 730, 102 Pac. 685.

As a general rule, the question of what is a "reasonable time" in which to present for payment a promissory note which was indorsed after maturity is one of fact to be determined by the circumstances of each par-

ticular case.—*Sheffield v. Cleland*, 19 Idaho, 612, 115 Pac. 20.

Editorial Notes.

Demand and notice of dishonor, what excuses: 1 Am. Dec. 99.

Notice of nonacceptance, necessity of: 2 Am. Dec. 619.

Negotiable instruments, waiver of demand and notice by taking security: 4 Am. Dec. 49.

Negotiable, demand and notice of dishonor, waiver of by promise to pay made after maturity: 8 Am. Dec. 304.

Notice of dishonor, how served: 38 Am. Dec. 607.

Checks, waiver of presentment of and notice of dishonor: 11 Am. Dec. 681.

Demand and notice of dishonor, waiver of by taking security: 39 Am. Dec. 95.

Demand when maker is out of the state: 13 Am. Dec. 346.

Presentment, place of: 15 Am. Dec. 643.

Protest, purpose, mode, and sufficiency of: 43 Am. Dec. 216.

Waiver of right to demand and notice on part of indorser, proof of by parol: 57 Am. Dec. 665.

Presentment for payment, what sufficient: 24 Am. Rep. 160.

Protest, to whom to be given when indorser is insolvent or bankrupt: 54 Am. Rep. 818.

Foreign, demand, protest, and notice of dishonor of bills of exchange, what law governs: 121 Am. St. Rep. 870.

Sufficiency of presentment and demand of payment of negotiable instrument by telephone: Ann. Cas. 1912A, 862.

Effect of giving notice of dishonor of bill or note to part only of joint indorsers: Ann. Cas. 1912D, 353.

VII. PAYMENT AND DISCHARGE.

Check in partial payment, when not considered as release in full. See Accord and Satisfaction.

Action to cancel promissory note which has been paid. See Cancellation of Instruments, I.

Where it is stipulated in a promissory note that a debt shall be paid at the residence of the payee and that the payor shall also pay exchange charges, and the payee thereafter receives and accepts the payment at the residence of the payor, he thereby waives exchange charges, and cannot thereafter recover such charges.—*Chase Nat. Bank v. Meholin*, 18 Idaho, 308, 109 Pac. 510.

VIII. ACTIONS.

Actions to cancel. See Cancellation of Instruments.

(A) RIGHT OF ACTION.

A note without grace, made payable at a bank, placed and remaining therein for collection until due, may be sued upon after banking hours on the evening of the day it falls due, where the opening and closing hours were well known to the maker.—*Sabin*

v. Burke, 4 Idaho, 28, 37 Pac. 352; *Sabin v. Burke*, 4 Idaho, 111, 37 Pac. 357, 352.

In an action on a note and mortgage, the complaint showed that the owner of the note, becoming indebted to the maker, indorsed on the note the amount of such indebtedness and then assigned the note so indorsed to a third person in consideration of the payment of the balance due on the note after deducting the amount of the indorsement. The complaint further alleged that the indorsement was made by mistake, but failed to allege how the mistake occurred. Held, that the original owner of the note retained no interest therein after the assignment and had no right of action thereon.—*Elg v. Hoff*, 7 Idaho, 330, 63 Pac. 37.

The bona fide holder of a note payable to C., agent, and by such agent indorsed and delivered before maturity for a valuable consideration, may maintain an action thereon. *Yates v. Spofford*, 7 Idaho, 737, 97 Am. St. Rep. 267, 65 Pac. 501.

The payee of a bank check may maintain an action against the drawer to recover the debt evidenced by such check upon the drawee refusing to pay the same.—*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 128 Am. St. Rep. 81, 21 L. R. A., N. S., 703, 99 Pac. 833.

Where it appears from the evidence that the promissory note sued on belonged to the bank of which the plaintiff was cashier and to whom the bank had assigned the same for collection, it was error to grant a nonsuit on the ground that the plaintiff was not the real party in interest.—*Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393.

(B) DEFENSES.

Fraud as defense in action on conditional sale note. See Fraud, II.

One of the two joint and several makers of a promissory note cannot defend on the ground that the signature of the other maker was procured by fraud.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

Inadequacy of consideration is no defense to an action on a promissory note unless there was also fraud on the part of the promisee.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

The maker of a promissory note cannot avoid payment of the same on the ground of failure of consideration, where the answer and proofs admit that there was not a total failure of consideration, and that he in fact received and retains a part of the consideration as the same was agreed upon.—*Daniels v. Englehart*, 18 Idaho, 548, 111 Pac. 3.

Where there has been a partial failure of consideration for the execution of a promissory note, the maker of the note, in order to obtain relief, must either rescind the contract and return the consideration received, or claim damages for breach of the contract, or pursue some remedy whereby the holder of the note may be enabled to receive

just compensation for such part of the consideration as actually passed.—*Daniels v. Englehart*, 18 Idaho, 548, 111 Pac. 3.

Editorial Notes.

Acceptor, defenses available to: 1 Am. St. Rep. 135.

Fraud in procuring the delivery of negotiable, when available as a defense: 37 Am. St. Rep. 458.

Right of indorser of note to set off against note individual debt due him from holder of note: Ann. Cas. 1913A, 1302.

Right to set up defense of total or partial failure of consideration under general issue or denial in action on negotiable instrument: Ann. Cas. 1913B, 318.

(C) PARTIES.

Right to sue guarantor. See Guaranty.

(D) PLEADING.

Where an answer in an action on promissory notes contains among other defenses an averment that "said notes and accounts have been fully paid," an objection that the answer does not set forth any defense should be overruled.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

In an action on promissory notes given as payment of the purchase price of mining property, defendant alleged fraudulent representations in the sale of such property. No offer to return the property was made, and the answer showed that the property had been sold to others. Held, that the answer was properly stricken from the files as containing no defense.—*Cowen v. Harrington*, 5 Idaho, 329, 48 Pac. 1059.

Where the complaint in an action on checks showed that the payee received the checks, drawn on a bank in the adjoining county, at least sixteen days prior to the insolvency of the bank, and it was not alleged that the checks were presented or reasonable effort made to present them nor that plaintiff had any reasonable excuse for not sooner presenting them, the complaint is demurrable.—*Fox v. Rogers*, 6 Idaho, 710, 59 Pac. 538.

In an action by the assignee of a promissory note and mortgage, the answer pleaded a total failure of consideration for said note and mortgage and also a breach of covenant against encumbrances in the deed, which was given as consideration for the note and mortgage. Held, that it was error to strike such defenses from the answer.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

A complaint alleging assignment of a note sued on may be amended so as to set up transfer and title by virtue of an indorsement.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

In an action on a promissory note where the complaint alleges that the note sued on was assigned to plaintiff by a former owner, and fails to allege that plaintiff holds the

same as owner or for collection only, and the defendants desire a more definite statement in regard to that question, they must demur on the ground of ambiguity or uncertainty, or they waive the same.—*Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393.

Where the indorsee of a promissory note, claiming to be a bona fide holder thereof, sues the maker thereof, and defendant sets up as one of his defenses that the payee is a foreign corporation doing business in this state and that it has failed to comply with the constitution and laws of the state relative to foreign corporations doing business therein, it is error for the trial court to strike such defense from the answer.—*Union Stockyards Nat. Bank v. Bolan*, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508.

A complaint alleged that H. was indebted to plaintiffs, that defendants agreed to pay such indebtedness to plaintiffs on consideration that plaintiffs release H. from his said obligation, that plaintiffs did so release H. and accepted the promise of defendants therefor. The answer denied the allegations of the complaint and set forth a written order of H. on defendant as president of a mining company to pay to plaintiff "eleven hundred (1100), same to be paid out of my stock placed with your Co., (Tri-State Realty Co.) for sale, when sale is made," and further that defendant as such president, and not otherwise, indorsed on said order a conditional acceptance. The court found in favor of the cause of action set forth in the complaint and also found that the order and acceptance stated in the answer had been made. Held, that the fact that defendants might not be liable on the contract pleaded in the answer did not negative the fact that they were liable on the cause of action stated in the complaint and that therefore Laws 1903, page 401, section 126, relating to conditional acceptances of bills of exchange had no application.—*McCallum v. McClarren*, 15 Idaho, 374, 98 Pac. 200.

In an action on a bank check, the defense that the drawer thereof was incapable by reason of intoxication from making the contract cannot be proven unless pleaded.—*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 128 Am. St. Rep. 81, 21 L. R. A., N. S., 703, 99 Pac. 833.

(E) EVIDENCE.

Note showing alteration inadmissible without explanation. See Alteration of Instruments.

In an action on a promissory note given as the purchase price of a stallion defendants claimed fraud in the inception of the note in that the horse was not as represented. The evidence showed that defendants retained the horse for nearly two years without repudiating the sale or offering to return the horse. The evidence showing that plaintiff had purchased the note for value before maturity in the ordinary course of business was uncontradicted. Held, not to show fraud or that plaintiff was not an innocent purchaser.—*First Nat. Bank v. Skinner*, 4 Idaho, 673, 43 Pac. 679; *Johnson*

v. Linford, 4 Idaho, 677, 43 Pac. 680; Bank of Troy v. Linford, 4 Idaho, 677, 43 Pac. 680.

In the absence of fraud, accident or mistake, parol evidence of an oral agreement contemporaneously made with the execution of a promissory note cannot be admitted to show that the note, though payable in money, was by such agreement to be paid in work and labor.—Stein v. Fogarty, 4 Idaho, 702, 43 Pac. 681.

The law presumes that one who draws a check on a bank has funds in the bank with which to pay such check.—Fox v. Rogers, 6 Idaho, 710, 59 Pac. 538.

In a suit on a note by the payee thereof, defendant pleaded want of consideration, alleging that plaintiff had placed a deed in escrow to be delivered to defendant on payment of the note and that plaintiff had withdrawn the deed from escrow before beginning suit on the note. Held, that defendant should have been permitted to show want of consideration.—Maydole v. Peterson, 7 Idaho, 502, 63 Pac. 1048.

The production of the note sued on, bearing indorsement regular in form, is sufficient prima facie evidence to entitle plaintiff to recover.—Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650.

Possession of a note sued on, even without explanation, is prima facie evidence that the holder is the proper owner or lawful possessor of the instrument and that he purchased the same before maturity, for a valuable consideration.—Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650.

Where the answer in an action on a note denies plaintiff's title thereto, evidence to show the assignment of a mortgage securing the note offered, for the purpose of showing that plaintiff had title to the note by assignment and not by indorsement, was inadmissible.—Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650.

In an action for the balance due on a promissory note executed by two defendants, the defense was payment. The evidence showed that plaintiff had settled with one of defendants for his half of the note. Plaintiff introduced a statement which was admitted to be a correct statement of the account as it appeared on its books and which showed a balance due from the other defendant. Defendants claimed that plaintiff had failed to make proper credits on its books. Certain promissory notes and receipts for divers sums of money were then offered in evidence by defendants. Held admissible, as they clearly bore upon the correctness and had some reference to the copy of the book account introduced by plaintiff.—Vollmer Clearwater Co. v. Rogers, 13 Idaho, 564, 92 Pac. 579.

Where the question of the authority and action of an agent is involved, it is not error to permit the principal to answer the following question: "You may tell the jury whether or not you gave to H. or authorized him in any manner to have notes in that style, or any note other than the note

which is offered in evidence, and the yellow paper, taken in settlement of that horse."—Rosenagle v. Armstrong, 17 Idaho, 246, 105 Pac. 216.

Where the issue is the execution and delivery of a promissory note to the agent of the payee, and the defendants offer to introduce a certificate of stock issued by the officers of the defendant company, who had organized as a company for the ownership and management of the property for which the note is alleged to have been given, and such certificate is offered for the purpose of corroborating their statements that they did not sign the note sued on, and it appears that the word "joint" appearing in such certificate was crossed out by the agent of the payee at the time of the transaction, it is not error to reject such offer for the reason that the real issue is the execution of the note and the written contract must prevail, and the action of the agent with reference to such certificate cannot affect the liability of the defendants, where the note is in the hands of an innocent purchaser.—Rosenagle v. Armstrong, 17 Idaho, 246, 105 Pac. 216.

Where the indorsee of a promissory note sues the makers and on the trial they establish the fact that the note was given in payment of the purchase price of an animal sold under fraudulent misrepresentation as to character and condition, and under a false and fraudulent guaranty, by R. C. 3516, the burden of proof shifts from the defendants to the plaintiff, to show that he acquired the note before maturity and in good faith for value.—Winter v. Nobs, 19 Idaho, 18, Ann. Cas. 1912C, 302, 112 Pac. 525.

In an action against the indorsee on a promissory note indorsed after maturity, evidence as to what transpired at the time the note was indorsed is admissible.—Sheffield v. Cleland, 19 Idaho, 612, 115 Pac. 20.

A promissory note introduced in the trial of an action brought thereon is prima facie evidence that the debt evidenced thereby is unpaid.—Sheffield v. Cleland, 19 Idaho, 612, 115 Pac. 20.

In an action on a promissory note by an alleged bona fide purchaser thereof, all evidence tending to show plaintiff's knowledge of any facts and circumstances in regard to any defect in the title to said promissory note should be admitted.—Shellenberger v. Nourse, 20 Idaho, 323, 118 Pac. 508.

Where, under the evidence, it was shown that the promissory note sued on was obtained by the payee through fraud, without consideration, and under an agreement that it would not be transferred, on such showing the burden of proof shifted to the respondent to show that he was a bona fide holder thereof in due course.—Shellenberger v. Nourse, 20 Idaho, 323, 118 Pac. 508.

In an action on a promissory note by an alleged innocent purchaser thereof, where it was claimed that there was fraud in the inception of the note and want of consideration therefor, it was error for the court to exclude any evidence tending to show the

plaintiff's relation as agent or otherwise with the payee up to the time of the alleged purchase of said note.—*Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508.

In an action upon a promissory note given in payment for the purchase of a stallion, where it appears that the sale of such stallion is made by an agent of the principal, it is proper to show the representations and statements made by such agent where fraud and misrepresentations and breach of warranty are plead as a defense, and the principal is bound by such representations and warranties made by such agent, and such evidence may be considered by the jury in determining the good faith and bona fides in the purchase of such note from such principal, where such purchaser took such note with knowledge of such facts or knowledge of circumstances which would lead a reasonable and prudent man to know such facts at the time such purchase was made.—*Park v. Brandt*, 20 Idaho, 660, 119 Pac. 877.

Mere evidence of fraud or deception in procuring a negotiable promissory note which is fair and regular on its face is not sufficient to raise a presumption of bad faith against the purchaser of such paper in due course, nor should such fact be given any consideration by a jury in determining the other fact, namely, that the holder of the instrument had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.—*Vaughn v. Johnson*, 20 Idaho, 669, 37 L. R. A., N. S., 816, 119 Pac. 879.

Evidence of fraud in procuring the execution of a negotiable instrument shifts the burden of proof as to the good faith of a purchaser thereof before maturity and is admissible for that purpose, but of itself in no way tends to establish bad faith on the part of such purchaser.—*Vaughn v. Johnson*, 20 Idaho, 669, 37 L. R. A., N. S., 816, 119 Pac. 879.

Where the issue to be determined is the good faith of the holder of a negotiable promissory note who claims to have purchased the same for a valuable consideration before maturity and without notice of any defenses existing between the makers and payee, and the holder of such note testifies that he paid a specified sum for the note, it is competent for him to introduce in corroboration of such testimony the canceled check which he claims to have given in payment for such note.—*Winter v. Hutchins*, 20 Idaho, 749, 119 Pac. 883.

Evidence in an action on a note held sufficient to show that plaintiff was not an innocent purchaser.—*Vaughan v. Brandt*, 21 Idaho, 628, 123 Pac. 591.

Evidence in an action on promissory notes held sufficient to support the verdict of the jury on the question whether plaintiff was a bona fide purchaser for a valuable consideration before maturity.—*McCarty v. Lowry*, 22 Idaho, 17, 123 Pac. 943.

Whenever it is shown that the title of any person who has negotiated a note was de-

fective, the burden is immediately transferred to the holder to show that he or some person under whom he claims acquired title to the instrument as a holder in due course.—*Brown v. Miller*, 22 Idaho, 307, 125 Pac. 982.

The evidence in this case shows that there was fraud in procuring the promissory note sued on, and that it was without consideration, and when that was shown the burden of proof shifted to the plaintiff to show that the note was purchased in due course and for a valuable consideration, and without notice of fraud.—*Altschul v. Rogers*, 22 Idaho, 512, 126 Pac. 1048.

Evidence in an action on a note held to be positive, certain and uncontradicted that the instrument is complete and regular upon its face, and that the plaintiff purchased the note in the usual course of business of the bank in good faith and for value, before maturity, and at the time of the purchase, had no notice that said note had been dishonored or of any infirmity in the instrument or defect in the title of the person negotiating it.—*Southwest Nat. Bank v. Baker*, 23 Idaho, 428, 130 Pac. 799.

Editorial Notes.

Negotiable, indorsement, parol evidence to limit or vary effect of: 9 Am. Dec. 381.

Indorsement, parol evidence to vary effect of: 7 Am. St. Rep. 366.

Bills and notes, parol evidence of conditions in: 128 Am. St. Rep. 609.

Parol evidence of conditions in bills and notes: 128 Am. St. Rep. 609.

Admissibility of parol evidence to show when indorsement was made on note: Ann. Cas. 1913A, 882.

(F) AMOUNT OF RECOVERY.

Where the evidence in a suit on a note and to foreclose a mortgage amounting to \$11,000 shows a contract to pay \$2,000 attorney's fees, half of which has already been paid, and there is evidence to show the reasonableness of the attorney's fees allowed, it is not error to allow an attorney's fee of \$1,000.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

Where there is a balance due the plaintiff at the time suit was brought on promissory notes and payment thereof is made prior to the trial of the case, the attorney's fee will not be as much as if the case had been contested and gone to judgment.—*Rinker v. Laner*, 13 Idaho, 163, 88 Pac. 1057.

In an action on four promissory notes of \$100 each, plaintiff prayed for judgment in the sum of \$221 and an attorney's fee of \$100. Plaintiff admitted the receipt of \$218 to be applied on the notes four days after the action was begun. The evidence showed that defendant under authority of plaintiff had paid for him \$100 for a real estate commission and over \$100 for taxes and in services. Held, insufficient to support a verdict for \$193 in favor of plaintiff.—*Rinker v. Laner*, 13 Idaho, 163, 88 Pac. 1057.

(G) TRIAL.

Evidence in an action on a note given for the purchase price of corporate stock held sufficient to authorize the submission of the question of fraud to the jury.—*New Mexico etc. Co. v. Hobson*, 4 Idaho, 689, 43 Pac. 573.

After supplementary proceedings, plaintiff sued defendant alleging that defendant was indebted to plaintiff's execution debtor on a note. Plaintiff's evidence showed that defendant in good faith conveyed certain real estate to the wife of a guardian of such execution debtor and that the guardian thereupon surrendered the note to defendant as paid. Held, that a nonsuit was properly granted, the evidence being *prima facie* sufficient to show payment of the note and the question of the guardian's good faith not being involved.—*Aikins v. Wilson*, 7 Idaho, 12, 59 Pac. 932.

Where the answer in a suit on a note admits the execution thereof, but denies plaintiff's ownership or that he was a bona fide purchaser for value before maturity, and further alleges want of consideration for the note, and plaintiff rests after introducing the note in evidence, a motion for nonsuit should not be sustained.—*Yates v. Spofford*, 7 Idaho, 737, 97 Am. St. Rep. 267, 65 Pac. 501.

Where in an action by the indorsee of a promissory note the makers show fraud in the transaction for which the note was given, it is a question for the jury to determine whether plaintiff has satisfactorily met the burden of proof shifted to him to make good his claim to be an innocent purchaser. *Winter v. Nobs*, 19 Idaho, 18, Ann. Cas. 1912C, 302, 112 Pac. 525.

In an action on a promissory note, the following instruction should not have been given, to wit: "You are instructed that the holder of such note means the payee or indorsee thereof, who is in possession of such note, or the bearer thereof, and if you find from the evidence that the plaintiff is such a holder, then he is deemed to be the holder thereof in due course, that is, that he became the holder thereof before it was overdue and that he took it in good faith and for value, and at the time it was transferred to him he had no notice of any infirmity in the instrument or defect in the title of the person transferring it to him."—*Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508.

In an action on a note, the following instruction was erroneous: "You are instructed that the answer having admitted the execution of this note, but denying that the plaintiff is the owner by purchase before maturity, for a valuable consideration, and the defendant, having alleged want of consideration in the plaintiff, if you find from the evidence that the plaintiff is the holder of such note, then the burden of proving such allegation is on the defendant, by a preponderance of the testimony."—*Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508.

An instruction, which covers the provisions of R. C. 3509, and adds thereto, "and the court instructs the jury that if you find from the evidence in this action that the title of McLaughlin Bros. in controversy was defective by reason of fraud, illegal consideration, or for any reason, then it becomes incumbent upon the plaintiff to show that he was a holder in due course, and in order for him to do so he must prove sufficient to show that he is a holder within the meaning of the definition above given," is erroneous by reason of including the words, "or for any reason."—*Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52.

In an action by the indorsee of a note, an instruction that, in considering whether or not the plaintiff is a holder in good faith, the jury may consider the fact, if shown in evidence, as to whether the plaintiff has attempted to recover on the note from the indorsers, as he has a right to proceed against the indorsers, and may consider whether the plaintiff knew or was acquainted with the defendants or any of them, was proper, the evidence having shown that the plaintiff was well acquainted with the indorsers, and that they were perfectly responsible.—*Park v. Brandt*, 20 Idaho, 660, 119 Pac. 877.

An instruction to the jury that, if they find from the facts of the particular transaction "or knowledge of other like transactions of McLaughlin Bros. that the plaintiff is not acting honestly, then they had a right to find that he did not act honestly in the purchase of this note," was erroneous, in that it authorized the jury to infer that the purchase of a negotiable instrument was fraudulent where they found that such purchaser had subsequently done some act they did not consider honest and fair.—*Vaughn v. Johnson*, 20 Idaho, 669, 37 L. R. A., N. S., 816, 119 Pac. 879.

The question as to the good faith of the purchaser of a negotiable promissory note who claims to have purchased the same in due course before maturity and for a valuable consideration is a question of fact, to be determined by the jury in the light of all the facts and circumstances bearing upon the transaction.—*Winter v. Hutchins*, 20 Idaho, 749, 119 Pac. 883.

(H) APPEAL.

Where the evidence shows that the note sued on was assigned after maturity by payee's agent, who held the same for collection, and who had no authority to sell it and that prior to the action the payee had given the maker a full release thereof, a judgment for plaintiff on the note will be reversed.—*First Nat. Bank v. Carter*, 8 Idaho, 391, 69 Pac. 123.

Where it appears that the note sued on was given pursuant to a prior settlement of account between the parties, and by the express terms of the settlement and by the evidence it is shown that several items were left unsettled and the settlement agreement provided, "If there are any mistakes in this settlement and are afterward proven, they are to be corrected," a judgment for the face

of the note will be reversed.—*Quayle v. Ream*, 15 Idaho, 666, 99 Pac. 707.

BONA FIDE PURCHASERS.

Of negotiable paper. See *Bills and Notes*, V, (D).
Of bills and notes secured by mortgage. See *Mortgages*.

BONDS AND UNDERTAKINGS.

See *Bail and Recognizance*.

Bond of assignee in bankruptcy. See *Bankruptcy*.
Bonds required or incident to particular remedies or legal proceedings. See *Appeal and Error*; *Attachment and Garnishment*, III, (C); *Bail and Recognizance*; *Costs*; *Injunction*; *Claim and Delivery*.

For erection of bridges. See *Bridges*.

Bonds for performance of particular classes of fiduciary or official duties. See *Bankruptcy*; *Executors and Administrators*, and titles of specific officers.

Allegation of conversion by officer does not change action on bond to action in tort. See *Action*.

Official bonds. See *Officers and titles of specific officers*.

To stay foreclosure proceedings. See *Chattel Mortgages*, IX, (C).

Liability on postmaster's bond. See *Postoffice*.

Limitation of action on official bond. See *Limitation of Actions*, I, (B).

Where an action is brought to indemnify a party beneficially interested in the bond sued on, and not a party to its execution, the allegation that it is for his use is legal and proper.—*People v. Slocum*, 1 Idaho, 62.

The affixing of the figures "\$1,000" between the signature and the seal of the obligor to a bond, the penalty of which is \$2,000, will not have the effect to limit his liability to \$1,000.—*Dangel v. Levy*, 1 Idaho, 722.

A bond payable to the people of the United States will not sustain a judgment in favor of the people of the United States of the territory of Idaho, unless such bond is first reformed.—*United States v. Shoup*, 2 Idaho, 493, 21 Pac. 656.

In an action on a joint and several bond, all or any of the sureties may be sued.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

The fact that a surety on a bond did not justify will not release him from liability if the bond has been accepted without such justification.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

The surety is estopped from denying any fact recited in the bond when by such denial he seeks to avoid the bond in an action between the parties to the bond.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

Laws 1899, page 235, providing a form for undertakings in civil and criminal actions, is constitutional.—*Smith v. Haner*, 8 Idaho, 370, 69 Pac. 109.

Editorial Notes.

Failure of some of the obligors to sign bond, effect of: 28 Am. Dec. 679.

Bonds, coupons, assignability and negotiability of: 64 Am. Dec. 428.

Statutory bonds, adding conditions to not required by the statute, effect of: 67 Am. Dec. 771.

What may be deposited as money in lieu of written undertaking: *Ann. Cas.* 1912C, 356.

Form of judgment on penal bonds: 62 L. R. A. 427.

BOUNDARIES.

I. DESCRIPTION.

II. EVIDENCE, ASCERTAINMENT AND ESTABLISHMENT.

See *Fences*; *Party-walls*; *Public Lands*, II, (A).

Geographical or political divisions. See *Counties*; *Municipal Corporations*; *Schools and School Districts*.

Assessment districts. See *Municipal Corporations*.
Requirements of the statute of fraud. See *Frauds*, *Statute of*, VI.

Of mines and mining claims. See *Mines and Minerals*.

I. DESCRIPTION.

A riparian proprietor on a fresh-water stream, whether navigable or non-navigable, takes title to the thread of the stream.—*Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47; reversed by 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.

Editorial Notes.

Navigable rivers as boundaries: 10 Am. Dec. 385; 42 L. R. A. 502.

A meander line run in conformity to the United States statute in surveying public lands bordering on a navigable stream is not a line of boundary, but is intended only to designate the sinuosity of the bank of the stream, and as a means of ascertaining the quantity of land in the fractional subdivisions to be paid for by the purchaser, and the real and true monument in such case is the water-course, and not the meander line.—*Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47.

A conveyance of land bounded on a highway carries with it the fee to the center thereof, unless such inference be expressly excluded, and this rule is applicable where the land conveyed is a lot or parcel of a lot in a town or city designated on the plat by its number.—*Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

Editorial Notes.

Streets or highways, when included within boundaries: 54 Am. Dec. 797; 32 L. R. A., N. S., 778.

A riparian proprietor on a meandered lake, where the lake is circular in form, must, in determining the boundary line between his land and that of an adjoining riparian proprietor, extend the side line or boundary line on a deflected course from the intersection of such side line with the meander line to the center of the lake.—*Ulbricht v. Baslington*, 20 Idaho, 539, 119 Pac. 292, 294.

Section 2 of a circular of the United States general land office relative to the restoration of lost or obliterated corners defines an "obliterated corner" as one where no visible evidence remains of the work of the original surveyor in establishing it; and defines a "lost corner" as one the position of which cannot be determined beyond reasonable doubt, either from original or reliable marks or reliable external evidence. Held, that the evidence showed that the corner in question was an obliterated corner and not a lost corner.—*Craven v. Lesh*, 22 Idaho, 463, 126 Pac. 774.

Editorial Notes.

Waters and watercourses as boundaries: 30 Am. Dec. 286; 27 Am. St. Rep. 56.

Construction of "beginning at the side of a road": 39 Am. Rep. 305.

II. EVIDENCE, ASCERTAINMENT AND ESTABLISHMENT.

Mistake as to boundary line between coterminous owners, acquiescence and payment of taxes. See *Adverse Possession*.

Where coterminous owners of land establish a boundary line and take possession to the line so agreed upon, and one of them erects valuable improvements thereon and holds quiet and peaceable possession thereof without objection from the other coterminous owner or his grantees for a period of more than eight years, such line is binding on such coterminous owner and his grantees and they will be estopped to question it.—*Idaho Land Co. v. Parsons*, 3 Idaho, 450, 31 Pac. 791.

Where two persons purchase adjoining lands with reference to a division line which is accepted by them at the time of purchase, neither can thereafter question the correctness of that line in the absence of fraud or deceit, even though the line was fixed by mistake.—*Taylor v. Reising*, 13 Idaho, 226, 89 Pac. 943.

A township of land was segregated under the Carey act and, the government corners and boundary monuments having become obliterated, was surveyed under direction of a water company and divided into tracts. Defendant entered one of these tracts and plaintiff thereafter entered an adjoining tract, both believing the boundary line between the two tracts to be the line established and pointed out by the water company. Plaintiff erected improvements on the tract entered by him and with the assistance of defendant built a fence on said dividing line. Held, that the line so established by the water company and marked on the ground was the true dividing line, even though it did not conform to the survey made by the government.—*Taylor v. Reising*, 13 Idaho, 226, 89 Pac. 943.

In an action brought to determine the corners and lines of a government survey, in which the issue is made as to whether either of two different surveys conforms to the government survey, and as to whether the parties to the action entered such land according

to one of such surveys, any evidence in relation to the correctness of such surveys, the manner in which the same were made, and the circumstances under which the parties to said suit entered such land, is admissible. *Humphrey v. Whitney*, 17 Idaho, 14, 103 Pac. 389.

The purpose of a resurvey subsequent to taking of title by purchasers and settlers is to ascertain the lines of the original survey and the original boundaries and monuments as established and laid out by the survey under which the parties originally took title. *Bayhouse v. Urquides*, 17 Idaho, 286, 105 Pac. 1066.

Evidence held not sufficient to support the findings of fact to the effect that the division line fence has been regarded by all of the parties concerned or interested in said boundary line as the true and correct boundary line, and acquiesced in as the true and correct boundary line.—*Brown v. Brown*, 18 Idaho, 345, 110 Pac. 269.

Acquiescence in the maintenance of a line fence for a great length of time may be presumptive evidence of an agreement as to a boundary line, but is not conclusive evidence, and will not overcome a positive agreement or understanding that after the true line is established, the fence will be made to conform to it.—*Brown v. Brown*, 18 Idaho, 345, 110 Pac. 269.

Editorial Notes.

Location of boundaries by acquiescence or agreement: 69 Am. Dec. 711; 27 Am. Rep. 239.

Settlement of boundaries by parol: 13 Am. Dec. 224.

Settlement of disputed, by an express or implied agreement: 27 Am. Dec. 121.

General rule for the location of: 129 Am. St. Rep. 990.

BOUNTIES.

R. S. 1760b, prescribing the proof necessary to obtain the bounty offered for the destruction of wild animals, is not applicable in case of claims and demands for bounty on the wild animals designated by Laws 1901, page 205, which prescribes the bounty for killing coyotes, lynx and wildcats, the latter statute having superseded the former as to such animals.—*State v. Adams*, 10 Idaho, 591, 79 Pac. 398.

BRANDS.

See *Animals*.

On logs. See *Logs and Logging*.

BREACH OF MARRIAGE PROMISE.

An agreement to marry entered into within six months after the date of a decree of divorce, to be consummated and the marriage contract actually made after the expiration of six months from the date of such decree, is valid, and damages for a breach thereof may be recovered in a proper action.—*Harbold v. Doyle* (on rehearing), 16 Idaho, 671, 102 Pac. 158.

Editorial Notes.

Breach of marriage promise, actions for: 63 Am. Dec. 532.

Cause of action for, when incomplete: 1 Am. Rep. 520; 66 L. R. A. 801.

BRIDGES.

Action to cancel warrants on bridge fund. See Cancellation of Instruments.

Construction across canals and irrigation ditches. See Waters and Watercourses, IX, (B), 2, 7.

Ditch on public land entered as a townsite, duty to construct and maintain bridge thereover. See Public Lands, II, (B), 4.

Duty to construct bridge where canal or ditch is constructed across public highway. See Waters and Watercourses, IX, (B), 7.

A county is not liable for damages sustained by reason of negligence in the construction and maintenance of a bridge unless made so by statute.—*Davis v. Ada County*, 5 Idaho, 126, 95 Am. St. Rep. 166, 47 Pac. 93.

Under R. S. 1762, county commissioners have no authority to contract for the building of a bridge, the cost of which will exceed \$1,000, without a petition therefor from at least one third of the tax-paying voters of the county; and if the cost thereof, added to the other ordinary and necessary expenses, will exceed the county's revenue for the fiscal year, the commissioners cannot contract for such bridge, without being authorized by a two-thirds vote, at an election called and held for that purpose as provided by Const., article 8, section 3.—*Dunbar v. Board of Commrs. Canyon Co.*, 5 Idaho, 407, 49 Pac. 409.

R. S. 1762 provides for the erection of county buildings and improvements on petition of taxpayers, and for notice of such petition and of the nature and cost of said buildings or improvements contemplated. It further provides that notice for sealed proposals must be given by the clerk, containing explicit specifications of the buildings or improvements to be made or erected, and that the contract may be let to the lowest responsible bidder, unless all bids are rejected. Held, that the board of county commissioners cannot enter into a contract for the erection of a bridge without having adopted plans and specifications for the bridge prior to the notice for sealed proposals for the construction thereof.—*Andrews v. Board Commrs. Ada Co.*, 7 Idaho, 453, 63 Pac. 592.

R. S. 1762 provides for the erection of county buildings and improvements on petition of taxpayers and for notice of such petition and of the nature and cost of said buildings or improvements contemplated. It further provides that notice for sealed proposals must be given by the clerk, containing explicit specifications, of the buildings or improvements to be made or erected, and that the contract may be let to the lowest responsible bidder, unless all bids are rejected. R. S. 947 provides that the contract for the construction of a bridge must be let out to the lowest bidder, after reasonable notice given by the board of commissioners. Held,

that a contract for the erection of a bridge upon plans submitted by the bidder, and not upon specifications stated in the notice inviting bids, was void.—*Andrews v. Board Commrs. Ada Co.*, 7 Idaho, 453, 63 Pac. 592.

The question of issuing bonds for the erection of a bridge cannot be submitted to the electors where the board of county commissioners has failed to adopt plans and specifications for the bridge as required by R. S. 1762.—*Andrews v. Board Commrs. Ada Co.*, 7 Idaho, 453, 63 Pac. 592.

Where a bridge connecting two streets of a village is a part of the public thoroughfare and within the corporate limits, the village authorities have the power to permit or reject the application of anyone to construct any kind of a building connecting with the bridge.—*Village of Sandpoint v. Doyle*, 11 Idaho, 642, 4 L. R. A., N. S., 810, 83 Pac. 598.

Where a bridge connecting two streets of a village is a part of the public thoroughfare and within the corporate limits of the village, the village has complete and exclusive control over the bridge, with the duty of keeping it in repair and safe for travelers.—*Village of Sandpoint v. Doyle*, 11 Idaho, 642, 4 L. R. A., N. S., 810, 83 Pac. 598.

The fact that the board of commissioners submitted to the qualified electors of the county the question of issuing bonds to cover the cost of superintending the construction of a bridge, in addition to the contract price thereof, and that the voters voted in favor thereof, does not render the bonds void, as the work of superintending is a part of the construction.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

Since the repeal of R. S. 1762 by Laws 1905, page 75, no petition is necessary to confer jurisdiction on the board of county commissioners to construct a bridge, as R. S. 3604, as amended by Laws 1899, pages 136, 443, leaves the matter to the judgment of the board of county commissioners as to whether or not the proposed issue of bonds therefor be submitted to the electors of the county.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

Where the record shows that the board of county commissioners, when in regular session, opened bids and awarded a contract for a bridge, and ordered an election to be called and held for the purpose of submitting to the qualified electors the question of issuing bonds of the county for the construction of said bridge, there was a sufficient finding under R. S. 3604, as amended by Laws 1899, pages 136, 443, as to the necessity and advisability of constructing said bridge.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

To authorize the issuance of municipal coupon bonds for the construction of a bridge, the board of county commissioners should find, and the record should show, a substan-

tial compliance with each step required by the statutes.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

Where a municipality constructs a bridge four hundred and fifty feet long across a small stream twenty-five feet wide and the adjacent ravine or natural depression in the surface of the ground, and such bridge is at the height of twenty feet from the ground at the place where it passes an abutting property owner's lot, it may adopt reasonable rules and regulations with reference to the erection and maintenance of buildings and all approaches to the same, and entrance to and over the street, but it cannot absolutely prohibit the property owner from connecting his property with the bridge so as to have entrance thereto or destroy his right of ingress and egress.—*Village of Sandpoint v. Doyle*, 14 Idaho, 749, 17 L. R. A., N. S., 497, 95 Pac. 945.

The board of county commissioners has the power to issue county bonds for bridges built in the county outside of a highway district and to levy taxes on the entire county for the payment of such bonds, provided it is determined that that portion of the county included in a highway district is benefited by the building of such bridges.—*Reinhart v. Canyon County*, 22 Idaho, 348, 125 Pac. 791.

Under R. C. 874, defining highways, public bridges are such as are held in trust for the public by municipalities, such as counties, cities, towns, and villages, and are open and common to the public without payment of toll. The municipal division is not the owner of the public highway or the bridges, but is recognized to have possession and control of the same, and is merely trustee of the public under the laws of the state.—*Bonneville Co. v. Bingham Co.*, 24 Idaho, 1, 132 Pac. 431.

Bridges are a part of the highways of the county.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

BROKERS.

Where the owners of a mine authorize an agent to sell it for them, or bring them a purchaser at a fixed price, with the understanding that the agent is to have all he can get above that price, the agent may make the best bargain he can with anyone; or he may purchase it himself, and he is under no obligation to disclose to his principals anything he may have discovered concerning the mine after such arrangement is made.—*Synnott v. Shaughnessy*, 2 Idaho, 122, 7 Pac. 82.

Where an agent acts openly and with the consent of both seller and purchaser, he may contract for and receive commissions from both.—*Synnott v. Shaughnessy*, 2 Idaho, 122, 7 Pac. 82.

Where a party employs a real estate broker to sell a piece of property at a stipulated price, at an agreed commission, and the broker finds a purchaser and introduces him to the seller, and afterward the seller revokes the agent's authority and sells the property to

such purchaser at a less price, a verdict in favor of plaintiff for his commission will not be disturbed.—*Smith v. Anderson*, 2 Idaho, 537, 21 Pac. 412.

A broker claiming commissions under a written agreement which provides that the party of the first part offers to sell certain mining property at a stated price and to pay second parties \$12,000 for services rendered in selling or placing said property, upon terms acceptable to first party, must allege in direct and positive terms that second party did render services which resulted in the sale thereof, or that he produced a party ready, willing and able to purchase said property upon the terms named or his complaint will be demurrable.—*Jacobs v. Shenon*, 3 Idaho, 274, 29 Pac. 44.

In an action for commissions for the sale of real estate, the first count alleged an express contract; the second count was on a quantum meruit; and the third count alleged that by reason of the defendants' actions, specifying them, plaintiffs were prevented from making the sale, to their damage, etc. Held, that the complaint stated a cause of action.—*Spotswood v. Morris*, 10 Idaho, 129, 77 Pac. 216.

Where a person employs a real estate broker to sell certain land at a stipulated price, and the broker procures a purchaser who purchases at that price, he is entitled to his commission though he does not formally introduce the purchaser or notify the seller that he has a purchaser for the land.—*Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490.

Evidence in an action for real estate commissions held to show that plaintiffs did not procure a purchaser, but that the purchaser was procured by another.—*Spotswood v. Morris*, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

In an action to recover damages for failure to procure title to real estate, the evidence showed that plaintiff, desiring to purchase such land, went to defendants, who were real estate agents. They told him that they had a letter from the owner in which she offered to take \$1,700 for the tract and that they would try to procure it for him at that price. He agreed to pay them a commission of \$60 for their services, and also paid \$100 to them, receiving the following receipt, "Received of K. one hundred dollars 1st payment Lot 4, Vesey Park, balance 1660, to be paid as soon as deed can be procured." Defendants then informed the owner that they had a purchaser at \$1,700; she refused to take less than \$2,000, of which fact defendants informed plaintiff. Thereafter defendants, at plaintiff's request, had further negotiations with the owner endeavoring to secure the land for \$1,700 but were not successful. They thereupon tendered back the \$100 to plaintiff. Held, that plaintiff could only recover the sum of \$100 so tendered.—*Kroeger v. Good*, 13 Idaho, 184, 89 Pac. 632.

Where a real estate agent is employed to sell a piece of property for a net sum to the owner, and he procures a purchaser who is ready, willing and able to buy the property

and pay therefor a specified sum which is in excess of the net sum to be received by the owner, and before the sale is closed and consummated the owner of the property sells to the purchaser thus procured by the agent, with the knowledge that such agent has procured the purchaser and exhibited the property to him and has been dealing with him with reference thereto, the owner will be held liable to the agent for a commission equal to the difference between the net price which he was to receive and the price the purchaser was ready, willing and able to pay to the agent for the property.—*Church v. Dunham*, 14 Idaho, 776, 96 Pac. 203.

Where an agent is employed to sell a piece of property at a specified net price, and the agent procures a purchaser who is ready and willing and able to pay a sum in excess of the net price, and notwithstanding such fact and information thereof the owner himself sells the property to such purchaser, he will be held liable for the commission the same as if the agent had completed the sale himself.—*Church v. Dunham*, 14 Idaho, 776, 96 Pac. 203.

Where the evidence shows that defendant did not act in good faith in selling property listed with plaintiff or in dealing with him with respect to his brokerage commissions on such sale, an instruction in effect withdrawing the defense of good faith was not erroneous.—*Church v. Dunham*, 14 Idaho, 776, 96 Pac. 203.

It is immaterial whether the contract of a real estate broker was one to sell the property or to procure a purchaser therefor, where the evidence shows that the conduct of the owner was such as to prevent and make it impossible for the agent to consummate the sale.—*Church v. Dunham*, 14 Idaho, 776, 96 Pac. 203.

Where the evidence shows that property is listed with real estate brokers; that they show such property to a prospective purchaser, who contracts to purchase the same, and pays part of the purchase price and takes possession of the property purchased under said contract, the evidence is sufficient to require a submission of said case to the jury, and it is error to grant a nonsuit therein.—*Colvin v. Lyons*, 15 Idaho, 180, 96 Pac. 572.

Evidence in an action for commissions for the sale of water rights examined and considered, and held, that it was sufficient to make out a prima facie case, and that it was error to take the case from the jury and dismiss the action.—*Mineau v. Imperial Dredge etc. Co.*, 19 Idaho, 458, 114 Pac. 23.

A broker was employed by the owners of property to find a purchaser, the owners to pay a commission of ten per cent upon such agent making such sale, within eighteen months. Thereafter said agent produced a purchaser who enters into a contract with the owners in which the owners agree to sell said property, payments to be made upon specific dates of certain amounts, and time being of the essence of the contract, and thereafter the owners gave an order on the bank where the agreement to purchase was depos-

ited in escrow to pay to such agent ten per cent upon payments made under said contract. The purchaser failed to make the payments, and said contract was abandoned. The owners refused to confer further with the proposed purchaser or make any further contract with him, and nothing was done under said contract, and the owners were in no way responsible for such forfeiture. Thereafter the owners in good faith make a contract through another person to sell to him said property, and such sale is completed. Held, that the first agent employed to make such sale is not entitled to recover a commission.—*Phillips v. Brown*, 21 Idaho, 62, 120 Pac. 454.

If a real estate agent or broker is employed as a mere middleman for the purpose only of bringing vendor and purchaser together, and has no further duty imposed upon him by his contract of employment, and does not undertake to advise or counsel either side, and the parties so understand his employment and are so advised, he may charge and receive a commission from both vendor and purchaser.—*Clopton v. Meeves*, 24 Idaho, 293, 133 Pac. 907.

If a real estate broker, who claims to have been only a middleman, has assisted either party in effecting or negotiating a trade or sale, or has made representation to either as to the value or advantages of the property of the other, he has to that extent made himself a partisan agent of the one or the other, and can no longer rightfully or lawfully represent the other party to the transaction.—*Clopton v. Meeves*, 24 Idaho, 293, 133 Pac. 907.

Evidence in an action by real estate brokers for commissions held not to support a finding that plaintiffs were middlemen but rather to show that they had acted as agents for defendant and that having accepted a commission from the purchaser they were thereby precluded from recovering a commission from defendant who was the vendor.—*Clopton v. Meeves*, 24 Idaho, 293, 133 Pac. 907.

Where a plaintiff, in an action to recover commissions for the sale of real estate, alleges that he was employed as a real estate broker, and the defense is interposed that he had acted in a dual capacity and had collected commission from the purchaser, if the proofs justify it, the court may properly find that the plaintiff was a middleman employed only to bring the vendor and purchaser together.—*Clopton v. Meeves*, 24 Idaho, 293, 133 Pac. 907.

The evidence in an action for real estate commissions held sufficient to sustain the verdict and judgment.—*Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho, 304, 133 Pac. 669.

Where a party employs a real estate broker to sell a piece of property at a stipulated price, and the broker procures a purchaser who purchases such property, or is able and willing to purchase such property upon the terms given to the agent by the owner, or where the purchaser's attention was first called to the desire of the owner of the property by the broker, and thereafter he purchases the property, the broker is entitled

to his commission.—*Tonkin-Clark Realty Co., v. Hedges*, 24 Idaho, 304, 133 Pac. 669.

Where evidence as to whether or not a person making a contract is the agent of another party is of a substantial character, which shows that the agent was acting for the defendant and made the contract, and that the person with whom the contract was made made the contract upon the solicitation of the agent, and that the person for whom the agent acted accepted the contract made and accepted the benefits which resulted from the contract, such party cannot evade or defeat the authority of the agent in making said contract.—*Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho, 304, 133 Pac. 669.

In an action by a real estate broker for commissions, it is necessary to allege and prove that a contract of employment was made and that under such employment the broker secures a purchaser who is ready, willing, and able to buy the property at the established price, or that the broker secures a purchaser who buys the property.—*Martin v. Wilson*, 24 Idaho, 353, 134 Pac. 532.

To entitle a real estate agent to commission a contract of employment is necessary, and, where employment is alleged and denied, the relation of principal and agent must be affirmatively established by preponderance of the evidence, though such relation may be implied from such facts and circumstances as satisfactorily establish its existence.—*Martin v. Wilson*, 24 Idaho, 353, 134 Pac. 532.

An agent or broker employed to sell land or find a purchaser for the same is not entitled to a commission therefor, where his principal merely gives an option to purchase to the party procured by such agent, and no sale is made.—*Martin v. Wilson*, 24 Idaho, 353, 134 Pac. 532.

A contract made to pay a broker a certain commission upon a sale of real estate, in consideration of the broker furnishing a purchaser, is not satisfied by the furnishing of a purchaser who enters into a contract to purchase the land upon the condition of buying a half interest in said property at a guardian's sale, where the contract provides it shall be optional with the purchaser to buy or not, and such interest is not bid for or purchased by the proposed purchaser, and a commission cannot be recovered by the broker for such sale.—*Martin v. Wilson*, 24 Idaho, 353, 134 Pac. 532.

Editorial Notes.

Brokers, commissions, right to, how affected by the invalidity of the contract or its being against public policy: 1 Am. St. Rep. 764.

Brokers, commission, when become entitled to: 28 Am. St. Rep. 546; 139 Am. St. Rep. 225.

Right of real estate broker to commission when he purchases property himself: Ann. Cas. 1912A, 202.

Amount of compensation of real estate broker where contract fails to fix rate: Ann. Cas. 1912A, 1267.

Right of real estate broker to commissions on sale made by owner: Ann. Cas. 1913D, 821.

Liability of person employing real estate broker for latter's commission as defendant on principal's interest in property: Ann. Cas. 1913E, 342.

Right of broker to commission and amount thereof where owner accepts less than stipulated price: Ann. Cas. 1913E, 784.

BUILDING AND LOAN ASSOCIATIONS.

Associations in general. See Associations.

A building and loan association loaned money to one of its stockholders, and the contract provided for monthly payments to be applied on "premium for precedence" and on interest. Held, in determining whether the contract is usurious or not, the so-called "premium for precedence" must be regarded as interest, and that building and loan associations are subject to the penalties provided in cases of usurious contracts.—*Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779, 986.

Where a contract between a loan association and a borrower therefrom provided that the latter was to make stated monthly payments on the principal of the loan and stated monthly interest payments, which were usurious, and that if said monthly payments remained delinquent for sixty days, the association might elect to treat the entire debt as due, a suit on such contract after the specified time of delinquency is not prematurely brought by reason of the fact that the interest payments were usurious.—*Fidelity Savings Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022.

Where a borrower subscribes for shares in a loan association merely to obtain a loan and is required to make monthly payments on such shares, and the contract provides that the "maturity of the shares" extinguishes the debt and cancels the stock, the borrower is a stockholder in fiction and not in fact, the actual relation between the parties being that of debtor and creditor.—*Fidelity Savings Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022.

Where a member of a loan association borrowed \$650 therefrom and agreed to pay monthly the sum of \$6 to be applied as payment on the principal and the sum of \$7.15 interest, until the entire debt should be paid, the contract was usurious.—*Fidelity Savings Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022.

A contract with a building and loan association by which the borrower was to pay a fixed sum of \$13 per month as interest and a monthly installment of \$9.75 on the principal or stock is usurious under R. S. 1266, where, by the reduction of the principal by monthly payments, the interest originally lawful would grow into a usurious rate before maturity of the contract.—*Ford v. Washington Nat. Bldg. etc. Assn.*, 10

Idaho, 30, 109 Am. St. Rep. 192, 76 Pac. 1010.

A contract with a building and loan association by which the borrower was to pay a fixed sum of \$13 per month as interest and a monthly installment of \$9.75 on the principal is usurious under R. S. 1266, where the aggregate amount of interest exceeds the legal rate and will not be relieved from the operation of the statute by reason of the fact that the contract gives the borrower the right to pay the entire debt at any time and that the interest charged, prior to a reduction of the principal, is at lawful rate.—*Ford v. Washington Nat. Bldg. etc. Assn.*, 10 Idaho, 30, 109 Am. St. Rep. 192, 76 Pac. 1010.

Editorial Notes.

Building and loan associations, contracts of, whether and when usurious: 83 Am. Dec. 612.

BUILDING CONTRACTS.

See Contracts.

BURGLARY.

In an indictment for burglary drawn under section 59, Crimes and Punishments, Revised Laws, page 332, providing that "every person who in the night . . . breaks and enters into a dwelling-house with intent to commit larceny," etc., it is not necessary to allege the value of the property intended to have been stolen.—*People v. Stapleton*, 2 Idaho, 47, 3 Pac. 6.

In a prosecution for burglary, where a witness testified as to the location of a burglarized building with reference to the one she was in, and that it was in plain sight from the back part of the dwelling where she was at work, it was proper to ask the witness, "Could anyone have gotten into that building after you got up that morning, and taken out this meat, without your knowing it?"—*State v. Haverly*, 4 Idaho, 484, 42 Pac. 506.

Evidence in a prosecution for burglary held insufficient to support a judgment of conviction.—*State v. Burke*, 11 Idaho, 420, 83 Pac. 228.

Evidence in a prosecution for burglary held sufficient to support a verdict of guilty.—*State v. Reel*, 19 Idaho, 463, 113 Pac. 721.

Editorial Notes.

House, what is within the meaning of the law of burglary: 22 Am. Dec. 150.

Burglary, entry by consent of owner is not: 91 Am. Dec. 482.

Essential elements of crime of, and what "breaking" will support indictment for burglary: 2 Am. St. Rep. 383.

Burglary, breaking and entry: 139 Am. St. Rep. 1046.

Sufficiency of indictment for burglary with respect to description of building: Ann. Cas. 1913D, 873.

Pleading and proving value of goods: 34 L. R. A., N. S., 246.

CANALS.

Across a public highway as a nuisance. See Nuisances.

Condemnation by canal company. See Eminent Domain, I.

Easement of irrigation canal not breach of covenant. See Covenants, III.

Irrigation, and waters in general. See Waters and Watercourses.

Reservation of right of way for ditches and canals over public lands. See Public Lands, II, (D).

Liens for work on canals or ditches. See Mechanics' Liens.

CANCELLATION OF INSTRUMENTS.

I. RIGHT OF ACTION AND DEFENSES.

II. PROCEEDINGS AND RELIEF.

See Quietting Title; Reformation of Instruments.

Action by benevolent corporation to cancel mortgage for usury. See Charities.

I. RIGHT OF ACTION AND DEFENSES.

The board of county commissioners issued warrants on the bridge fund of the county in excess of the constitutional limitation and without conforming to the statutory requirements. In return therefor, the county received a valuable bridge and other improvements. In the meantime third persons had acquired interests in the warrants, which were not negotiable instruments. In an action by the county to cancel such warrants, no tender of the bridge and improvements was made, nor was any offer made to place the parties in statu quo. Held, that the action could not be maintained, because the county had an adequate remedy at law in that it could interpose any defense it might have to an action on the warrants and thus the defendants would not be deprived of their right to trial by jury, and further because the county had a complete and adequate remedy against delay of defendants in bringing suit upon the warrants under R. S. 4928, which provides that an action may be maintained for the purpose of determining an adverse claim for money or property on an alleged obligation.—*Ada County v. Bullen Bridge Co.* (on rehearing), 5 Idaho, 188, 95 Am. St. Rep. 180, 47 Pac. 818; reversing *Ada County v. Bullen Bridge Co.* (on rehearing), 5 Idaho, 79, 36 L. R. A. 367, 47 Pac. 818; *Ada County v. First Nat. Bank* (on rehearing), 5 Idaho, 197, 47 Pac. 1098; reversing *Ada County v. First Nat. Bank*, 5 Idaho, 98, 47 Pac. 1098.

Editorial Notes.

Cancellation of instruments notwithstanding a defense at law: 9 Am. St. Rep. 859, note.

Where plaintiff delivered a deed to defendant on the express understanding and agreement that such deed was not to become operative or to pass title until payment of certain indebtedness and a mortgage had been made by defendant, plaintiff was entitled to have the deed canceled on failure of defendant to comply with the conditions of such delivery.—*Steffy v. Esler*, 6 Idaho, 228, 55 Pac. 239.

R. C. 4928, authorizing actions to determine an adverse claim for money or property upon an alleged obligation, applies to an action brought to cancel a promissory note, where it is alleged that the same has been paid or that the consideration therefor has been paid.—*Harrison v. Russell*, 17 Idaho, 196, 105 Pac. 48.

Where C. signs a joint and several contract of guaranty, guaranteeing the payment of promissory notes, and afterward dies, and an administrator is appointed, and the holder of such notes files the same as claims against the estate of C., and full opportunity is given to contest such claims upon any legal or equitable ground by the administrator, heirs or creditors of said estate, such administrator, heirs or creditors of said estate cannot afterward maintain an action in equity against the holder of said notes for the purpose of releasing said estate from its liability upon said contracts of guaranty, upon the ground that a conspiracy was entered into between the holder of such notes, the administrator of said estate, and the stockholders of the principal debtor, whereby property belonging to the principal debtor was transferred to the holder of such notes at less than its actual and true value and the purchase price thereof improperly applied upon such indebtedness.—*Miller v. Kettenbach*, 18 Idaho, 253, 138 Am. St. Rep. 192, 109 Pac. 595.

II. PROCEEDINGS AND RELIEF.

Where the grantor in a deed is alleged to have been incompetent, evidence of acts of the grantor occurring long prior to the date of the deed tending to show his incompetency may be introduced as tending to show such incompetency at the date of the deed, but such evidence is entitled to no weight unless connected with evidence tending to prove incompetency at the date of the deed.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

Where an action is brought to set aside a deed on the ground of undue influence, and the evidence shows that the deed was the free and voluntary act of the grantor, the fact that the husband of the grantee usually assisted and advised the grantor in relation to business matters will not render the deed void.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

A complaint for the cancellation of a deed alleged that the deed was executed and delivered by plaintiff to the defendant "upon the express agreement and understanding that the title to said undivided interest in said mining claim, as hereinbefore set forth, should not vest in the defendant, but should remain in the plaintiff until the full performance by the defendant of said condition precedent, to wit, the payment by defendant of said sum of \$386, with the accrued interest thereon, so due from plaintiff on his note and mortgage to L., as aforesaid, and the release

of the plaintiff from said indebtedness, and the payment by defendant of the said sum of \$825, so due and owing from plaintiff and defendant to different individuals, as hereinbefore set forth, and the release of plaintiff from said indebtedness." The complaint then averred defendant's failure to perform the conditions precedent after demand and a refusal to reconvey after demand. Held, that the complaint stated a cause of action.—*Steffy v. Eeler*, 6 Idaho, 228, 55 Pac. 239.

In an action brought to set aside a deed and bills of sale, the complaint alleged that the conveyance and bills of sale were given to defendant with the agreement and understanding that defendant was to pay certain debts of plaintiff, which debts were set forth in an exhibit attached to the complaint; that defendant had failed and refused to pay said debts or any part thereof. The complaint prayed for the appointment of a receiver, for a cancellation of the conveyances and for an accounting. Held, that the complaint stated a cause of action.—*Standley v. Flint*, 10 Idaho, 629, 79 Pac. 815.

In an action for rescission of a contract, it is sufficient if the plaintiff makes offer to restore or to do equity in his complaint, as it is always within the power of the court to require that the person invoking equity shall do equity as a condition of relief, and the court may impose terms which may be just and equitable and may enforce compliance therewith.—*Gamblin v. Dickson*, 18 Idaho, 734, 112 Pac. 213.

In an action for the purpose of rescinding a contract for the sale of certain real estate, whereby certain shares of stock in a corporation were a part of the consideration, and it is sought to rescind the contract on the ground that the corporation was insolvent and that such shares of stock were valueless, it is incumbent on the plaintiff to prove that the corporation was insolvent or in a failing condition at the time or on the date that the trade was made, and it is not sufficient proof of that fact simply to show that such corporation made an assignment for the benefit of its creditors a little over six months after the date of the contract sought to be rescinded.—*Nobach v. Scott*, 20 Idaho, 558, 119 Pac. 295.

Under the facts of this case, held that the appellant was in as favorable a position to know and ascertain the condition of said corporation and the value of its capital stock and assets as was the respondent and as he neglected and failed to do so, and failed to show that said corporation was insolvent or in a failing condition at the date of the contract referred to, the judgment of nonsuit at the close of his testimony will not be disturbed.—*Nobach v. Scott*, 20 Idaho, 558, 119 Pac. 295.

CAREY ACT LANDS.

See Public Lands.

Existence of easement of irrigation canal not breach of covenant in deed. See Covenants, III.

CARRIERS.

- I. CONTROL AND REGULATIONS OF COMMON CARRIERS.
- II. CARRIAGE OF GOODS.
- III. CARRIAGE OF LIVESTOCK.
- IV. CARRIAGE OF PASSENGERS.

Regulation of commerce. See Commerce.

Matters relating to particular classes of carriers in other relations or capacities. See Corporations; Master and Servant; Railroads; Street Railroads. Construction, regulation and operation of railroads in general. See Railroads.

Interstate commerce regulations. See Commerce.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

Where a company is organized as a railway corporation, it becomes a common carrier under Const., article 11, section 5, irrespective of any intention of its corporators to use it for private purposes only, and it can be compelled to perform its duties as a public service corporation.—*Connolly v. Woods*, 13 Idaho, 591, 92 Pac. 573.

Where a railroad company acquired twenty acres of station grounds under the provisions of the act of Congress of March 3, 1875, chapter 152, 18 Stat. 482 (U. S. Comp. Stats. 1901, p. 1568), for occupation and use as a common carrier, and such grounds are so situated as to abut upon a navigable lake or body of water, and such company constructs thereon a dock or wharf for use in receiving and discharging freight and passengers from boats and for forwarding through freight and passengers, and the same is in fact used both in carrying on through business and local business, such dock or wharf is a public "facility" for the transportation of freight and passengers within the purview and meaning of Const., article 11, section 6, and such railroad company cannot make any undue or unreasonable discrimination between competing boat lines engaged in the same kind or class of business with such railroad company.—*Coeur d'Alene etc. Co. v. Ferrell*, 22 Idaho, 752, 128 Pac. 565.

Under Const., article 11, section 6, "no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers of the same class, by any railroad, or transportation, or express company, between persons or places within the state."—*Coeur d'Alene etc. Co. v. Ferrell*, 22 Idaho, 752, 128 Pac. 565.

A railroad company owning and maintaining a dock or wharf on its station grounds may adopt and enforce such reasonable rules and regulations as will prevent blocking and interfering with its business or with the public traffic, and, so long as such rules and regulations are reasonable and do not amount to an undue or unreasonable discrimination between competitors, the same may be enforced and observance thereof required.—*Coeur d'Alene etc. Co. v. Ferrell*, 22 Idaho, 752, 128 Pac. 565.

A contract entered into by a railroad company granting to a steamboat company the exclusive right to receive and discharge

freight and passengers at a dock or wharf which is a part of and connected with its depot and station grounds, and which affords the only means and facility for approaching the station grounds by means of the water highway, and excluding all the competitors of such steamboat company from like or similar privileges at any time or at all, is undue and unreasonable discrimination in favor of the one company and against its competitors, which is in violation of Const., article 11, section 6.—*Coeur d'Alene etc. Co. v. Ferrell*, 22 Idaho, 752, 128 Pac. 565.

Editorial Notes.

Who liable as carriers: 47 Am. Dec. 648.

Right of carriers to grant exclusive privileges to hackmen and other solicitors: 22 Am. St. Rep. 699.

Right of carrier to discriminate as to special or unusual service: 12 L. R. A., N. S., 506.

Elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic: 15 L. R. A., N. S., 108; 25 L. R. A., N. S., 1001.

II. CARRIAGE OF GOODS.

Taking goods from possession of a carrier and receipting for them as in good condition raises only a rebuttable presumption that they were not damaged, and this presumption is overcome by evidence that the receipt was signed as a matter of form in securing the goods and that immediate notice was given of the damage.—*Bloomingtondale v. Du Rell*, 1 Idaho, 33.

Evidence that goods were exposed and became wet while in transitu with no other evidence was sufficient to prove that damage thereto occurred while in possession of the carrier.—*Bloomingtondale v. Du Rell*, 1 Idaho, 33.

Where defendant contends that plaintiff is not the owner of the property for which he sues and has no property therein, such objection is not waived by failure to demur on the ground provided by R. S. 4174, "that the plaintiff has not the legal capacity to sue," such statute not being applicable to such case. *Pratt v. Northern Pacific Express Co.*, 13 Idaho, 373, 121 Am. St. Rep. 268, 10 L. R. A., N. S., 499, 90 Pac. 341.

Where property is received by a common carrier on an unconditional and unrestricted consignment, the carrier must treat the consignee as the absolute owner until he receives notice to the contrary.—*Pratt v. Northern Pacific Express Co.*, 13 Idaho, 373, 121 Am. St. Rep. 268, 10 L. R. A., N. S., 499, 90 Pac. 341.

Where A deposits a sum of money in the office of defendant, a common carrier, with instructions to deliver the same to B at another office on its line of transportation, and takes defendant's receipt therefor, and gives defendant no other or further instructions as to the ownership or right of possession of the property and imposes no condition or restriction as to the delivery thereof, B may maintain an action against defendant carrier to recover the amount so deposited.—*Pratt v. Northern Pacific Express Co.*, 13 Idaho, 373, 121

Am. St. Rep. 268, 10 L. R. A., N. S., 499, 90 Pac. 341.

Where a shipper delivers his property to a common carrier marked and addressed to another person as a consignee, with no further instructions or directions, the law will presume that the contract for transportation was made on behalf of the consignee, and that the latter is entitled to sue for possession of the property.—*Pratt v. Northern Pac. Express Co.*, 13 Idaho, 373, 121 Am. St. Rep. 268, 10 L. R. A., N. S., 499, 90 Pac. 341.

A railroad company, engaged in the business of common carrier, is bound under the common law to receive and carry, within the class of goods it is engaged in carrying, such goods as are tendered for that purpose, and, in the absence of a special contract, to carry them with the full common-law liability of a common carrier.—*McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66.

When a shipper goes to a carrier with a view of making a shipment, and the carrier has different kinds of contracts, one by which the carrier insures the goods shipped, and the other by which the shipper assumes all risk, it is incumbent upon the carrier to show the contract actually made.—*McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66.

A common carrier may limit its strict common-law liability as an insurer in such manner as the law can recognize as reasonable and not inconsistent with sound public policy, but cannot make a contract exempting the carrier from negligence.—*McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66.

Where a shipper is granted no concession or reduction of rate, the fact that the railroad company accepts the goods and agrees to ship them is not a sufficient consideration for the waiver on the part of the shipper of the carrier's liability as insurer.—*McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66.

A bill of lading, which in terms was a receipt for the goods to be transported contained a statement that: "This contract, and the responsibilities of the parties hereto, is limited and controlled by the conditions printed on the back hereof; as also by the terms and conditions of this company's printed tariffs, which are hereby declared to be an essential part to this contract." Upon the back of such bill of lading was the statement that the goods mentioned are received for carriage, subject to the condition that the carrier shall not be liable for any loss or damage by fire. Held, not to show upon its face any consideration for such exemption, and such exemption is void as against the shipper, unless it be shown by other evidence that there was a consideration for such exemption. *McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66.

Where a special contract is pleaded as a defense in an action to recover damages for loss of goods by a common carrier, the burden of proof is upon the carrier to prove the contract, and to prove a consideration therefor; and the mere fact that the shipper accepts a bill of lading containing conditions of exemption, without such contract showing a consideration therefor, does not presume a consideration.—*McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66.

Where the evidence does not show that the agent of the carrier, or the shipper, knew that a special rate would be given, or was given, as a condition for an agreement upon the part of the shipper that the carrier should be exempt from liability for loss by fire, it is not error to sustain an objection to the question propounded to a clerk in the general freight department of such carrier that such company had in force and effect two rates, one by which a less rate was charged, upon condition that the shipper waive the right to hold the carrier liable for loss by fire, than was charged where no such condition was embraced in the contract.—*McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66.

New Meadows, the legal destination of the shipment involved, is located in Adams county, and Adams county is a dry county under the local option act, Laws 1909, page 17. Under section 25 of such act it is provided that any person, firm, corporation, society, or club within this state who shall accept for shipment, transportation, or delivery, or who shall ship, transport, or deliver any intoxicating liquor to any person, firm, corporation, society, or club in any prohibition district in the state of Idaho, or to any point or place in this state where the sale of intoxicating liquors is prohibited by law, except as may be authorized by this act or the interstate commerce law of the United States, shall be guilty of a misdemeanor and punished as provided in section 30 of this act. Held, that the shipment being an interstate shipment by reason of passing through the state of Oregon prior to reaching its destination, defendant could not be compelled to receive a consignment of liquor billed to New Meadows, though the ultimate destination was McCall, Idaho, which was not in prohibition territory.—*Crescent Brewing Co. v. Oregon Short Line R. Co.*, 24 Idaho, 106, 132 Pac. 975.

Editorial Notes.

Stoppage in transitu, right of, when and by whom may be exercised: 29 Am. Dec. 384; 19 Am. Rep. 87; 1 Am. St. Rep. 312.

Stoppage in transitu, right of when terminates: 60 Am. Rep. 51.

Power of to limit their liability and how may be exercised: 32 Am. Dec. 495.

Bills of lading, definition and effect of: 38 Am. Dec. 407.

Right of to detain goods against owner when possession was not received from him: 40 Am. Dec. 44.

Customs and usages of and their effect: 50 Am. Dec. 99.

Notices contained in tickets and bills of lading: 15 Am. Rep. 457; 29 Am. Rep. 166; 5 Am. St. Rep. 719.

Liability, stipulations exempting from, when void: 31 Am. Rep. 567.

Discrimination by carriers when improper and unlawful: 44 Am. Rep. 568; 54 Am. Rep. 862.

Discriminations by carriers what are unreasonable and unlawful: 11 Am. St. Rep. 647.

Agreements and stipulations which may not extort from shippers, and their effect if extorted: 13 Am. St. Rep. 782; 46 Am. St. Rep. 777.

Power of carriers to limit their liability in the event of a loss to a sum less than the injury suffered: 23 Am. St. Rep. 593.

Agreements with fixing the value of property shipped: 23 Am. St. Rep. 595.

Special contracts, right to exact from shippers: 46 Am. St. Rep. 777.

Liability of carriers limiting by bills of lading: 88 Am. St. Rep. 74.

Validity and enforceability of contract by carrier to carry goods at discriminating rate fixed by mistake: Ann. Cas. 1913C, 1386.

Validity of contract between carrier of goods and shipper whereby value of goods is fixed and liability of carrier is limited to such amount: Ann. Cas. 1913D, 981.

Validity of contract between carrier and shipper whereby value of goods is fixed and liability of carrier is limited to such amount: 12 Ann. Cas. 1124; 13 Ann. Cas. 353.

Validity of contract for transportation in violation of particular statutes: 12 L. R. A., N. S., 609.

Consignee's right to sue carrier: 22 L. R. A. 428; 36 L. R. A., N. S., 68.

III. CARRIAGE OF LIVESTOCK.

(No paragraphs.)

IV. CARRIAGE OF PASSENGERS.

Effect of servant's riding on railway pass on liability of railroad for injuries to servants. See *Master and Servant*, III, (A).

Liability for injuries to servants. See *Master and Servant*.

Under R. S. 4168, subdivision 2, providing that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, a complaint which states that plaintiff was wrongfully ejected from defendant's train by one of defendant's brakemen, the agent and employee of defendant company, is sufficient and need not allege that the servant was acting within the scope of his employment.—*Lindsay v. Oregon etc. R. R. Co.*, 13 Idaho, 477, 12 L. R. A., N. S., 184, 90 Pac. 984.

In an action against a carrier for the wrongful ejection of plaintiff while a passenger on one of its trains, it is no defense that the brakeman who expelled plaintiff was acting outside of his authority in so doing.—*Lindsay v. Oregon etc. R. R. Co.*, 13 Idaho, 477, 12 L. R. A., N. S., 184, 90 Pac. 984.

Where a husband and his sick wife enter a train and the husband is wrongfully ejected therefrom, he can recover for his anxiety and mental suffering on account of thus being separated from her.—*Lindsay v. Oregon etc. R. R. Co.*, 13 Idaho, 477, 12 L. R. A., N. S., 184, 90 Pac. 984.

In an action by a passenger for wrongful ejection from one of defendant's trains, evi-

dence held to show that plaintiff was expelled from the train and did not leave voluntarily.—*Lindsay v. Oregon etc. R. R. Co.*, 13 Idaho, 477, 12 L. R. A., N. S., 184, 90 Pac. 984.

In an action by a passenger for damages for wrongful ejection from defendant's train on which plaintiff's sick wife was a passenger, the judgment-roll in an action by plaintiff and his wife against defendant to recover damages on account of the physical injury and pain and agony suffered by plaintiff's wife was pleaded to show *res adjudicata*. Held, proper to reject such judgment-roll.—*Lindsay v. Oregon etc. R. R. Co.*, 13 Idaho, 477, 12 L. R. A., N. S., 184, 90 Pac. 984.

Under R. S. 2674, the liability of a railroad company to furnish the passenger free transportation to the point of his destination in case of refusal to deliver him a check for his baggage is as much a part of the penalty for refusal to check the baggage as is the \$20 cash penalty named therein.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

Where a passenger is wrongfully ejected from a railroad train, he has a right to return to the train, and the use of force and violence in keeping him off is as much a wrong and trespass upon his rights as it would have been to have used that violence on him in the first instance.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

Plaintiff purchased a railroad ticket at a station where the railroad company had no agent to receive and check baggage. His baggage was received by the conductor and brakeman. Plaintiff declined to surrender his ticket or pay his fare until he received a check for his baggage, and was thereupon ejected from the train by the employees of the company. Held, that under R. S. 2674, the company should have furnished such check, and therefore would be liable for such wrongful ejection.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

R. S. 2674, providing that a railroad company shall not collect toll or fare from a passenger when it fails or refuses to deliver the passenger a check for his baggage, is not a taking of property without due process of law in violation of the fourteenth amendment to the constitution of the United States.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

L., while riding on a railway train, was struck by a rock or boulder which rolled from the mountainside, and received an injury for which he sought to recover damages from the railroad company; the evidence failed to show the cause which set the rock in motion or the place from which it started, but did satisfactorily show that the stone did not come from the face of the cut through which the train was running or from the company's right of way, and the evidence failed to show any negligence on the part of the company. Held, that the railroad company was not liable for damages sustained on account of the injury thus received.—*Le Deau v. Northern Pac. Ry. Co.*, 19 Idaho, 711, Ann. Cas. 1912C, 438, 34 L. R. A., N. S., 725, 115 Pac. 502.

Where an accident occurs and an injury is received by a passenger on a railway train, and the evidence clearly discloses that the injury was not caused by any defect in the machinery or appliances used by the company in the operation of its road, or by any defect in the construction of the road, and was not caused by any act of the employees of the company, or of any person in charge of the train, there is no presumption of negligence on the part of the railway company, and it is incumbent on the party seeking relief to prove negligence.—*Le Deau v. Northern Pac. Ry. Co.*, 19 Idaho, 711, Ann. Cas. 1912C, 438, 34 L. R. A., N. S., 725, 115 Pac. 502.

Editorial Notes.

Carriers of passengers, liability of for injuries to: 43 Am. Dec. 355.

Carriers of passengers, negligence, burden and sufficiency of proof: 62 Am. Dec. 679.

Carriers of passengers, liability of for injuries resulting from defects in their vehicles and other appliances: 64 Am. Dec. 521.

Carriers of passengers, liability of: 31 Am. Rep. 324.

Passengers, when cease to be: 37 Am. Rep. 384; 2 L. R. A., N. S., 873; 20 L. R. A., N. S., 1019.

Passengers who are, and when they become such: 61 Am. St. Rep. 75.

Passenger, right of to forcibly resist unlawful ejection: 125 Am. St. Rep. 727.

Legal meaning of "require" in statute relating to free transportation by railroad: Ann. Cas. 1912A, 1238.

Liability of carrier to passenger for injuries caused by fall of window of car: Ann. Cas. 1912B, 850.

Liability of carrier for injury to passenger caused by train being struck by object falling from bank on side of track: Ann. Cas. 1912C, 440.

Liability of carrier with respect to baggage of gratuitous passenger: Ann. Cas. 1912C, 629.

Duty of carrier in respect to furnishing proper cars for passengers: 31 L. R. A. 313.

CERTIFICATE.

Of acknowledgment. See Acknowledgment.

Of state recorder as to livestock brand. See Animals.

Of mining location. See Mines and Minerals, I. (B), 3, (E).

Right to bail does not follow right to have certificate of probable cause. See Bail and Recognizance.

To depositions. See Depositions.

Effect of filing certificate of judicial sale, as notice. See Judicial Sales.

CERTIORARI.

I. NATURE AND GROUNDS.

II. PROCEEDINGS AND DETERMINATION.

Appeal and not review from order as to visiting children after decree of divorce. See Divorce, VI.

Determination on writ of review of order disbaring attorney. See Attorney and Client, I.

Right of appeal from decision of district court on certiorari. See Appeal and Error, III, (B).

To review action of state medical board. See Physicians and Surgeons.

To review action of board of equalization. See Taxation, V, (F), (G).

To review contempt proceedings. See Contempt.

In insolvency proceedings. See Insolvency.

I. NATURE AND GROUNDS.

Estoppel to question jurisdiction of state court after remand from federal court as preventing certiorari. See Removal of Causes.

To entitle a petitioner to a writ of review, he must be a party to the suit or controversy.—*Gold Hunter Min. etc. Co. v. Holleman*, 3 Idaho, 99, 27 Pac. 413; *Washington County Abstract Co. v. Stewart*, 9 Idaho, 376, 74 Pac. 955.

Certiorari will not lie until the case has been finally disposed of in the inferior court. *People v. Lindsay*, 1 Idaho, 394.

In order that the writ of certiorari may be granted under the provisions of our statute, three things must appear: First, that the court or judge below exceeded his jurisdiction; second, that there is no appeal provided by law from the judgment or decision of the court; third, that there is no other plain, speedy or adequate remedy.—*People v. Lindsay*, 1 Idaho, 394.

An intervenor is entitled to a writ of review equally with the original parties to the suit.—*Gold Hunter Min. etc. Co. v. Holleman*, 3 Idaho, 99, 27 Pac. 413.

A writ of review does not lie from the action of a board of county commissioners, the statute having provided a speedy and adequate remedy by appeal.—*Rogers v. Hays*, 3 Idaho, 597, 32 Pac. 259.

A writ of review cannot be granted to review the action of the court in denying an application for change of venue in disbarment proceedings, since this is not a final order and there is a plain, speedy and adequate remedy by appeal from all the proceedings in the court below.—*State v. Goode*, 4 Idaho, 730, 44 Pac. 640.

An insolvent, against whom an order is made to account for certain property, is "beneficially interested" within the meaning of R. S. 4963, providing that the party beneficially interested may make application for a writ of review.—*Madison v. Piper*, 6 Idaho, 137, 53 Pac. 395.

Under R. S. 4962, providing when writs of review may be granted, such writ will not lie to review the action of a city council in letting a contract to pave a street, such action being administrative and not judicial or quasi-judicial.—*Adleman v. Pierce*, 6 Idaho, 294, 55 Pac. 658.

Certiorari will lie to review an order appointing a receiver, to determine, from the evidence, whether the trial court had jurisdiction to appoint the receiver.—*Sweeney v. Mayhew*, 6 Idaho, 455, 56 Pac. 85.

Certiorari lies to annul an order appointing a receiver which was made on ex parte application after the appearance of the de-

fendant in the action.—*Cummings v. Steele*, 6 Idaho, 666, 59 Pac. 15.

The only method of reviewing an order made after judgment by the probate court in proceedings supplemental to execution is by writ of review, the statute not providing for an appeal from such orders.—*Gans v. Steele*, 7 Idaho, 143, 61 Pac. 286.

Under R. S. 4962, providing that a writ of review may issue to an inferior tribunal, board or officer exercising judicial functions, when such tribunal, board or officer has exceeded his or its jurisdiction and there is no appeal or plain, speedy and adequate remedy, the issuance of such writs is not limited to review the actions of courts of record.—*Gans v. Steele*, 7 Idaho, 143, 61 Pac. 286.

Certiorari will lie to review the judgment of a justice's court in the district court, when such judgment is attacked for want of jurisdiction.—*Nordyke etc. Co. v. McConkey*, 7 Idaho, 562, 64 Pac. 893.

The supreme court has no jurisdiction to review by certiorari a judgment of a justice of the peace.—*Nordyke etc. Co. v. McConkey*, 7 Idaho, 562, 64 Pac. 893.

A writ of review will not lie to review the action of a board of school trustees in entering into a contract with a school teacher, to teach school, such act being an administrative act.—*Nuckols v. Lyle*, 8 Idaho, 589, 70 Pac. 401.

Under R. S. 4962, providing that a writ of review may be granted when an inferior tribunal, board or officer exercising judicial functions exceeds its or his jurisdiction and there is no appeal or speedy and adequate remedy at law, certiorari and not mandamus is the proper remedy where the district court exceeds its jurisdiction in quashing the panel and discharging the jury selected by the board of county commissioners.—*Heitman v. Morgan*, 10 Idaho, 562, 79 Pac. 225.

The writ of review is not a remedy for correcting errors and mistakes of judgment, nor can it be invoked for the purpose of reviewing the facts upon which the inferior tribunal, board or officer acted, except for the purpose of ascertaining the one fact of jurisdiction, the province of the writ being limited entirely to a review of the questions of law involved in the matter.—*McConnell v. State Board of Equalization*, 11 Idaho, 652, 83 Pac. 494.

R. S. 4962 prescribes the cases when a writ of review may be issued. Const., article 5, section 9, empowers the supreme court to review, on appeal, any decision of the district courts or the judges thereof. R. S. 4880 defines an "order" as every direction of a court or judges made or entered in writing and not included in a judgment. Held, that an order setting aside the satisfaction of a decree of foreclosure and decreeing a third person to be the equitable assignee of the decree of foreclosure to the extent of a specified portion of the amount named in the decree, declaring the claim of such third person a lien on said judgment and directing the sale of the premises to satisfy such claim, is an appealable order, and hence a writ of review

will not lie.—*Dahlstrom v. Portland Min. Co.*, 12 Idaho, 87, 85 Pac. 918.

Under R. S. 4962, a writ of review will not lie to review the action of the district court in passing on a motion to dismiss an appeal from the probate court, since the district court had jurisdiction to pass on such motion.—*Gunderson v. District Court*, 14 Idaho, 478, 94 Pac. 166.

Under R. S. 5210 et seq., relating to eminent domain, the district court or judge thereof has jurisdiction to determine the right and necessity for the exercise of that right, and if, on a hearing of an application to appoint commissioners and assess damages, the court or judge rejects certain evidence offered in regard to the location of the right of way sought to be condemned, or the necessity thereof, certiorari will not lie to review his action.—*Coeur d'Alene Min. Co. v. Woods*, 15 Idaho, 26, 96 Pac. 210.

Where the district court, having acquired jurisdiction of the parties and the subject matter appoints a receiver to take charge of certain notes, certificates of stock and choses in action, its action though erroneous, cannot be questioned by writ of review.—*Utah Assn. of Credit Men v. Budge*, 16 Idaho, 751, 102 Pac. 390.

Under R. C. 4962, providing when a writ of review may be granted, if an order made by a trial court is within its jurisdiction or if an appeal lies therefrom, a writ of review will not lie to such order, however erroneous it may be.—*Utah Assn. of Credit Men v. Budge*, 16 Idaho, 751, 102 Pac. 390.

Editorial Notes.

Writ of certiorari when issues and what reviewable upon: 12 Am. Dec. 531.

Legislative acts which cannot be reviewed by certiorari: 18 Am. Dec. 236.

Questions reviewable upon certiorari: 40 Am. St. Rep. 29.

Persons entitled to prosecute writ of certiorari: 103 Am. St. Rep. 110.

Exceptions to rule that certiorari will not lie where there is an appeal: 50 L. R. A. 787.

II. PROCEEDINGS AND DETERMINATION.

A writ of certiorari improperly granted will be dismissed on motion.—*People v. Lindsay*, 1 Idaho, 394.

Where a petition for a writ of review alleges that the state board of equalization, in excess of the jurisdiction conferred upon it by law, has reduced the valuation of a certain class of property in a county, and has increased the valuation placed upon other certain classes of property by the local assessor, the writ should be granted under R. S. 4962, since the statute provides no method of appeal.—*Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416.

R. S. 4963 provides that the application for writ of review must be made on affidavit by the party beneficially interested. R. S. 4199, relating to the verification of plead-

ings, provides that the attorney of a party may make the affidavit when the facts are within his knowledge. Held, that the application for the writ is the complaint and that it may be verified by the attorney when the facts are within his knowledge.—*Madison v. Piper*, 6 Idaho, 137, 53 Pac. 395.

Under R. S. 4968, providing that the review on writ of certiorari cannot be extended further than to determine whether the inferior tribunal, etc., has regularly pursued its authority, the court may consider the sufficiency of the evidence to establish jurisdictional facts.—*Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85.

The fact that a writ of review is defective in form is ground for demurrer or motion to quash, but such fact does not affect the jurisdiction of the court to issue the writ.—*Gans v. Steele*, 7 Idaho, 143, 61 Pac. 286.

Under R. S. 4963, providing that the application for a writ of review must be made on affidavit and that the writ may be granted with or without notice, it is not necessary that the application be filed before the writ issues.—*Gans v. Steele*, 7 Idaho, 143, 61 Pac. 286.

Where a writ of review is asked on the ground that an order was made by the judge at chambers, and not by the court, and was therefore in excess of the jurisdiction of the judge, and the return to the writ, containing a copy of the court's record, shows that the matter was heard by the court at a regular term thereof, the writ will be discharged.—*Porter v. Steele*, 7 Idaho, 414, 63 Pac. 187.

On certiorari to review the appointment of a receiver of a corporation the only question to be considered is the jurisdiction of the court to make the appointment.—*Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85; *Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733.

Under R. S. 4962, providing when a writ of review may be granted, and R. S. 4968, providing that the review on this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued his or its authority, the supreme court cannot pass upon the constitutionality of an act upon the application for such writ by a private person to protect his private property rights.—*McConnell v. State Board of Equalization*, 11 Idaho, 652, 83 Pac. 494.

Where it appears that plaintiff has an adequate remedy by appeal from an order, a writ of review will be quashed on motion.—*Dahlstrom v. Portland Min. Co.*, 12 Idaho, 87, 85 Pac. 916.

Under R. S. 4962, prescribing when a writ of review will be granted an order made by a judge allowing claims against an estate and disallowing others and directing a receiver to pay the allowed claims out of the funds in his hands and distribute the funds according to the order and judgment of the judge, is an appealable order or judgment and a writ of review will not lie to review such order.—*Canadian Bank of Commerce v. Wood*, 13 Idaho, 794, 93 Pac. 257.

Failure to serve notice of application for a writ of review upon the parties really interested, as required by supreme court rule 28, paragraph 5, is not ground for quashing the writ but is ground for postponement of the hearing until reasonable notice can be given.—*Canadian Bank of Commerce v. Wood*, 13 Idaho, 794, 93 Pac. 257.

Under supreme court rule 28, paragraph 5, an application for a writ of mandate or review against a district judge must disclose the names of the real parties in interest, and the applicant must serve on the parties in interest a certified copy of the affidavit and writ and file proof of such service.—*Connolly v. Woods*, 13 Idaho, 591, 92 Pac. 573; *Canadian Bank of Commerce v. Wood*, 13 Idaho, 794, 93 Pac. 257.

Allegations in a petition for a writ of review that the expenses of an appeal would be almost prohibitory and disproportionate to the small amount plaintiff might recover, even though successful, are not sufficient to show that plaintiff has not a plain, speedy and adequate remedy at law and do not warrant the granting of a writ of review.—*Canadian Bank of Commerce v. Wood*, 13 Idaho, 794, 93 Pac. 257.

A "writ of review" brings up the record of the tribunal, board or body whose acts are to be examined, and is issued for the purpose of reviewing the law applicable to the case, instead of examining the facts of the case, except in so far as an examination of the facts is necessary in the determination of the single question of jurisdiction. The purpose of the review is to determine primarily the law applicable to the case, rather than the facts of the case.—*Lansdon v. State Board of Canvassers*, 18 Idaho, 596, 111 Pac. 133.

The state board of canvassers, in canvassing election returns sent up by the boards of canvassers of the several counties and computing the total vote received by each candidate and certifying to the Secretary of State the names of the persons who received the majority or plurality, as the case may be, of all votes cast for each respective office, is discharging a ministerial duty, rather than a judicial function.—*Lansdon v. State Board of Canvassers*, 18 Idaho, 596, 111 Pac. 133.

The fact that the state board of canvassers on receiving returns from the boards of canvassers of the several counties did not consider such returns inaccurate, uncertain, or as showing on their face omissions or errors, and their consequent neglect or refusal to send the same back to the county boards of canvassers for correction, does not constitute an excess of jurisdiction, nor does it oust the board of the jurisdiction acquired to canvass returns and declare the results.—*Lansdon v. State Board of Canvassers*, 18 Idaho, 596, 111 Pac. 133.

CHAMPERTY AND MAINTENANCE.

Construction of statute adopted from other state.

See Statutes, VI, (A), 5.

Contracts contrary to good morals and public policy.

See Contracts, I, (F).

Unless the question of champerty be raised by the pleadings, it cannot be considered.—*Brumback v. Oldham & Co.*, 1 Idaho, 709.

"Champerty" at common law consisted in supporting or maintaining a suit for someone else in consideration of agreement to have a part of the thing in dispute, or some profit out of the result of the litigation, or an agreement to divide the receipts from the suit or action.—*Merchants' Protective Assn. v. Jacobsen*, 22 Idaho, 636, 127 Pac. 315.

An assignment of a claim for collection with an agreement that the assignee upon making the collection is to pay to the assignor one half the amount collected, together with a sum previously advanced by the assignor for expense of making the collection, is not contrary to good morals or public policy.—*Merchants' Protective Assn. v. Jacobsen*, 22 Idaho, 636, 127 Pac. 315.

The common-law rule of champerty and maintenance is not in force in this state, and under R. C. 4900 the measure and mode of compensation of attorneys is left to the agreement, express or implied, entered into between the attorney and client, and, so long as such agreement is not contrary to good morals or sound public policy, it will be enforced by the courts.—*Merchants' Protective Assn. v. Jacobsen*, 22 Idaho, 636, 127 Pac. 315.

Under R. C. 6524, an attorney at law is prohibited and forbidden, either directly or indirectly, buying any evidence of debt or thing in action with intent of bringing suit thereon, and for a violation of this statute the attorney is held guilty of a misdemeanor.—*Merchants' Protective Assn. v. Jacobsen*, 22 Idaho, 636, 127 Pac. 315.

Editorial Notes:

Agreements of attorneys, when offend against the law of champerty and maintenance: 15 Am. Dec. 316; 27 Am. Rep. 319; 83 Am. St. Rep. 167.

CHARITIES.

Associations in general. See Associations.

Under R. S. 2764, a benevolent corporation cannot legally encumber its real property without an order from the district court.—*Portneuf Lodge v. Western etc. Sav. Co.*, 6 Idaho, 673, 59 Pac. 362.

Where a benevolent corporation mortgages its property without first obtaining an order of the district court as required by R. S. 2764, and it is shown that the notes secured by the mortgage are usurious and that the corporation has paid the principal of the debt, the corporation will be entitled to a decree canceling the mortgage but will not be entitled to the statutory penalty and damages for failure of defendant to satisfy the mortgage.—*Portneuf Lodge v. Western etc. Sav. Co.*, 6 Idaho, 673, 59 Pac. 362.

CHATTEL MORTGAGES.

- I. REQUISITES AND VALIDITY.
- II. FILING, RECORDING AND REGISTRATION.
- III. CONSTRUCTION AND OPERATION.
- IV. RIGHTS AND LIABILITIES OF PARTIES.
- V. RIGHTS AND REMEDIES OF CREDITORS.
- VI. ASSIGNMENT OF MORTGAGE OR DEBT.
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- VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE AND SATISFACTION.
- IX. FORECLOSURE.
 - (A) Right to Foreclose in General.
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- X. REDEMPTION.

Attachment of mortgaged property. See Attachment and Garnishment.

Conditional sales. See Sales.

Mortgages of real property or interests therein. See Mortgages.

I. REQUISITES AND VALIDITY.

Rights as to fixtures. See Fixtures.

Validity as to creditor. See post, V.

A chattel mortgage on crops to be sown is valid.—*Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401; *Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405.

Defendant, desiring to start a Democratic newspaper in Boise, requested a loan from the citizens thereof, to be repaid in one year, with interest. A subscription of five thousand five hundred dollars was made by Democrats of the city. With full knowledge that said amount was in subscriptions and not then collected, defendant executed his note and mortgage for said amount. Three thousand and fifty dollars of said sum was collected and paid to defendant. Held, that the mortgage, being given to secure future advances contingent on collection of the subscriptions, could be foreclosed.—*O'Farrell v. Kennedy*, 5 Idaho, 401, 49 Pac. 313.

A mortgagee of a stock of merchandise under a mortgage authorizing the retention and sale of the chattels by the mortgagor is estopped to question the validity of a prior similar mortgage of which he had knowledge and to which his mortgage was expressly made subject.—*Wells, Fargo & Co. v. Alturas etc. Co.*, 6 Idaho, 506, 56 Pac. 165.

Under R. S. 3385, as amended by acts of 1899, 292, providing that chattel mortgages may be made on all property, not defined by

statute to be real estate, a chattel mortgage on real estate creates no lien thereon.—*Beeler v. C. C. Mercantile Co.*, 8 Idaho, 644, 1 Ann. Cas. 310, 60 L. R. A. 283, 70 Pac. 943.

Where a hotel building is affixed to land and owned, occupied, used and conveyed as real estate, the parties to a chattel mortgage on the hotel building cannot by mere agreement, treat the building as a chattel or encumber it by a chattel mortgage while it remains affixed to the land.—*Beeler v. C. C. Mercantile Co.*, 8 Idaho, 644, 70 Pac. 943, 1 Ann. Cas. 310, 60 L. R. A. 283.

Failure to attach to a chattel mortgage an affidavit to the effect that "it was made in good faith and without any design to hinder, delay or defraud creditors" as provided in R. S. 3386 does not invalidate the mortgage as between the parties thereto.—*Marchand v. Bonaghan*, 9 Idaho, 95, 72 Pac. 731.

A stipulation in a chattel mortgage giving the mortgagee the right to take possession of the property, by force if necessary, on breach of the conditions of the mortgage, is not contrary to public policy.—*First Nat. Bank v. Steers*, 9 Idaho, 519, 108 Am. St. Rep. 174, 75 Pac. 225.

Editorial Notes:

Execution of mortgage, manner and essentials of: 137 Am. St. Rep. 471.

Possession of the mortgagor, when evidence of fraud: 31 Am. Rep. 178.

Chattel mortgages, allowing the mortgagor to retain possession and sell property: 15 Am. St. Rep. 912.

Validity of a chattel mortgage of stock of merchandise as affected by a provision or agreement giving the mortgagor the possession with power of sale: 18 L. R. A. 604; 36 L. R. A., N. S., 1181.

Future crop mortgage: 23 L. R. A. 449.

II. FILING, RECORDING AND REGISTRATION.

Failure to file or record as affecting priorities. See post, III.

Record of mortgage as notice affecting priority. See post, III.

III. CONSTRUCTION AND OPERATION.

Renewal note and mortgage. See post, VIII.

A chattel mortgage on crops to be sown, when duly recorded, is notice to all persons acquiring or claiming to have acquired rights in or to the mortgaged property, through or under the mortgagor, subsequent to the recording of the mortgage.—*Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401; *Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405.

R. leased land to D. for the year 1890, at a rental of one third of the crop grown, reserving the right to seed said ground in case the lessee should fail to do the same in good season. The lease did not provide for forfeiture or re-entry. The lessee continued in possession to the end of the term. On January 28, 1890, D. gave a chattel mortgage on the crop to S., which mortgage was duly recorded. On March 24, 1890, D. executed to his lessor a release of the lease. There was

no change of possession or management after the making of such release. The crop was divided as provided in the lease. Held, that the lessor took the release subject to the rights of S. under his mortgage.—*Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405.

In an action to foreclose a chattel mortgage on a crop, certain persons who had filed laborers' liens on said crop were made parties. The lien claimants endeavored to show that their work was done at the instance and request of the agent of the mortgagee. There was no evidence showing a waiver of the priority of the mortgage over the other lien claims and no evidence that the work was done at the request of the mortgagee or that he ratified the same. Held, that the mortgage was prior to the liens, to all costs incurred in the foreclosure thereof, and to the charges and compensation of the receiver appointed therein.—*Rourke v. Bergevin*, 4 Idaho, 742, 44 Pac. 645.

Plaintiff gave defendant a chattel mortgage to secure an indebtedness. Subsequently plaintiff and his copartner executed a mortgage on the partnership property to secure a debt of the firm, including in such mortgage the amount of the original mortgage. The latter mortgage was paid. By an agreement between plaintiff and defendant, defendant was to hold the first mortgage as security for an individual indebtedness existing and to arise from future advances to be made by defendant to plaintiff. Held, that such agreement was contrary to R. S. 3351, providing that "a mortgage can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant or conveyance of real property."—*Willows v. Rosenstien*, 5 Idaho, 305, 48 Pac. 1067.

R. S. 3351, providing that a mortgage can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant or conveyance of real property, applies to chattel mortgages as well as to real estate mortgages.—*Willows v. Rosenstien*, 5 Idaho, 305, 48 Pac. 1067.

A chattel mortgage upon a stock of merchandise, under the terms of which the mortgagor retains possession and sells in the usual course of trade, applying the proceeds thereof less expenses to the mortgage debt, is valid as between the parties and as against junior mortgages of the same kind, taken with actual notice of such former mortgage.—*Wells, Fargo & Co. v. Alturas etc. Co.*, 6 Idaho, 506, 56 Pac. 165.

Actual notice of a prior unrecorded chattel mortgage binds a junior mortgagee.—*Wells, Fargo & Co. v. Alturas etc. Co.*, 6 Idaho, 506, 56 Pac. 165.

The lessee of sheep agreed to pay a yearly rental therefor, the title to remain in the lessor. The contract provided that the lessor should have a lien on the increase of the sheep to secure payment of the stipulated rental, and that in case of default in any payment of rental, the lessor could seize the sheep, with all the increase, as his absolute property. The lessee agreed to care for the sheep and return the full number originally leased, replacing any that might be lost with

like sheep. Held, that a mortgage lien created on the wool and the increase of the sheep by the lessee was valid against the lessor, since the title to the wool and increase did not remain in the lessor under R. S. 3333, which provides that "notwithstanding an agreement to the contrary, a lien or contract for a lien transfers no title to the property subject to the lien."—*Solomon v. Franklin*, 7 Idaho, 316, 62 Pac. 1030.

Under the laws of Idaho, mortgaged property becomes the primary security and the personal obligation of the mortgagor a secondary one.—*Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63.

Where a chattel mortgage is not recorded in the county where the property is located as required by R. S. 3386, amended by Laws 1899, page 121, a subsequent purchaser of such property without notice of the mortgage is not bound thereby.—*Cowden v. Finney*, 9 Idaho, 619, 75 Pac. 765; *Cowden v. Mills*, 9 Idaho, 626, 75 Pac. 766.

An instruction that the filing of a chattel mortgage in the recorder's office gave notice to the plaintiff and to all the world of the existence of said mortgage and that it was plaintiff's duty to inquire from some proper source of information whether or not the same had been paid, and if he failed to make such inquiry, and the same had not been paid, he bought at his peril, and got no title by the purchase thereof, was correct.—*Hansen v. Haley*, 11 Idaho, 278, 81 Pac. 935.

The mortgagee of trade fixtures acquires no greater rights in and to mortgaged trade fixtures than the tenant, and when the tenant's right to re-enter and sever and remove such fixtures has ceased, the rights of the mortgagee also cease.—*Bush v. Havird*, 12 Idaho, 352, 10 Ann. Cas. 107, 86 Pac. 529.

Where a chattel mortgage on a stock of merchandise contains no provision as to after-acquired property, the mortgagee will not be authorized to seize merchandise purchased and put into the business subsequent to the execution of the mortgage and after a sale of the original stock, where such sale has been with the consent and permission of the mortgagee.—*Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

R. C. 3409 recognizes the right of a mortgagor and mortgagee to agree that the possession of the mortgaged property may remain in the mortgagor or be given to the mortgagee; and that if the mortgagee receive and retain actual possession of the mortgaged property, such possession is equivalent to the recording of such mortgage, and gives to the world the same notice that is given by the recording of such mortgage.—*Martin v. Holloway*, 16 Idaho, 513, 25 L. R. A., N. S., 110, 102 Pac. 3.

When a mortgagee agrees in writing that his mortgage, although prior in date, shall be held subject to another certain mortgage, and there is no consideration stated in such agreement, and it appears as a fact that no consideration passed to the first mortgagee for making such agreement, and the only consideration claimed is that the second mortgagee made advances and loans to the mortgagor

which he would not otherwise have made, and it further appears that advances and loans have been made by the second mortgagee prior to the making of such agreement, and that there was no change in the method of making such advances or loans, and that the second mortgagee was under bond to see that the mortgagor carried out and fulfilled a contract for which such advances were made, such evidence is sufficient to support a finding that there was no consideration for such agreement, and that the party making such agreement was not estopped to claim that his mortgage was prior to that held by the other party to such agreement.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

Evidence examined as to the interest retained by a mortgagor in crops to be grown, and held that the same is sufficient to support the findings of the trial court, and that R. C. 3406, authorizes and justifies the conclusion of law drawn by the trial court to the effect that the crop was liable in the hands of a third party to the extent of the interest retained therein by the mortgagor.—*Collins v. Brown*, 19 Idaho, 360, 114 Pac. 671.

Editorial Notes:

Giving mortgagee right to take possession when he deems himself unsafe, construction of: 51 Am. Rep. 805.

Removal of property to another state, effect of on the lien: 30 Am. St. Rep. 324.

Title and rights of the holder of mortgage of chattels after condition broken: 96 Am. St. Rep. 682.

Effect on lien of chattel mortgage of independent action on debt secured: Ann. Cas. 1912A, 828.

IV. RIGHTS AND LIABILITIES OF PARTIES.

Sale or removal by mortgagor. See post, VII.

A mortgagee of personal property to whom delivery of the mortgaged personal property has been made can maintain claim and delivery for the wrongful taking thereof by a third person.—*O'Neill v. Whitcomb*, 3 Idaho, 624, 32 Pac. 1133.

Where the mortgagee takes possession of the mortgaged chattels and sells them in any other manner than that pointed out by statute, he is guilty of conversion and becomes liable therefor to the mortgagor.—*Marchand v. Ronaghan*, 9 Idaho, 95, 72 Pac. 731.

Where a mortgagee has a right to take possession of chattels mortgaged, he may maintain an action of claim and delivery against one unlawfully holding the same without first resorting to his right to foreclose the mortgage.—*First Nat. Bank v. Steers*, 9 Idaho, 519, 108 Am. St. Rep. 174, 75 Pac. 225.

Under a chattel mortgage providing that "if the said property shall be levied upon by attachment or execution, the said debt shall at once become due and the mortgagee may take possession of said property, using all necessary force to do so, and may immedi-

ately proceed to sell the same in the manner provided by law," the mortgagee may maintain the action of claim and delivery to recover possession of the mortgaged property from an officer holding the same under writ of attachment subsequent to the mortgage after demand for the property and refusal by the officer to deliver the property or pay the mortgage debt.—*First Nat. Bank v. Steers*, 9 Idaho, 519, 108 Am. St. Rep. 174, 75 Pac. 225.

Where a mortgagee permits the mortgagor of a stock of goods to remain in possession and dispose of the same after default, the mortgage will be good as between the mortgagor and mortgagee as to any and all property not disposed of.—*Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

A mortgagor and mortgagee may make an agreement, valid as between themselves, that the possession of the mortgaged property shall remain in the mortgagor with power to dispose of the mortgaged property and apply all or a part of the proceeds in payment of the mortgage indebtedness.—*Martin v. Holloway*, 16 Idaho, 513, 25 L. R. A., N. S., 110, 102 Pac. 3.

A stipulation in a mortgage, which authorizes the mortgagee upon named contingencies to take possession of the mortgaged property, is valid under the laws of this state.—*Martin v. Holloway*, 16 Idaho, 513, 25 L. R. A., N. S., 110, 102 Pac. 3.

A complaint in an action in claim and delivery, which alleges the giving of a chattel mortgage to the plaintiff upon a stock of merchandise, containing a provision that the mortgagor retain possession with power to sell the mortgaged property and apply only a part of the proceeds to the payment of the mortgage debt, and that subsequent to the execution of such mortgage the mortgagor and the mortgagee agreed that the mortgagee should take possession of such mortgaged property for the better securing of such debt, and that the mortgagee went into such possession under such mortgage, states a cause of action as against an officer levying a writ of attachment upon such property subsequent to the time the mortgagee went into possession under such mortgage.—*Martin v. Holloway*, 16 Idaho, 513, 25 L. R. A., N. S., 110, 102 Pac. 3.

Where U. gives a mortgage to L. upon certain sheep consisting of "1,200 head of ewe sheep and the increase thereof and 300 head of two year old wether sheep," and L. commences proceedings to foreclose said mortgage and applies to the court for the appointment of a receiver, and such receiver takes possession of said mortgaged property and holds the same for L., and the court thereafter revokes the order appointing said receiver, and such receiver thereafter continues in possession of said mortgaged property for L., and L. retains possession of said personal property until judgment is obtained in said foreclosure proceedings and execution issued, and levy is made upon a portion of said mortgaged property, and the same is sold and applied upon the foreclosure judgment, and the portion of the property not levied upon is not returned to U. and no account is given

of the same, U., in an action for conversion, may recover the market value of the property so taken and unaccounted for.—*Unfried v. Libert*, 20 Idaho, 708, 119 Pac. 885.

The evidence in this case examined, and held not to show willful malice or fraud or gross negligence on the part of the appellant in the taking of the property, the value of which is sought to be recovered in this action. *Unfried v. Libert*, 20 Idaho, 708, 119 Pac. 885.

Where a mortgagee of personal property authorizes the mortgagor to sell the same and apply the proceeds thereof in payment of the mortgages, he may revoke such authority to sell at any time before the sale is made.—*Saxton v. Breshears*, 21 Idaho, 333, 121 Pac. 567.

The mortgagee of a hay crop authorized the mortgagor to sell the same and apply the proceeds in payment of the mortgage debt. Thereafter the mortgagor contracted with plaintiff to sell him the mortgaged hay at \$8 per ton, the hay to be baled and placed on board the cars, the purchaser reserving the right to reject any and all of said hay and payment therefor to be made when the hay was accepted. Part payment was made on the contract and thereafter a dispute arose between the parties as to which one must pay for baling the hay. Such dispute continued for more than three months, when the purchaser agreed to pay \$5.25 per ton on board the cars, reserving the right to reject any and all hay that was not first class. Before delivery thereof, the mortgagee commenced foreclosure proceedings and the sheriff took possession of the hay. Held, that an action in claim and delivery could not be maintained by the purchaser, as he was not entitled to possession under either contract until delivery of the hay on board the cars.—*Saxton v. Breshears*, 21 Idaho, 333, 121 Pac. 567.

The mortgagee of a hay crop authorized the mortgagor to sell the same and apply the proceeds in payment of the mortgage debt. Thereafter the mortgagor contracted with plaintiff to sell him the mortgaged hay at \$8 per ton, the hay to be baled and placed on board the cars, the purchaser reserving the right to reject any and all of said hay and payment therefor to be made when the hay was accepted. Part payment was made on the contract and thereafter a dispute arose between the parties as to which one must pay for baling the hay. Such dispute continued for more than three months, when the purchaser agreed to pay \$5.25 per ton on board the cars, reserving the right to reject any and all the hay that was not first class. Before delivery thereof, the mortgagee commenced foreclosure proceedings and the sheriff took possession of the hay. Held, that the purchaser was not entitled to possession under either contract until delivery of the hay on board the cars.—*Saxton v. Breshears*, 21 Idaho, 333, 121 Pac. 567.

Where a mortgagee of personal property authorizes the mortgagor to sell the same and apply the proceeds thereof in payment of the mortgage, he does not thereby waive his lien until a valid contract of sale has been made.

Saxton v. Breshears, 21 Idaho, 333, 121 Pac. 567.

Editorial Notes:

On growing crops, lien of, whether continues after the severance: 18 Am. St. Rep. 770.

V. RIGHTS AND REMEDIES OF CREDITORS.

Payment by creditor releases mortgage. See post, VIII.

Right of mortgagor to have mortgage assigned to another creditor after payment thereof. See post, VIII.

Attachment of mortgaged property. See Attachment and Garnishment.

Attacking validity of chattel mortgage by attaching. See Attachment and Garnishment, II.

A mortgage of a stock of merchandise, permitting the mortgagor to retain possession thereof and to sell and retail the same, without requiring that the proceeds shall be applied to the payment of the debt due to the mortgagee, is absolutely void as to attaching creditors of the mortgagor.—*Lewiston Nat. Bank v. Martin*, 2 Idaho, 734, 23 Pac. 920.

A crop mortgage, which describes the property as "the crop of wheat and flax now being, standing and growing, or all the wheat and flax now growing upon the land known as the "timber claim" of the mortgagor in Nez Perce county, Idaho, is sufficient as to the description of the property mortgaged, since a third person, aided by inquiries suggested by the instrument, would be enabled therefrom to identify the property.—*McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 403.

A crop mortgage, containing the description "all wheat and flax to be sown and grown upon the land described," without specifying the year in which it is to be sown and grown, is too indefinite and uncertain, and is void as to creditors.—*McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 403.

A chattel mortgage on cordwood provided that "until default be made in the payment of said money, the party of the first part, his executors, etc., may remain and continue in the quiet and peaceable possession of the said goods and chattels and in the full and free use and enjoyment of the same." Held, that the mortgage was not void as to creditors on the ground that the mortgage authorized a sale of the property by the mortgagor, since such sale was not authorized thereby.—*Meyer v. Munro*, 9 Idaho, 46, 71 Pac. 969.

Where a mortgagee permits the mortgagor to remain in possession of the mortgaged stock of goods for at least nine months after breach of the conditions named in the mortgage and to sell and dispose of the property without any attempt to collect the mortgage debt or take possession of the property, there is, as a matter of law, such fraud upon attaching creditors and purchasers as to avoid the mortgage.—*Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

Though a chattel mortgage is defective or invalid as to third parties, if the mortgagee takes possession of the mortgaged property prior to any creditors' rights initiating by

reason of attachment or other lien, his security will be held valid.—*Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427.

If a mortgagee takes possession of the mortgaged chattels, consisting of a stock of merchandise, with the consent of the mortgagor before any other right or lien attaches, his right to possession under the mortgage is good against everybody, if it was previously valid between the mortgagor and mortgagee, although such mortgage contained a provision that the mortgagor shall retain possession of the mortgaged property with power to dispose of the same in the ordinary course of business, applying only a part of the proceeds in discharge of the mortgaged debt.—*Martin v. Holloway*, 16 Idaho, 513, 25 L. R. A., N. S., 110, 102 Pac. 3.

Where a chattel mortgage upon a stock of merchandise contains a provision that the mortgagor shall retain possession and have power to dispose of the mortgaged property in the ordinary course of trade, and apply part of the proceeds upon the mortgage debt, and it appears that the mortgagee took possession of the mortgaged property with the consent of the mortgagor before any specific right or lien upon the property is acquired by a creditor, the possession of such mortgagee is valid and cures such defect, if any, in the mortgage, and gives the mortgagee the right to retain the possession for the purpose of enforcing such lien against the right to such possession of a subsequent attaching creditor.—*Martin v. Holloway*, 16 Idaho, 513, 25 L. R. A., N. S., 110, 102 Pac. 3.

The evidence supports the finding of the court, to the effect that the plaintiff's mortgage was given in good faith for a valuable consideration, and without intention to hinder, delay, or defraud the creditors of the mortgagor.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

Sale or assignment of mortgage after payment thereof. See post, VIII.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

Under Gen. Laws 1880-81, page 307, making the willful sale of property on which there is a chattel mortgage, without the written consent of the mortgagee, larceny and declaring the sale void, evidence of an oral consent of the mortgagee to the sale of such property is admissible to explain the intention of the mortgagor in making such sale.—*Mills v. Glennon*, 2 Idaho, 105, 6 Pac. 116.

An instruction that "the sale of any portion of mortgaged property without written consent of the mortgagee, is void," is erroneous, since such a sale would convey the title subject to the mortgage lien.—*Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

To secure various successive loans and advances, the owners of sheep executed mortgages thereon. Subsequently another mortgage was taken by the mortgagees, subject to prior mortgages on portions of said

sheep. Letters from the mortgagees prior to the date of the last mortgage showed that they were willing and anxious that the mortgagor should sell the sheep mortgaged. No notice was given subsequent to the last mortgage that the consent of the mortgagees to sale of the sheep was withdrawn. The evidence tended to show that the parties to the mortgages treated them all as one continuing transaction. The mortgagee caused the sheep to be seized under the last mortgage and plaintiff who had previously bought them from the mortgagors sued to recover them. Held, that the letters of the mortgagee were properly admitted in evidence.—*Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

To secure various successive loans and advances, the owners of sheep executed mortgages thereon. Subsequently, the mortgagee took another mortgage as additional security and to secure a further advance. Letters from the mortgagees prior to the date of the last mortgage showed that they were willing that the mortgagor should sell the sheep mortgaged. No notice was given subsequent to the last mortgage that the consent of the mortgagees to sale of the sheep was withdrawn. The evidence tended to show that the parties to the mortgage treated them all as one continuing transaction. The mortgagee caused the sheep to be seized under the last mortgage and plaintiff who had previously bought them from the mortgagors sued to recover them. Held, that a verdict for plaintiff was supported by the evidence.—*Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

The consent of the mortgagee to a sale of the chattels mortgaged waives the lien of the mortgage as to a purchaser from the mortgagor.—*Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

A chattel mortgage on cordwood provided that "until default be made in the payment of said money, the party of the first part, his executors, etc., may remain and continue in the quiet and peaceable possession of the said goods and chattels and in the full and free use and enjoyment of the same." Held, not to authorize a sale thereof by the mortgagor *Meyer v. Munro*, 9 Idaho, 46, 71 Pac. 969.

Under R. S. 7100, the fact that the mortgagee has received full payment of the mortgage debt after the sale of the mortgaged property will not prevent the prosecution of the mortgagor for the crime of larceny for willfully selling mortgaged property. *State v. Barber*, 15 Idaho, 96, 96 Pac. 116.

Under R. S. 7100, making the willful removal, destruction, sale or other disposition of mortgaged property by the mortgagor larceny, the degree of larceny as between grand and petit larceny is determined by the value of the property as stated in R. S. 7048. *State v. Barber*, 15 Idaho, 96, 96 Pac. 116.

Where the mortgagee authorizes the mortgagor to sell the mortgaged property, such authority is not a waiver of the mortgage lien until the mortgagor has made a valid contract for the sale of such hay, and the mortgagee may revoke such authority at any time before a valid sale is made.—*Saxton v. Breshears*, 21 Idaho, 333, 121 Pac. 567.

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VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE AND SATISFACTION.

Where, in an action to foreclose a mortgage, defendant's evidence that the note secured has been paid, partly in cash and partly by another note secured by chattel mortgage, is not contradicted by any substantial evidence, a judgment for plaintiff will be reversed.—*Commercial Bk. v. Lieuallen*, 5 Idaho, 47, 46 Pac. 1020.

A prior chattel mortgage is not canceled or released by the giving of a new mortgage for the same indebtedness, unless there is an agreement between the parties to that effect. *Willows v. Rosenstien*, 5 Idaho, 305, 48 Pac. 1067.

Where a creditor seeks to subject mortgaged personal property of a debtor to the payment of his claim, and pays to the mortgagee the amount of the mortgage as provided in R. S. 3389, such payment discharges the mortgage and the lien thereunder, and the creditor cannot thereafter enforce the mortgage lien.—*Baumgartner v. Vollmer*, 5 Idaho, 340, 49 Pac. 729.

Where a chattel mortgage is given to secure a debt evidenced by a note, and thereafter a new note and chattel mortgage are given for the same debt, though a different rate of interest is provided for in the new note and an additional sum for attorney's fee, it is not a new contract, where it is stated that the new obligation is given to renew the old one.—*Vollmer v. Reid's Estate*, 10 Idaho, 196, 77 Pac. 325.

Where a mortgagor makes payments upon the mortgage debt out of money belonging to the mortgagor, and such payments amount to the sum secured by such mortgage, such mortgagor cannot thereafter have such mortgage assigned to another creditor to secure a debt due such creditor, to the prejudice of a creditor or subsequent mortgagee.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

Where it appears that money due and belonging to a mortgagor has been paid to the mortgagee upon the indebtedness secured by such mortgage, such debt thereby becomes liquidated and extinguished, and such mortgage is no longer the subject of sale and transfer.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

IX. FORECLOSURE.

(A) RIGHT TO FORECLOSE IN GENERAL.

R. S. 3390 et seq., providing the manner in which chattel mortgages may be foreclosed, are valid.—*Givens v. Keeney*, 7 Idaho, 335, 63 Pac. 110.

(B) RESTRAINING FORECLOSURE.

R. S. 3396 provides a remedy for a judgment creditor who desires to attack the validity of a mortgage about to be foreclosed.—*Blumaur-Frank Drug Co. v. Branstetter*, 4 Idaho, 557, 95 Am. St. Rep. 151, 43 Pac. 575

Where, in an action brought under R. S. section 3396, to contest the right of a mortgagee to foreclose a chattel mortgage, a motion is made to compel defendant to file the original affidavit in the chattel mortgage foreclosure proceedings or to compel it to file a complaint setting up its right to a deficiency judgment and facts showing the right to foreclosure of the chattel mortgage before the sheriff, and it is shown that the sale has taken place before the hearing of the motion, the presumption is that the sheriff has made his return on the affidavit as required by R. S. 3395 and filed it with the clerk, and the court properly denied such motion in the absence of a showing that the affidavit was in defendant's possession and that it was not produced on proper demand.—*Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.

An injunction will lie to restrain the foreclosure of a chattel crop mortgage executed by the husband alone on property belonging to the husband, and exempt from execution. *Kindall v. Lincoln Hardware etc. Co.*, 8 Idaho, 664, 70 Pac. 1056.

Where a husband and wife sue to enjoin the foreclosure of a chattel mortgage on community property, void for want of the wife's signature, the death of the wife during the pendency of the action does not make the mortgage enforceable against the husband.—*Kindall v. Lincoln Hardware etc. Co.*, 8 Idaho, 664, 70 Pac. 1056.

Where a creditor seeks to enjoin a sale under foreclosure of a chattel mortgage under R. S. 3396, and his complaint fails to show the debtor's insolvency or that he has no other property out of which to pay plaintiff or that any demand has been made on the debtor for payment, and also fails to show that he has obtained any judgment against the debtor or connected himself with the specific property by lien or attachment, a demurrer to the complaint should be sustained.—*Neustadter Bros. v. Doust*, 13 Idaho, 617, 92 Pac. 978.

(C) BOND TO STAY PROCEEDINGS.

While plaintiff was threatening to foreclose by notice and sheriff's sale a chattel mortgage, the mortgagor began an action against him to recover on debts due from plaintiff to the mortgagor and in the same action sought to enjoin the foreclosure on the ground of fraud in the procurement of the note and mortgage. After the plaintiff had filed his cross-complaint in said action praying the foreclosure of the mortgage, defendants herein executed a bond to plaintiff for a stay of proceedings on the note and mortgage, the bond providing that after judgment in said action "defendant might proceed either upon the note and mortgage, or upon this obligation at his option." The action proceeded to judgment and the plaintiff herein obtained a decree foreclosing his mortgage. Held, that plaintiff was not estopped to maintain an action on the bond.—*Givens v. Keeney*, 7 Idaho, 335, 63 Pac. 110.

While plaintiff was threatening to foreclose by notice and sheriff's sale a chattel mortgage, the mortgagor began an action

against him to recover on debts due from plaintiff and in the same action alleged that the note and mortgage were fraudulently procured. A temporary injunction was issued and subsequently dissolved and the mortgagor obtained judgment against plaintiff, which judgment was reversed on appeal. On a new trial plaintiff obtained on his cross-complaint a decree of foreclosure of his chattel mortgage. After the injunction was dissolved, defendants in this action executed a bond to plaintiff, reciting the proceedings had, and that "whereas, the plaintiff is desirous of staying the payment of said note and mortgage until after the trial of this cause or the dismissal thereof; now, therefore, in consideration of the premises and the stay of proceedings to enforce the payment of said note and mortgage, we are held and firmly bound unto defendant, G., and agree to pay to said defendant the amount due or to become due on said note, after deducting the amount of the judgment if any, which plaintiff may finally recover herein against defendant." The bond further provided that after judgment in said action, defendant might proceed either upon the note and mortgage, or upon this obligation, at his option. Held, that the granting of time and opportunity to adjudicate the question of plaintiff's debts to the mortgagor and the question of the validity of the note and mortgage was a sufficient consideration for the bond.—*Givens v. Keeney*, 7 Idaho, 335, 63 Pac. 110.

(D) EXERCISE OF POWER OF SALE.

R. S. 4520 provides that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter." R. S. 3390 et seq. provide for the foreclosure of chattel mortgages by affidavit, notice and sale by the sheriff, and also by action in the district court. Held, that these methods of foreclosure are exclusive and that the power to seize and sell at private sale property mortgaged cannot lawfully be exercised though the mortgage so provides.—*Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63.

(E) ACTIONS TO FORECLOSE.

Under a statute providing that "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property," plaintiff cannot maintain an action for claim and delivery where he has already commenced an action to foreclose a chattel mortgage on the same property which action is still pending.—*Cederholm v. Loofborrow*, 2 Idaho, 191, 9 Pac. 641.

Under R. S. 4183-4185, in an action brought to contest the foreclosure of a chattel mortgage, defendant may file a cross-complaint seeking to foreclose a real estate mortgage given by plaintiff in the same transaction.—*Murphy v. Russell & Co.*, 8 Idaho, 151, 67 Pac. 427.

In an action to foreclose a chattel mortgage, the complaint alleged that the mort-

gage by mutual mistake of the parties omitted to state where the property was at the time of the execution of the mortgage and asked that the mortgage be reformed so as to correct such mistake. Held, that evidence was admissible to show the location of the property at the time the mortgage was executed.—*Marchand v. Bonaghan*, 9 Idaho, 95, 72 Pac. 731.

Where a mortgage provides that the mortgagor shall keep the property insured, and that in case he fails to do so the mortgagee may insure, and all sums paid by the mortgagee for insurance shall become a part of the mortgage debt and be secured by the mortgage lien, a failure of the mortgagor to insure will not amount to such waste of the security as to authorize the appointment of a receiver to take charge of the property. *Eureka Min. etc. Co. v. Lewiston Nav. Co.*, 12 Idaho, 472, 86 Pac. 49.

Where a mortgage is given on a boat that is plying on an interstate stream in such manner that its use in navigating such stream must necessarily take it beyond the jurisdiction of the state in which the mortgage was executed, and it is stipulated in the mortgage that the mortgagor shall not remove the vessel "beyond the limits of the United States," a removal beyond the jurisdiction of the state and its use in navigation of a portion of the same stream where it is no more dangerous or perilous will not constitute grounds for the appointment of a receiver to take charge of the property pending foreclosure, the vessel being in charge of a competent crew.—*Eureka Min. etc. Co. v. Lewiston Nav. Co.*, 12 Idaho, 472, 86 Pac. 49.

A stipulation in a mortgage for the allowance of an attorney's fee in foreclosure proceedings is valid.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

To entitle a plaintiff to recover attorneys' fees upon the foreclosure of a mortgage, where it is stipulated that a certain specified sum may be recovered as attorneys' fees in such foreclosure proceedings, and that the same are reasonable, the plaintiff must also prove that he has agreed to pay his counsel a stipulated or reasonable fee, for his services in such action, and the reasonableness of the fee agreed to, or what would be a reasonable fee in such action.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

Where a mortgagee of personal property authorizes the mortgagor to sell the same and apply the proceeds thereof in payment of the mortgage, the commencement of foreclosure proceedings and placing the sheriff in possession operates a revocation of the authority to sell.—*Saxton v. Breshears*, 21 Idaho, 333, 140 Pac. 567.

(F) DEFICIENCY AND PERSONAL LIABILITY.

Default having been made by defendant in the condition of a chattel mortgage, plaintiff

foreclosed by notice and sale. The return of the sheriff showed a deficiency, to recover which plaintiff brought this action. To a complaint setting forth all the proceedings of the foreclosure, the sale and the report of the deficiency, in proper form, the court sustained a demurrer. Held, error.—*Advance Thresher Co. v. Whiteside*, 3 Idaho, 64, 26 Pac. 660.

Under R. S. 4520, providing that if it appear in mortgage foreclosure proceedings from the sheriff's return "that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance against defendants personally liable," a decree of foreclosure stating "that the defendant, B., do have and recover from plaintiff, B., the sum of \$442, together with costs of suit, hereby taxed at \$8.70" is not a money judgment, since such a judgment can only be docketed after the sheriff's return as provided by the statute.—*Barnes v. Buffalo Pitte Co.*, 6 Idaho, 519, 57 Pac. 267.

Where a mortgagee seizes the mortgaged personal property and sells it at private sale under the provisions of the mortgage allowing him so to do, he cannot thereafter maintain an action for the balance due on the mortgage debt.—*Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63.

A mortgagee cannot waive his security and sue upon the debt.—*Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63.

Mortgaged personal property becomes the primary security for the debt, and the personal obligation of the mortgagor a secondary one.—*Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63.

(G) WRONGFUL FORECLOSURE.

The expense for loss of time and the expense of employing counsel in advising the method to be pursued by the mortgagor in resisting the foreclosure of a chattel mortgage, where it is claimed by the mortgagor that the debt has been paid, cannot be recovered in such action or in an independent action brought for the purpose of recovering such damages.—*Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463.

X. REDEMPTION.

(No paragraphs.)

CHECK.

Certified check as substitute for appeal bond. See *Justices of the Peace*, V.
Canceled admissible to prove payment. See *Bills and Notes*, VIII, (E).

CHINESE.

See *Aliens*.

CHOSE IN ACTION.

Action by assignee thereof. See *Assignments*.

CHURCHES.

See *Religious Societies*.

CITIZENS.

See Aliens; Indians.

Citizenship as affecting right to acquire mining claims. See Mines and Minerals.

Right of suffrage. See Elections, I.

No vested rights in general laws, precluding amendment or repeal. See Constitutional Law, I.

CIVIL RIGHTS.

Deprivation of life, liberty or property without due process of law; denial of equal protection of law; subjection of person and property to police power and other powers of state; protection of vested rights and contract obligations. See Constitutional Law.

Guaranty of trial by jury. See Jury.

Restrictions on procedure in criminal cases. See Criminal Law.

CLAIM AND DELIVERY.**I. RIGHT OF ACTION AND DEFENSES.****II. JURISDICTION, VENUE AND PARTIES.****III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.****IV. PLEADING AND EVIDENCE.****V. DAMAGES.****VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT AND REVIEW.****VII. LIABILITIES ON BONDS AND UNDERTAKINGS.**

Mortgagee cannot maintain where foreclosure proceedings begun. See Chattel Mortgages, IX, (E).

Right of mortgage to maintain action of. See Chattel Mortgages, IV.

For trespassing hogs. See Animals, VII.

I. RIGHT OF ACTION AND DEFENSES.

Claim of lien as defense. See Animals, II.

To support an action of claim and delivery, the property must have been a personal chattel at the time of the taking, and not something which has been turned into a chattel by reason of having been separated from the freehold by the defendant.—Hull v. Hull, 1 Idaho, 361.

A demand for the return of property made on the deputy sheriff, who conducted the sale thereof under a chattel mortgage foreclosure, is sufficient to bind the sheriff in a replevin action, if any demand was necessary.—Dobbins v. Mounce, 5 Idaho, 325, 48 Pac. 1070.

The common-law action of replevin is abolished in this state, and the provisions of R. C. 4271-4282, providing for claim and delivery, are substituted therefor.—Bates v. Capital State Bank, 21 Idaho, 141, 121 Pac. 561.

Under the common law, replevin would not lie against a defendant who had parted with the possession of the chattel prior to the commencement of the action.—Bates v. Capital State Bank, 21 Idaho, 141, 121 Pac. 561.

Under R. C. 4271-4282, prescribing the remedy and procedure in cases of claim and delivery, an action to recover possession of personal property may be maintained, though

defendant has parted with possession thereof prior to the commencement of the action.—Bates v. Capital State Bank, 21 Idaho, 141, 121 Pac. 561.

R. C. 4272 provides that, where immediate delivery is claimed in an action of claim and delivery, an affidavit must be filed by the plaintiff setting forth certain facts, and he must also give the written undertaking provided by R. C. 4274. R. C. 4273 provides that the plaintiff or his attorney may indorse on the affidavit a notice to the sheriff to take the property. Held, that such written indorsement serves the purpose of the judicial writ of replevin, issued by the king's chancellor under the common law.—Bates v. Capital State Bank, 21 Idaho, 141, 121 Pac. 561.

Under R. C. 4271, providing that in an action to recover the possession of personal property the plaintiff may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter, such demand is optional with the plaintiff and he need not demand immediate possession of the personal property but may demand the same at any time before the answer is filed.—Bates v. Capital State Bank, 21 Idaho, 141, 121 Pac. 561.

N. and wife gave to F. two chattel mortgages on a growing crop of hay to secure the payment of two notes. Thereafter, the mortgagee authorized the mortgagor to sell the mortgaged property and to apply the proceeds on said notes, and a few days after the mortgages became due N. entered into a contract with S. to sell him the mortgaged hay at \$8 per ton, whereby the hay was to be baled and placed on board the cars. S. reserving the right to reject any and all of said hay, and payment therefor to be made when hay was accepted S. paid \$100 on said contract, and thereafter a dispute arose between S. and N. as to which one must pay the expense of baling the hay, and such dispute continued from December 24, 1908, to April 9, 1909, when a written contract was entered into for the sale of said hay, whereby the purchaser was to pay \$5.25 per ton on board the cars at Nampa, the purchaser reserving the right to reject any and all of such hay that was not first class. On the 17th of March, 1909, the mortgagee commenced the foreclosure of said mortgages and the sheriff took possession of said hay. Held, that an action in claim and delivery by said purchaser cannot be maintained for the possession of said hay, as under either of said contracts he was not entitled to the possession thereof until the same was delivered on board the cars.—Saxton v. Breshears, 21 Idaho, 333, 121 Pac. 567.

Under R. C. 4272, where a delivery of personal property is claimed in an action, it must appear that the plaintiff is the owner of the property claimed or is entitled to the possession thereof, and that the property is wrongfully detained by the defendant.—Saxton v. Breshears, 21 Idaho, 333, 121 Pac. 567.

Editorial Notes.

Replevin for property seized under execution: 20 Am. Dec. 696; 80 Am. St. Rep. 697.

Replevin when and against whom sustainable: 80 Am. St. Rep. 741.

Right of one from whom property has been taken in replevin to maintain similar action for its recovery: 8 L. R. A., N. S., 216.

When defendant not in possession: 18 L. R. A., N. S., 1265.

II. JURISDICTION, VENUE AND PARTIES.

(No paragraphs.)

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

In an action of claim and delivery by a bank against a railroad company for a car of apples, the record showed that the railroad company issued a bill of lading therefor to the intervener and thereafter destroyed said bill when informed that the apples belonged to the bank; that thereafter, at the request of intervener and without the consent of the bank, the railroad company issued a second bill of lading and proceeded to remove the apples out of the state; that theretofore on the same day intervener had told representatives of the bank that he would not ship the apples. Held, that an affidavit in claim and delivery that plaintiff did not know the cause of detention of the apples by defendant, was justified by the facts.—Kendrick State Bank v. Northern Pac. Ry. Co., 10 Idaho, 483, 79 Pac. 457.

IV. PLEADING AND EVIDENCE.

Evidence in action by married woman against bank. See Depositaries.

Where, in an action of claim and delivery, the complaint alleges ownership and a right to possession, and the answer denies these allegations, defendant should be permitted to prove his right to possession by virtue of a lien on the property.—Lindsay v. Wyatt, 1 Idaho, 738.

Where, in an action of claim and delivery, defendant claims a right to possession by virtue of a lien on the property, such lien need not be affirmatively pleaded.—Lindsay v. Wyatt, 1 Idaho, 738.

In an action of "claim and delivery," the complaint alleged that on October 21, 1890, the plaintiff "was the owner of and entitled to" the property in question; that on October 20, 1890, defendant wrongfully took the same; that on October 23, 1890, and "before the commencement of this action, said plaintiff demanded of defendant the possession thereof." Held, sufficient to show that plaintiff was in possession of or entitled to the possession of the property in dispute on the date of the alleged unlawful taking.—Pierce v. Langdon, 3 Idaho, 141, 28 Pac. 401.

In an action of claim and delivery, a complaint is insufficient which merely describes the property as "590 sacks of wheat" without any further means of identification.—Pierce v. Langdon, 3 Idaho, 141, 28 Pac. 401.

Under a general denial in claim and delivery, defendant may prove fraud in the sale to plaintiff.—Cornwall v. Mix, 3 Idaho, 687, 34 Pac. 893.

Where in an action of claim and delivery defendant claims fraud in the sale to plaintiff, it is proper to permit cross-examination of plaintiff's vendor as to the terms and conditions of the sale by him to plaintiff.—Cornwall v. Mix, 3 Idaho, 687, 34 Pac. 893.

A complaint in replevin alleged that defendant unlawfully took possession of four hundred bushels of wheat and twenty-two sacks of barley. The complaint specifically alleged the year when the grain was raised and described the particular tract of land on which it was raised. Held, that evidence was admissible to show that the grain was part in shock and part standing uncut in the field at the time defendant took possession thereof.—Dobbins v. Mounce, 5 Idaho, 325, 48 Pac. 1070.

Where the complaint in an action of claim and delivery states that plaintiff was the owner of the property two years before the commencement of the action but fails to allege that at the time of the commencement of the action plaintiff was the owner or entitled to the possession of such property, the allegations are insufficient to support the action.—Bingham Co. etc. Assn. v. Rogers, 7 Idaho, 63, 59 Pac. 931.

In an action of replevin to recover slot machines, alleging that defendant wrongfully took them from the possession of plaintiff, and on demand refused to deliver the same, an answer which sets up that plaintiff is a foreign corporation, and has not complied with the law as required of a foreign corporation doing business in the state, and denies that plaintiff was at any time lawfully possessed of the slot machines, or entitled to possession, denies the alleged value of the machines, or that any one of them was at any time the property of plaintiff, denies a demand for possession, and denies unjust detention, and for a second defense alleging that defendant is a justice of the peace, and that as such justice, on information, he issued warrants commanding a constable to seize such machines, which was done according to law, and the machines were in custody of the law and under the control of the constable, subject to the orders of the justice's court, which plaintiff knew, and that the machines were gambling machines, used for that purpose only, and were outlawed property, without value or ownership, and that plaintiff was a foreign corporation and has not filed its articles of incorporation with the Secretary of State, states a good defense.—Mills Novelty Co. v. Dunbar, 11 Idaho, 671, 83 Pac. 932.

In an action of claim and delivery, the real question at issue is the right of possession of the property in controversy, and it is competent for defendant to offer any evidence tending to show that plaintiff did not have the right of possession at the time the action was commenced.—Idaho Placer Min. Co. v. Green, 14 Idaho, 249, 93 Pac. 954.

Where defendant files a specific denial of the allegations of a complaint in claim and delivery, it is proper to sustain a demurrer to a further answer and defense which sets up facts provable under the specific denial. *Idaho Placer Min. Co. v. Green*, 14 Idaho, 249, 93 Pac. 954.

Where the allegations of a complaint in claim and delivery are specifically denied, defendant may offer evidence to controvert plaintiff's evidence, to disprove his allegations or to prove other and inconsistent facts. *Idaho Placer Min. Co. v. Green*, 14 Idaho, 249, 93 Pac. 954.

In an action of claim and delivery, a specific denial puts in issue all the essential averments of the complaint.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 249, 93 Pac. 954.

Where an action is brought for the recovery of specific personal property described in the complaint, or its value, the fact that the complaint fails to allege that plaintiff is entitled to the immediate possession of said property will not render the complaint demurrable.—*Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277.

In an action of claim and delivery to recover possession of a steer, evidence examined, and held sufficient to support a verdict for defendant.—*Friedrich v. Donahue*, 20 Idaho, 92, 116 Pac. 1029.

Editorial Notes.

Necessity and sufficiency of allegation as to ownership or right to possession in complaint in replevin: *Ann. Cas.* 1912A, 333, 11 *Ann. Cas.* 1150.

V. DAMAGES.

In an action of claim and delivery, where the property sought to be recovered is valuable for use aside from its intrinsic value, and the prevailing party claims damages for the loss of its use in his pleadings, the measure of damages is the value thereof and the reasonable value of its use during its detention; and in determining the value of its use, the taxes which the prevailing party would have paid had he retained possession thereof and the usual and ordinary risk incident to the possession thereof should be considered.—*Sebree v. Smith*, 2 Idaho, 359, 16 Pac. 915.

In an action of replevin, where the verdict is in favor of defendant, whose ownership is special, by reason of a chattel mortgage or other lien, the measure of damages in case a return cannot be had is the amount due him upon his lien if within the value of the property.—*Blackfoot Stock Co. v. Delamue*, 3 Idaho, 291, 29 Pac. 97.

The measure of damages in actions of replevin, where the property sought to be recovered has a usable value, is the value of the property at the time of the taking, with the value of its use from the time of the taking.—*Cornwall v. Mix*, 3 Idaho, 687, 34 Pac. 893.

In a replevin action for grain, the evidence showed the market value of the grain. Defendant failed to show the expenses he incurred in harvesting, threshing and marketing the grain. Held, that a verdict for the market value of the grain would not be disturbed.—*Dobbins v. Mounce*, 5 Idaho, 325, 48 Pac. 1070.

In an action to recover possession of personalty wrongfully seized, or the value thereof, plaintiff cannot be limited to the price for which defendant may have sold the same.—*Cowden v. Finney*, 9 Idaho, 619, 75 Pac. 765; *Cowden v. Mills*, 9 Idaho, 626, 75 Pac. 766.

In an action of replevin where the property sought to be recovered has a usable value and that value amounts to more than interest on the value of the property, a court would be justified in assessing damages for the amount of the usable value of the property and that would be the proper measure of damages, and not interest on the value of the property.—*Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228.

In an action of claim and delivery for certain sheep, a judgment for defendants was reversed on account of errors of law occurring during the trial. Under the writ of replevin the sheep had been placed in plaintiff's possession and by him shorn of their wool. Held, that, if on a retrial of the action defendants should recover the sheep or their value with the value of the wool shorn from the sheep, plaintiff would be entitled, as an offset thereto, to the reasonable cost of shearing the sheep and marketing the wool, but would not be entitled to the cost of keeping the sheep from the time he took possession of them to the date of the judgment so reversed; and further, that he would be entitled, as an offset against any damages recovered by defendants, to the reasonable value of the cost of keeping said sheep, if he has kept them since the date of said judgment until the determination of the case on a retrial after remand. *Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228.

Editorial Notes.

Damages, recoverable in replevin, measure of: 22 *Am. Rep.* 285.

Lost profits as damages: 52 *L. R. A.* 56.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT AND REVIEW.

Where the property claimed in claim and delivery is so mixed with other property that a delivery of the specific article cannot be made, and the plaintiff fails to ask judgment for its value in case it cannot be delivered, the action of claim and delivery cannot be maintained.—*Hull v. Hull*, 1 Idaho, 361.

In an action of claim and delivery, a general verdict, finding for or against either party, is sufficient to enable the court to enter judgment thereon for the return of the property when such return is the appropriate remedy.—*Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

In an action of claim and delivery, where verdict is given for defendant, the judgment of the court should be in the alternative for the return of the property or for its value in case return cannot be made.—*Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

Where the return of property is the appropriate remedy in an action of claim and delivery, the verdict need not be in the alternative.—*Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

In an action of claim and delivery, if either party desires a finding for the return of the property, he should request such finding or he will be deemed to have waived it.—*Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

Where the complaint in an action of claim and delivery describes the property as "590 sacks of wheat," the description is insufficient, and a verdict and judgment which refer only to "the property described in the complaint," are fatally defective.—*Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401.

In an action of replevin against a constable, the evidence of plaintiff showed that she was in actual possession of the property and tended to show that she was the owner thereof. Held, that a prima facie case was established and that it was error to grant a nonsuit.—*Kansteiner v. Clyne*, 5 Idaho, 59, 46 Pac. 1019.

Where plaintiff sued to recover a specified number of sheep of a certain brand, of the value of two dollars per head, and on the trial it was expressly agreed that there was no dispute as to the value or number, a verdict of the jury finding "for the plaintiff for the return of the property set forth in the complaint, or, if return cannot be had, then the value of the same, which we assess at two dollars per head," is not too vague or indefinite to support a judgment for plaintiff. *Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

In an action of claim and delivery for a band of sheep, the sheep were taken from defendants and placed in possession of plaintiff, who had possession thereof at the time of trial. The action was tried on the question of how many of such sheep defendants were entitled to have returned, the value thereof and the damages for detention by plaintiff. The jury found that defendants were entitled to the return of a certain number thereof, their value and damages for their detention. No objection was raised by plaintiff to the verdict in that it did not directly find that plaintiffs were entitled to the possession of the remaining sheep. Held, that the verdict was sufficient to support a judgment for defendants for the specified number, their value and damages for their detention.—*Campbell v. First Nat. Bank*, 13 Idaho, 95, 88 Pac. 639.

In an action of claim and delivery where several articles are sought to be recovered, if either party desires a finding of the value of each article, he should request that such findings be made, or he cannot take advantage of their failure so to do on appeal.—*Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

Editorial Notes.

Necessity that verdict in replevin give separate valuation of several articles involved: *Ann. Cas.* 1912D, 849.

Effect on verdict in replevin of failure to find unlawful taking or detention: *20 Ann. Cas.* 430.

Requisites of special verdict in replevin: *24 L. R. A.*, N. S., 18.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

The sureties in an undertaking on claim and delivery are liable for breach thereof where their principal converted the property seized to its own use and the property was not returned on demand to the defendant in such action, notwithstanding the fact that no judgment for the return of the goods was made in the claim and delivery action on the dismissal thereof for failure to prosecute.—*Keenan v. Washington Liquor Co.*, 8 Idaho, 383, 69 Pac. 112.

In an action on an undertaking on claim and delivery, the original complaint alleged that the action on claim and delivery was determined adversely to defendant. The complaint was amended before issue joined so as to allege that defendant had failed to prosecute the action, for which reason judgment of dismissal was rendered. Held, that the latter allegation was not so inconsistent with the former as to prevent the amendment. *Keenan v. Washington Liquor Co.*, 8 Idaho, 383, 69 Pac. 112.

In an action on a claim and delivery bond, the following description of the property seized under the claim and delivery proceedings and converted by defendants was sufficient: "A certain stock of liquors, tobaccos and cigars then the property of R.," etc.—*Keenan v. Washington Liquor Co.*, 8 Idaho, 383, 69 Pac. 112.

CLASS LEGISLATION.

In general. See Constitutional Law, IX.
Local and special laws. See Statutes.

CLERK OF COURT, AUDITOR AND RECORDER.

Duty of auditor as to election ballots. See Elections, VII.

As to certificates of election. See Elections, IX.

Duty of clerk to file information presented by prosecuting attorney. See Indictment and Information, IV.

Effect of failure of clerk to enter judgment of dismissal on application. See Dismissal and Nonsuit.
Limitation of action to recover money wrongfully collected. See Limitation of Actions, I, (B).

Const., article 5, section 16, provides for the election of a clerk of the district court for each county. Const., article 18, section 6, provides that the clerk of the district court shall be ex-officio auditor and recorder. Const., article 18, section 7, provides that the compensation of this officer for all the duties he shall perform as such officer shall not exceed \$3,000 nor fall below \$500 for any one year. Held, that these sections are self-

operative.—Hillard v. Shoshone County, 3 Idaho, 103, 27 Pac. 678; Hillard v. Auditor Shoshone County, 3 Idaho, 107, 27 Pac. 680.

Const., article 5, section 16, provides for the election of a clerk of the district court for each county. Const., article 18, section 6, provides that such clerk shall be ex-officio auditor and recorder. Const., article 18, section 7, provides that the compensation of this officer for all the duties he shall perform as such officer shall not exceed \$3,000 nor fall below \$500 for any one year. Held, that the compensation of the clerk, as clerk, auditor and recorder for all his duties therein cannot exceed \$3,000; and such compensation must be derived from fees and commissions, the county making up such deficiency if the fees fall below the minimum specified.—Hillard v. Shoshone County, 3 Idaho, 103, 27 Pac. 678; Hillard v. Auditor Shoshone County, 3 Idaho, 107, 27 Pac. 680.

Such parts of R. S. 1679 and 2157, subdivision 5, as relate to fees of county auditors for services in connection with the assessment and collection of taxes are repealed by Laws 1891, page 174, section 4, prescribing the fees of the county auditor and recorder. Cunningham v. Moody, 3 Idaho, 125, 28 Pac. 395; Wickersham v. Commrs. Elmore County, 4 Idaho, 137, 36 Pac. 700.

The evident intent of the framers of the constitution was to limit the costs of the office of the clerk of court to the fees provided by law, except when such fees did not amount to the minimum fixed by law.—Woodward v. Board Commrs. Idaho Co., 5 Idaho, 524, 51 Pac. 143.

Where the necessity for the appointment of a deputy clerk of court is occasioned by the absence of the clerk on business not connected with his office, or on account of his sickness, the county is not liable for the compensation of such deputy.—Woodward v. Board Commrs. Idaho Co., 5 Idaho, 524, 51 Pac. 143.

Under Const., article 18, section 6, authorizing the board of county commissioners to empower the sheriff, etc., to appoint such deputies and employ such clerical assistance, as the business of their offices may require, the facts creating the necessity for the appointment of a deputy clerk of court should appear on the records of the board.—Woodward v. Board Commrs. Idaho Co., 5 Idaho, 524, 51 Pac. 143.

Where the board of county commissioners on application found and determined that a necessity existed for the appointment of a deputy for the district clerk, and authorized such appointment under Const., article 18, section 6, and the fees and commissions of said office exceeded the maximum salary of such officer and deputy, it is the duty of the board to audit and allow the claim for such deputy's salary, and if the board refuses so to do, an action will lie against the county for the amount of such salary.—Dunbar v. Canyon County, 6 Idaho, 725, 59 Pac. 536.

Under Const., article 18, section 6, authorizing the county commissioners to empower the

"auditor and recorder and clerk of the district court" to appoint such deputies and clerical assistance as the business of their offices may require, the authorization of the appointment of a deputy for such officer by the board is not an infraction of that provision of the constitution in said section which provides that "no other county offices shall be established" than those enumerated in said section.—Dunbar v. Canyon County, 6 Idaho, 725, 59 Pac. 536.

Under Const., article 18, section 7, all fees collected by the clerk of the district court by virtue of United States R. S. 2294, as amended by act of March 11, 1902, for taking homestead or other land proofs or other services in connection therewith, are collected by such clerk in his official capacity and must be turned over to the county.—Rhea v. Board of County Commrs., 12 Idaho, 455, 88 Pac. 89.

Under R. S. 3101, as amended by Laws 1899, page 237, and Laws 1899, page 440, the fee for recording the affidavit of proof of labor on mining claims is fifty cents for each claim named in such affidavit.—Empire Copper Co. v. Henderson, 15 Idaho, 635, 99 Pac. 127.

An application addressed to the board of county commissioners, asking "for additional clerical assistance, asking you that I be empowered to appoint a transcribing clerk, said clerk to receive such remuneration as may be fixed by the board, which remuneration shall be paid quarterly in the same manner as the salaries of the county officers are paid," under R. C. 2119, is broad enough to give the board or court hearing such application jurisdiction to authorize the clerk to appoint a deputy to render such clerical assistance.—Dukes v. Boise County Commrs., 17 Idaho, 736, 107 Pac. 491.

Where application is made by the clerk of the district court and ex-officio auditor and recorder for clerical assistance, under R. C. 2119, and the board of commissioners to whom such application is addressed continues such application to the next succeeding session of the board, and in the meantime the applicant files a paper addressed to such board, containing an argument and reason why the applicant should be allowed assistance, the latter will not be considered as a separate application, but merely an argument in support of the former application.—Dukes v. Boise County Commrs., 17 Idaho, 736, 107 Pac. 491.

A finding, "That the business of the office of clerk of the district court and ex-officio auditor and recorder of said office requires the assistance of one additional deputy," is a finding in effect that a necessity exists for the appointment of a deputy in such office.—Dukes v. Boise County Commrs., 17 Idaho, 736, 107 Pac. 491.

Where a county recorder has recorded papers and written instruments, and has not collected the full amount of fees prescribed by the statute therefor, and has thereafter rendered his accounts, and settled with the board of county commissioners without ac-

counting for the uncollected portion of such fees, the county has such an interest in the unpaid fees as to enable it to prosecute an action directly against the party for whom the work was done and to recover the same. *Lincoln Co. v. Twin Falls etc. Water Co.*, 23 Idaho, 433, 130 Pac. 788.

The fees prescribed by the statute to be charged by the county recorder are arbitrary charges fixed by act of the legislature, and no officer has any right to change the same or depart from the terms thereof as prescribed by the legislature.—*Lincoln Co. v. Twin Falls etc. Water Co.*, 23 Idaho, 433, 130 Pac. 788.

The fact that the county recorder has a blank book containing printed forms in which he records certain contracts, instruments or documents that conform to the printed forms in his record book does not justify him in making any less or different rate than twenty cents per folio for the recording of the same, and it is his duty to make a folio charge for every word contained in the instrument, whether the same be printed, written, or type-written in such record book.—*Lincoln Co. v. Twin Falls etc. Water Co.*, 23 Idaho, 433, 130 Pac. 788.

Neither the board of commissioners nor the county recorder has any power or authority to enter into an agreement or contract with any person or corporation for recording any instrument, contract, or other paper or document for a less price or at a less rate than that prescribed by statute, namely, twenty cents per folio.—*Lincoln Co. v. Twin Falls etc. Water Co.*, 23 Idaho, 433, 130 Pac. 788.

Under R. C. 2124, the county recorder is allowed, and it is his duty, to charge and collect twenty cents per folio for every instrument, paper, or notice recorded by him.—*Lincoln Co. v. Twin Falls etc. Water Co.*, 23 Idaho, 433, 130 Pac. 788.

Editorial Notes.

Right of clerk on salary basis to retain fees for naturalization: 30 L. R. A., N. S., 810.

CLUBS.

See Associations.

Benevolent corporation. See Charities.

Rights and liabilities as to the sale of liquors. See Intoxicating Liquors, IV, VI.

COLLATERAL ATTACK.

On excessive levy. See Attachment and Garnishment, V.

On judgments. See Judgment.

COLLEGES AND UNIVERSITIES.

Medical colleges. See Physicians and Surgeons.

Action against trustees of state normal school. See States, VI.

Schools in general. See Schools and School Districts.

Condemnation of land of, for railroad purposes. See Eminent Domain.

Const., article 8, section 1, provides that the legislature shall not in any manner create any debt or liability unless it provides

at the same time for the payment of the interest of said debt or liability as it falls due, and also for the payment and discharge of the principal of such debt or liability within twenty years of the time of contracting the same. Laws 1905, page 221, provided for the issuance of state bonds for the erection and equipment of a domestic science building in connection with the State University, and for a sinking fund for the redemption of such bonds. Held, that said act was unconstitutional because it failed to provide any means for the payment of the interest or debt that would be created by the issuance of such bonds.—*Roach v. Gooding*, 11 Idaho, 244, 81 Pac. 642.

An act of Congress, approved February 18, 1881 (21 U. S. Stats. at Large, p. 323), granted to the territory of Idaho seventy-two sections of land for university purposes. Laws 1889, page 21, created the University of Idaho. Idaho admission act (26 Stats. at Large, p. 216) provides in section 5 thereof that all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute the permanent school fund, and the interest of which shall only be expended in the support of said schools. Section 8 of said admission act provides that the said act of Congress granting said seventy-two sections shall be so amended as to provide that none of said lands shall be sold for less than \$10 per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by the state, and that the income thereof shall be used exclusively for university purposes. Const., article 9, section 4, provides that the public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted to the state by the general government and known as school lands, and those granted in lieu thereof, etc. Held, that the interest or income from the proceeds of the sale of said university lands can only be used in the support and maintenance of such university in the payment of current expenses thereof and charges for conducting the same and cannot be used for the erection or equipment of university buildings or buildings connected therewith.—*Roach v. Gooding*, 11 Idaho, 244, 81 Pac. 642.

The board of regents of the State University has no authority to incur any indebtedness against the state, directly or indirectly, in the erection of university buildings for which it has no funds to pay.—*Moscow Hdq. Co. v. Regents, etc.*, 19 Idaho, 420, 113 Pac. 731.

Laws 1889, page 17, section 3, makes the board of regents of the State University a body corporate. Const., article 9, section 10, gives them general supervision of the university and control of its funds. Held, that an action may be maintained in the district court on its contract for the erection of buildings and that, therefore, the supreme court has no jurisdiction to render a recommendatory decision on a claim against the board for building materials.—*Moscow Hdq. Co. v. Regents, etc.*, 19 Idaho, 420, 113 Pac. 731.

The board of regents of the State University let several contracts for the construction of the foundation of one of the University buildings, the total contract price being \$31,071.15. The board subsequently discharged the contractor for failure to furnish a bond. According to the estimates of the architect, the contractors had expended in work and material on said foundation the sum of \$7,845.79 and it cost the board of regents to complete the work the sum of \$24,905.18, thus leaving in the hands of the board \$6,165.97 of the contract price for said work. Held, that the board of regents should apportion said balance pro rata among the respective claimants who established their claims for material, hardware and furnishings to the contractor and used in the foundation, either by the contractor or by the board of regents subsequent to the discharge of the contractor.—*Moscow Hdw. Co. v. Regents, etc.*, 19 Idaho, 420, 113 Pac. 731.

Plaintiff bank loaned to C., who had the contract for the construction of the foundation of one of the State University buildings, the sum of \$7,500. Said construction contract was forfeited and the board of regents completed the contract. The evidence failed to show that any part of said sum was expended by the contractor on the foundation. Held, that a recommendatory judgment would not be made.—*First Nat. Bk. v. Regents, etc.*, 19 Idaho, 440, 113 Pac. 735.

Under R. C. 490, the board of regents of the State University has power to remove the president or any professor, instructor or officer of the University, when, in their judgment, the interests of the university require it.—*Hyslop v. Board of Regents*, 23 Idaho, 341, 129 Pac. 1073; *Shinn v. Board of Regents*, 23 Idaho, 344, 129 Pac. 1074.

COLLISION.

Action for death caused by railway collision. See Death.

In an action for damages caused by a collision between two boats, the test of negligence is not that the pilot might have done any one of a number of things other than what he did do under the particular circumstances and thereby avoided the accident, but rather was he negligent and careless in doing the particular thing he did do at the time and under the circumstances as they confronted him.—*Carscallen v. Coeur d'Alene etc. Co.*, 15 Idaho, 444, 98 Pac. 622.

In determining the negligence of a steamboat pilot in the case of a collision, his acts and conduct must be judged in view of the dangers, emergency and conditions as they surrounded him at the time and place, when and where, the accident occurred.—*Carscallen v. Coeur d'Alene etc. Co.*, 15 Idaho, 444, 98 Pac. 622.

Where a vessel is moored in a place of usual and ordinary safety and where but few vessels are plying, and at a point where other vessels are not likely to be running, and out of the way of incoming and outgoing vessels, and there is no law or harbor rule or regulation requiring the displaying of a signal, it is not negligence to fail to display

such light.—*Carscallen v. Coeur d'Alene etc. Co.*, 15 Idaho, 444, 98 Pac. 622.

Where a combination steamboat and pile-driver is shown to have been engaged in regular work and to have had such employment as would have kept it employed until the bay in which it was working froze up, and it appears clearly and satisfactorily what its net earnings were per diem at the time, it is not erroneous in an action for damages caused by a collision to allow the owners of the injured vessel to recover the per diem shown to have been its net earnings for the number of days the vessel was being raised and was undergoing repairs.—*Carscallen v. Coeur d'Alene etc. Co.*, 15 Idaho, 444, 98 Pac. 622.

Where there is no statute, municipal ordinance, port or harbor regulation requiring the displaying of a signal light on a steamer, vessel or craft at particular times or under given circumstances, it is not negligence per se not to display such light, but the necessity will be a question of fact to be determined by the jury under the particular facts and circumstances of each separate case.—*Carscallen v. Coeur d'Alene etc. Co.*, 15 Idaho, 444, 98 Pac. 622.

COLOR OF TITLE.

See Adverse Possession.

COMITY.

See Courts, VIII.

Transfer laws of another state as affecting property in this state. See Sales, II.

COMMERCE.

Carriage of goods and passengers. See Carriers.

The nonexercise by Congress of its power to regulate commerce among the states is equivalent to a declaration by that body that such commerce shall be free from any restriction.—*State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 39 L. R. A. 365, 51 Pac. 456.

Laws 1895, page 125, section 14, concerning the appointment of a sheep inspector, and Laws 1897, page 115, sections 4, 6, declaring it unlawful to bring sheep into the state without having them dipped, discriminate between persons who may desire to bring sheep into the state and those who have sheep within the state, and are repugnant to Const. U. S., article 4, section 2.—*State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 39 L. R. A. 365, 51 Pac. 456.

Act of March 13, 1899, sections 1, 2, requiring the quarantine of sheep coming from infected districts in other states and prescribing penalties for violation of such quarantine regulations, is not an interference with interstate commerce in contravention of U. S. Const., article 1, section 8.—*State v. Rasmussen*, 7 Idaho, 1, 95 Am. St. Rep. 234, 52 L. R. A. 78, 59 Pac. 933; judgment affirmed, *Rasmussen v. State*, 181 U. S. 198, 45 L. Ed. 820, 21 Sup. Ct. Rep. 594.

A manufacturer of goods, who carries on his business in another state, may send his

agents into the state to solicit orders without paying to the state a license tax therefor, and is protected in so doing by the federal constitution.—*In re Kinyon*, 9 Idaho, 642, 2 Ann. Cas. 699, 75 Pac. 268.

Laws 1901, page 155, section 4, requiring every peddler or solicitor taking orders for mercantile establishments to pay a license, and section 8 (page 156), providing that the act shall not apply to runners traveling for wholesale houses and taking orders from merchants only, is in violation of Const. U. S., article 1, section 8, clause 3, when applied to persons acting as agents and solicitors for citizens of other states in the sale of property not at the time within the state, as affecting interstate commerce.—*In re Kinyon*, 9 Idaho, 642, 2 Ann. Cas. 699, 75 Pac. 268.

Laws 1901, page 155 providing for licensing solicitors taking orders for goods, is unconstitutional, as an interference with interstate commerce, in so far as it imposes such burden on the authorized solicitors of citizens of other states trying to introduce their goods into the state; but where the property, prior to the sale, has been transported to the state, a contract concerning the same does not look to interstate transportation for its consummation and is subject to state control.—*In re Kinyon*, 9 Idaho, 642, 2 Ann. Cas. 699, 75 Pac. 268.

Internal and domestic commerce are subject to the taxing and police powers of the state.—*In re Abel*, 10 Idaho, 288, 77 Pac. 621.

Laws 1901, page 155, section 8, providing that the act requiring peddlers, hawkers, etc., to procure a license shall not be construed to apply to peddlers and hawkers in farm products, applies to farm products of other states as well as of this state and in no manner interferes with interstate commerce.—*In re Abel*, 10 Idaho, 288, 77 Pac. 621.

The legislature cannot impose conditions on the right of a foreign corporation to make contracts in the state for the carrying on of interstate commerce; and R. S. 2653, relating to such corporations doing business in the state, were not intended to and do not interfere with interstate commerce.—*Belle City Mfg. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58.

Goods ordered by citizens of Idaho from wholesale merchants in San Francisco were put up in separate packages, each marked with the name of the purchaser, and these packages were then placed in one box and consigned to the shippers at Ilo, Idaho, and received by them at their destination and removed from the depot or warehouse. The large package or box was then broken open by the shipper at the place of destination, and the separate packages delivered to purchasers in accordance with the orders previously given and filled in San Francisco. Held, that the "original package" was the box in which the smaller packages were shipped into the state, and when a box was opened for the sale or delivery of the packages therein contained and such packages were removed therefrom, they lost their dis-

tinctive character of articles of interstate commerce and became part of the taxable property of the state, and hence the taxation thereof was not in violation of U. S. Const., article 1, sections 8, 10.—*Parks Bros. & Co. v. Nez Perce County*, 13 Idaho, 298, 121 Am. St. Rep. 261, 12 Ann. Cas. 1113, 89 Pac. 949.

Laws 1909, page 72, authorizing the collection of a grazing license fee on sheep entering from other states, cannot be construed into an inspection law by reason of the fact that the fund realized from the payment of the grazing fee is paid into the livestock sanitary fund, out of which the expenses and costs are paid for the enforcement of the laws of the state regulating the sanitary and healthful condition of livestock, where no like fee is required to be paid upon livestock produced within the state and no inspection required under the provisions of said act, or any duty imposed upon those whose duty it is to enforce the livestock laws of the state.—*State v. Butterfield Livestock Co.*, 17 Idaho, 441, 134 Am. St. Rep. 263, 26 L. R. A., N. S., 1224, 106 Pac. 455.

The federal constitution reserves to the states the power to pass inspection laws and to lay imposts and duties upon imports or exports necessary for executing and carrying into effect such inspection laws.—*State v. Butterfield Livestock Co.*, 17 Idaho, 441, 134 Am. St. Rep. 263, 26 L. R. A., N. S., 1224, 106 Pac. 455.

A state under the guise of exercising its police power cannot enact inspection laws which burden foreign or interstate commerce or impose upon property or products brought into a state from another state burdens or taxes more onerous than are imposed upon like property or products of the state enacting such legislation.—*State v. Butterfield Livestock Co.*, 17 Idaho, 441, 134 Am. St. Rep. 263, 26 L. R. A., N. S., 1224, 106 Pac. 455.

Laws 1909, page 72, entitled "An act to provide for the payment of a grazing license fee on sheep entering the state of Idaho from other states and territories, and providing a penalty for the violation thereof," which in the body of the act requires all persons who bring or cause to be brought sheep from any other state or territory within the state of Idaho to pay a grazing fee of five cents per head, is not an inspection law, but is a discriminatory tax against property of another state, and an undue interference with interstate commerce and is unconstitutional and void.—*State v. Butterfield Livestock Co.*, 17 Idaho, 441, 134 Am. St. Rep. 263, 26 L. R. A., N. S., 1224, 106 Pac. 455.

R. C. 1475 and 1476, which require that state and county printing, binding and stationery work shall be done within the state and within the county where required for use, is not an interference with or regulation of commerce, and is not repugnant to the commerce clause of section 8, article 1, of the federal constitution.—*In re Gemmill*, 20 Idaho, 732, Ann. Cas. 1913A, 76, 119 Pac. 298.

Where the evidence clearly shows that the proposed transportation of goods offered for

shipment was from Nampa, in the state of Idaho, to Weiser, Idaho, passing from Idaho into Oregon and through a portion of Oregon and back into Idaho, and from Weiser, Idaho, to New Meadows, Adams county, Idaho, the terminus of the connecting line with the defendant company, such facts show the proposed shipment was an "interstate shipment" under the Interstate Commerce Act.—*Crescent Brewing Co. v. Oregon Short Line R. Co.*, 24 Idaho, 106, 132 Pac. 975.

Section 6 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. Stats. 1901, p. 3156]), as amended by Act June 18, 1910, c. 309, sec. 9, 36 Stat. 548 (U. S. Comp. Stats. Supp. 1911, p. 1292), requires every common carrier subject to the provisions of the act to file with the commission and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own routes and between points on its own routes and points on the route of any other carrier by railroad pipe-line, or by water, when a through route and joint rate have been established.—*Crescent Brewing Co. v. Oregon Short Line R. Co.*, 24 Idaho, 106, 132 Pac. 975.

Editorial Notes.

Interstate commerce, constitutionality of state regulation of: 27 Am. St. Rep. 547.

Quarantine and health regulations interfering with commerce: 47 Am. St. Rep. 538.

Commerce, animals, regulation by the states providing for the inspection of: 93 Am. St. Rep. 77.

Animals, regulations which state may enforce for the quarantine of: 97 Am. St. Rep. 242.

Peddlers, license taxes imposed by the states upon: 96 Am. St. Rep. 844.

State taxation of business of taking orders for foreign goods or services as attempted regulation of interstate commerce: 2 Ann. Cas. 701; 14 Ann. Cas. 865.

State regulation of soliciting orders for intoxicating liquors by nonresident as interference with interstate commerce: 10 Ann. Cas. 736.

License or occupation tax on hawkers and peddlers and persons engaged in soliciting orders by sample or otherwise as a violation of the commerce clause: 19 L. R. A., N. S., 297; 28 L. R. A., N. S., 265.

Contracts fixing freight rate: 38 L. R. A., N. S., 351.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

Of brokers or real estate agents. See Brokers.

COMMISSIONER.

Commissioner taking depositions. See Depositions.
To assess damages in condemnation proceedings. See Eminent Domain, III.

COMMON LAW.

Rule that evidence by depositions is in derogation of. See Depositions.

As to fish. See Fish and Game.

Construction of statutes in derogation of. See Statutes, VI, (B).

Common law as to gaming-house superseded by statute. See Gaming, III.

Where a question before the court is governed by the rule of the common law instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred, and that the common law is understood and construed to be the same in the foreign state as it is in the state of the forum.—*Maloney v. Winston Bros. Co.* (on rehearing), 18 Idaho, 740, 111 Pac. 1080.

Editorial Notes.

What the "common law" includes: Ann. Cas. 1913E, 1222.

Extent of adoption of common law: Ann. Cas. 1913E, 1232; 22 L. R. A. 501.

Adoption of common law in relation to crimes: Ann. Cas. 1913E, 1249.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Account Stated.

Between counties after division. See Counties, I.

Admissibility in evidence of offer of compromise.

See Evidence, VII.

Adjustment of insurance loss. See Insurance, XV.

Partial payment check, when not a release of compromise agreement. See Accord and Satisfaction.

Ratification of compromise made by agent. See Principal and Agent.

Where disputes and disagreements arose between parties to a written contract and they thereafter made an additional agreement "in order to avoid complications" and for the purpose of fixing a basis on which their settlement shall be had, the latter agreement is supported by a sufficient consideration.—*Russell v. Lambert*, 14 Idaho, 284, 94 Pac. 54.

Where a note was given in settlement of an account, which provided "for the correction of any mistakes which should afterwards be found," and the evidence showed that several items were left unsettled, a judgment for the face of the note will be reversed.—*Quayle v. Ream*, 15 Idaho, 666, 99 Pac. 707.

Where a claim is made against another in good faith, and the latter denies its liability, and to avoid a lawsuit agrees to pay such claim in consideration that suit will not be brought upon such claim, there is a sufficient consideration to support such compromise agreement.—*Heath v. Potlatch Lumber Co.*, 18 Idaho, 42, 108 Pac. 343.

There is sufficient consideration to support a compromise agreement if the claim is made in good faith and is disputed, and in consideration that the claimant forbears to sue in respect to such claim, a promise is made to pay a certain sum of money, and such promise may be enforced in an action at law.—*Heath v. Potlatch Lumber Co.*, 18 Idaho, 42, 108 Pac. 343.

In an action on an agreement of compromise and settlement, evidence was introduced

to show that the agreement was entered into by the defendant, relying upon certain false and fraudulent statements made by plaintiff at the time of the contract, that plaintiff knew such statements were false and that defendant did not know the falsity thereof and relied and acted thereon. Held, sufficient to support a verdict for defendant.—*Seawell v. Pacific & I. N. Ry. Co.*, 21 Idaho, 277, 121 Pac. 556.

Evidence in an action by an attorney for services rendered held sufficient to sustain verdict for the plaintiff and to show that there was no settlement between the parties.—*Gunn v. Perseverance Min. etc. Co.*, 23 Idaho, 418, 130 Pac. 458.

Editorial Notes.

When compromise and settlement enforceable on payment of part of a demand: 100 Am. St. Rep. 412, 429.

CONDITIONAL SALES.

See Sales.

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CONFUSION OF GOODS.

Intermingling of logs. See Logs and Logging.

Intermingling of property of husband and wife. See Husband and Wife.

As barring action of replevin. See Claim and Delivery, VI.

Where a mining corporation works a mining claim in which it has a minority interest, against the protest of the majority interest, and mingles with the gold extracted therefrom a portion of gold extracted from its own claim, without the consent of the other party, and the quantity and value of such portion is unknown, the minority interest cannot recover the gold so mingled.—*Hawkins v. Spokane etc. Min. Co.*, 3 Idaho, 650, 33 Pac. 40.

Editorial Notes.

What is and effect of confusion of goods: 54 Am. Dec. 589; 101 Am. St. Rep. 913.

Tortious or wrongful confusion of goods: Ann. Cas. 1913E, 665.

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CONSPIRACY.

Acts and declarations of conspirators as evidence against co-conspirators in general. See Evidence, VII; Criminal Law, X, (G).

In contemplation of law, there can be no malice or conspiracy where the thing to be done is lawful and the means employed in doing the thing are also lawful.—*Barton v. Rogers*, 21 Idaho, 609, Ann. Cas. 1913E, 192, 123 Pac. 478.

Editorial Notes.

Definition and nature of conspiracy and general principles relating thereto: 51 Am. Dec. 82.

Conspiracy, crime of, what constitutes, and evidence in prosecutions for: 3 Am. St. Rep. 474.

Combination in restraint of trade as criminal conspiracy: Ann. Cas. 1913E, 603.

Boycott: 33 L. R. A., N. S., 1034; 16 L. R. A., N. S., 85; 32 L. R. A., N. S., 792.

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CONSTITUTIONAL LAW.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

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I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

Amendment of statutes. See Statutes, IV.

Amendment as affecting tenure of office of district attorney. See District and Prosecuting Attorneys.

The organic act of the territory takes the place of and performs the office of a constitution for the territory.—*People v. Maxon*, 1 Idaho, 330.

Citizens of a state or territory can have no vested rights in its existing general laws which can preclude their amendment or re-

peal, and there is no implied promise on the part of either to protect its citizens against incidental injury occasioned by changes in the law.—*People v. Griffin*, 1 Idaho, 476.

Const., article 20, section 1, provides the manner of proposing amendments to the constitution, submitting the same to the electors and that "if a majority of the electors shall ratify the same, such amendment or amendments shall become part of this constitution." Held, that where a majority of the electors, voting on a proposed amendment, vote in favor thereof, the amendment is ratified, though the votes thus cast are not a majority of the votes cast at the general election at which the question was voted on by reason of the fact that many of the voters failed to vote on the amendment.—*Green v. State Board of Canvassers*, 5 Idaho, 130, 95 Am. St. Rep. 169, 47 Pac. 259.

It is not necessary that the subject of a proposed amendment to the constitution shall be expressed in its title or that it have a title, since Const., article 3, section 16, providing that every act shall have a proper title, does not apply to such proposed amendments. *Hays v. Hays*, 5 Idaho, 154, 47 Pac. 732.

In proposing an amendment to the constitution, it is not necessary for the legislature to pass a formal act or statute in conformity with Const., article 3, section 15, but such amendment may be proposed by joint resolution of the houses of the legislature.—*Hays v. Hays*, 5 Idaho, 154, 47 Pac. 732.

Where the state board of canvassers canvass the votes on a proposed amendment to the constitution and declare that a majority of the votes were cast in favor of the amendment, stating the number for and against it, it is not necessary that the board should further declare, in terms, as to whether the amendment was carried.—*Hays v. Hays*, 5 Idaho, 154, 47 Pac. 732.

The amendment to Const., article 18, section 6, separating the offices of probate judge and county superintendent of instruction, provides that the legislature by general and informal laws shall provide for the election biennially of a county superintendent of public instruction. Held, that such amendment is not self-executing, and does not go into operation until the legislature provides for the election of such superintendent by law and an election is had thereunder.—*Blake v. Commrs. Ada County*, 5 Idaho, 163, 47 Pac. 734.

The provisions of Const., article 20, section 1, with reference to entering proposed constitutional amendments, together with the yeas and nays vote thereon, upon the journal, are mandatory.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

The provisions of Const., article 20, section 2, that if two or more amendments are proposed, they shall be so submitted that the electors shall vote on them separately are mandatory.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

Amendments to the constitution may be proposed in either branch of the legislature by joint resolution, and Const., article 3, section 18, providing that no act shall be revised or amended by mere reference to its title,

does not apply to constitutional amendments. *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

Where a section of the constitution is amended at the same time by two different amendments, and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution, or to reconcile the same, they both must fail.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

While the constitution prescribes no particular method or form for proposing and submitting amendments to the constitution, the better course to pursue is to indicate in the resolution proposing the amendment the particular matter to be inserted or omitted as an amendment, and the particular place in the section the amendment is to be inserted.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

Where it is proposed to make an amendment to the constitution become operative upon a date different from that fixed by the constitution, then the time so fixed should be incorporated in and made a part of such amendment.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

Section 1, article 20, of the constitution provides that an amendment shall become a part of the constitution upon its ratification, and the legislature has no power to change this provision of the constitution.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

The legislature has no power to incorporate in a joint resolution, proposing amendments to the constitution, any matter except the amendment proposed and the question and manner of submitting the same.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

Const., article 20, section 2, providing that "if two or more amendments are proposed, they shall be submitted in such a manner that the electors shall vote for or against each of them separately," means that all changes which relate to one subject and accomplish a single purpose, shall be treated, recognized and submitted as a single amendment.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

Under Const., article 20, section 2, the legislature cannot incorporate into a single proposed constitutional amendment several distinct and independent subjects and submit the same as a single amendment.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

Where two amendments are proposed to the same section of the constitution and are regularly submitted to the electors of the state at the same time, and the vote is in favor of both proposed amendments and they are directly in conflict, they both fail.—*Utter v. Moseley*, 16 Idaho, 274, 133 Am. St. Rep. 94, 18 Ann. Cas. 723, 100 Pac. 1058.

Where one of two proposed constitutional amendments is not submitted in accordance with the provisions of the constitution and is not adopted or made part of the constitution, and the other amendment is regularly submitted in accordance with the provisions of the constitution and adopted, the latter amendment will not fail because it conflicts with the former.—*Utter v. Moseley*, 16 Idaho,

274, 133 Am. St. Rep. 94, 18 Ann. Cas. 723, 100 Pac. 1058.

A question submitted as a constitutional amendment does not become a constitutional amendment unless submitted and adopted in accordance with the provisions of the constitution.—*Utter v. Moseley*, 16 Idaho, 274, 133 Am. St. Rep. 94, 18 Ann. Cas. 723, 100 Pac. 1058.

The legislature in proposing an amendment to Const., article 8, section 1, stated in the title to the resolution submitting such amendment that the amendment was intended "to permit the legislature to authorize a bond issue sufficient to complete the construction and furnishing of the State Capitol building at Boise," and the section providing the manner and form of submitting the question directed that it should be in the following language: "Shall sec. 1 of art. 8 of the Constitution of the state of Idaho be amended so as to permit the Legislature to authorize a sufficient bond issue or make a sufficient appropriation to complete the construction and furnishing of the State Capitol building at Boise, Idaho?" Held, that it was both the intention of the legislature in making the submission and of the people in voting to adopt the proposed amendment to amend the original section of the constitution only in so far as to grant the power to the legislature to authorize a bond issue sufficient to "complete the construction and furnishing of the State Capitol building" then in process of construction, and that the omission of the word "not" after the word "shall" in the first line of the section was an oversight, mistake, or inadvertence, and that it was clearly the intention of the legislature in proposing the amendment, and of the people in voting to adopt it, that it should be read with the word "not" contained therein, and as follows: "The legislature shall not in any manner create any debt or debts," etc.—*Fletcher v. Gifford*, 20 Idaho, 18, 115 Pac. 824.

Editorial Notes.

Constitutional conventions, nature and powers of: 72 Am. Dec. 78.

Provisions of constitution for amendment thereof as mandatory or directory: 15 Ann. Cas. 786; 10 L. R. A., N. S., 149.

II. CONSTRUCTION, OPERATION AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

Constitutional provisions relating to clerk of court self-operative. See *Clerk of Court, Auditor and Recorder*.

Constitutional provisions as to foreign corporations self-operative. See *Corporations*, XII, (C).

Operation of statute unconstitutional in part. See *Statutes*, I, (D).

Where the constitutionality of a law is questioned, the court will not pass upon it unless it is necessary to a decision of the case.—*State v. Baker*, 6 Idaho, 496, 56 Pac. 81; *In re Marshall*, 6 Idaho, 516, 56 Pac. 470; *McGinness v. Davis*, 7 Idaho, 665, 65 Pac. 364; *Jack v. Village of Grangeville*, 9 Idaho, 291, 74 Pac. 969; *Howell v. Board Commrs. Ada Co.*, 6 Idaho, 154, 53 Pac. 542;

State v. Jones, 9 Idaho, 693, 75 Pac. 819; *Mills Novelty Co. v. Dunbar*, 11 Idaho, 671, 83 Pac. 932.

When a statute can be reasonably construed and applied in a manner to avoid conflict with the constitution, such construction will be adopted by the courts.—*Grice v. Clearwater Timber Co.*, 20 Idaho, 70, 117 Pac. 112; *Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

Before a legislative act is held unconstitutional it should appear beyond a reasonable doubt that it infringes some provision of the constitution.—*Noble v. Bragaw*, 12 Idaho, 265, 85 Pac. 903; *Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

In passing on the constitutionality of a statute, it is the duty of the court to give both the statute and the constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction.—*Doan v. Commrs. Logan County*, 3 Idaho, 38, 26 Pac. 167; *People v. George*, 3 Idaho, 72, 26 Pac. 983.

Where a constitutional provision has been adopted from another state, and the court of last resort of such state had construed the provision in that state prior to its adoption in this state, the presumption arises that the framers of the constitution in adopting such provision meant and intended to also adopt the construction that had been placed upon it by the highest court of the state from which it was taken.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246; *In re Schriber*, 19 Idaho, 531, 37 L. R. A., N. S., 693, 114 Pac. 29.

Const., article 7, section 5, requiring uniformity of taxation upon the same class of subjects, is self-acting.—*Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416.

Const., article 7, section 7, providing that all taxes levied and collected for state purposes must be paid into the state treasury, without any deduction for commissions or other charges, is self-acting and goes into effect without any legislation.—*Cunningham v. Moody*, 3 Idaho, 125, 28 Pac. 395.

The constitutionality of an act of the legislature cannot be determined collaterally by the court on an application for a writ of mandate by a private party to enforce a private right.—*Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565.

The constitutionality of an act of the legislature creating a new county will not be passed upon in an application for writ of prohibition in a case where it is not directly in issue and only collaterally involved.—*Bellevue Water Co. v. Stockslager*, 4 Idaho, 636, 43 Pac. 568.

Where defendant in a criminal action attacks certain sections of a statute as unconstitutional, and it appears that his rights were not affected by such sections, and the remaining portion of the statute is sufficient to support the judgment, the court will not pass on the validity of the sections so attacked.—*State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17.

When the language of a constitutional provision is plain and free from ambiguity, courts, in applying it, have no need to look beyond the provision itself to ascertain the reason for its adoption.—*Powell v. Spackman*, 7 Idaho, 692, 54 L. R. A. 378, 65 Pac. 503.

Acts inconsistent with the spirit of the constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein.—*McDonald v. Doust*, 11 Idaho, 14, 69 L. R. A. 220, 81 Pac. 60.

Const., article 21, section 2, continuing in force all laws not repugnant to the constitution until they expire by their own limitation or are altered or repealed by the legislature, applies to all laws, special or general, continued in force after the adoption of the constitution, and the word "altered" as used in said section means to make different without destroying identity, to vary without entire change.—*Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234.

In construing a constitutional provision, it is the rule that all negative or prohibitory clauses in mandatory or prohibitive form are of themselves self-operative as to the subject matter or thing to be prohibited or denied.—*Katz v. Herrick* (on rehearing), 12 Idaho, 1, 86 Pac. 873.

Const., article 1, section 18, providing that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice," is self-operating and self-executing, and can neither be nullified by legislation or lack of legislation.—*Day v. Day*, 12 Idaho, 556, 10 Ann. Cas. 280, 86 Pac. 531.

Const., article 6, section 3, being a negative and prohibitory provision, is self-operative and needs no legislation to carry its provisions into effect.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Where a statute may constitutionally operate on certain persons or in certain cases, and was evidently not intended to conflict with the constitution, it will not be held unconstitutional because there may be persons to whom or cases in which it cannot constitutionally apply; but in such case, it will be deemed constitutional and construed not to apply to the latter persons or cases on the ground that courts are bound to presume that the legislature did not intend to violate the constitution.—*In re Gale*, 14 Idaho, 761, 95 Pac. 679.

In determining the validity or constitutionality of a constitutional amendment, the court will not concern itself with the justice or wisdom of the amendment, and will presume that the legislature acted regularly in submitting the same to the voters of the state, and will uphold and sustain such amendment unless it appears that the same has not been proposed, submitted and adopted in accordance with the provisions of the constitution.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

The determination of the question as to whether a proposed change or changes in the constitution constitutes one or more amendments depends upon whether the change as proposed relates to one subject and accomplishes a single purpose. If it does not, then there are as many amendments as there are independent subjects, and it matters not whether the proposed change affects one or many sections or articles of the constitution.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

That which the constitution directly prohibits may not be done by indirection or by a general legislative act which is meant and intended to include and accomplish the purposes and objects specifically or impliedly prohibited.—*Atkinson v. Board of Commrs. of Ada County*, 18 Idaho, 282, 108 Pac. 1046.

Where a section of the constitution is apparently contradictory in its parts or a literal reading and construction thereof would render it contradictory and absurd, it should be so construed in the light of the purposes and objects to be accomplished and the manifest intent of the law-making body in submitting the same, and the people in voting to adopt it, as to render its several provisions harmonious, and to give the whole section a practical effect and accomplish the purposes and objects intended.—*Fletcher v. Gifford*, 20 Idaho, 18, 115 Pac. 824.

In construing the provisions of the constitution, they should be construed in such a way as to give the constitution practical effect according to the intention of the body that framed it and the people who adopted it.—*Grice v. Clearwater Timber Co.*, 20 Idaho, 70, 117 Pac. 112.

Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given or the enforcement of any duty. This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts.—*Cleary v. Kincaid*, 23 Idaho, 789, 131 Pac. 1117.

Const., article 18, section 6, as amended by the amendment adopted by the voters of the state on November 5, 1912, which provides, "By striking out the words 'who is ex-officio tax collector,' after the words 'a county assessor,' and inserting the words 'and also ex-officio tax collector' after the words 'a county treasurer, who is ex-officio public administrator,'" is self-operative and became a part of the state constitution upon its adoption by the voters of the state at the general election on the 5th of November, 1912.—*Cleary v. Kincaid*, 23 Idaho, 789, 131 Pac. 1117.

Editorial Notes.

Construction of inconsistent provisions or amendments of constitution: 18 Ann. Cas. 725.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) LEGISLATIVE POWERS AND DELEGATION THEREOF.**

Quarantine law not a delegation of legislative power to executive. See *Animals*, III.

Legislative power as to taxation. See *Taxation*, I.

The legislative assembly has authority to regulate the mode of taking and allowing writs of error, bills of exception and appeals; and such regulations when made apply to all cases, whether arising under the laws of the United States or of the territory.—*United States v. Gilson*, 1 Idaho, 364.

Laws 1899, page 405, fixing the maximum and minimum salaries of all county officers and leaving the amount thereof to be fixed by the county commissioners of each county, is not unconstitutional as a delegation of legislative functions to the county board.—*Stookey v. Board of Commrs. Nez Perce County*, 6 Idaho, 542, 57 Pac. 312; *Reynolds v. Board of Commrs. Oneida County*, 6 Idaho, 787, 59 Pac. 730.

Laws 1899, page 345, providing for a state board of medical examiners, and authorizing the governor to appoint such board without the concurrence of the senate, is not a violation of Const., article 2, section 1, providing that no person or collection of persons charged with the exercise of powers properly belonging to either one of three departments, viz., the legislative, executive or judicial, shall exercise any powers belonging to the others.—*In re Inman*, 8 Idaho, 398, 69 Pac. 120.

The legislature has authority to provide by statute that statements, maps and plats prepared by the state engineer under direction of the court in a trial of water rights, as provided by Laws 1903, page 249, section 37, shall be accepted as evidence on the trial of such action.—*Boise City Irr. & Land Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Editorial Notes.

Legislative power to fix tolls, rates or prices: 33 L. R. A. 177.

(B) JUDICIAL POWERS AND FUNCTIONS.

Judicial amendment of a statute, made by interpolating or adding words thereto which create a county, would impinge on the function vested solely in the legislature, and is beyond the power of the court, though the court may believe, from a reading of the statute, that the legislature intended to create a county.—*Holmberg v. Jones*, 7 Idaho, 752, 65 Pac. 563.

The judicial department of the government cannot prohibit the executive or legislative department from acting within the recognized scope of their respective branches of

the government.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

The motives which prompt the chief executive of a state to issue warrant for the rendition of a prisoner are not the proper subjects of judicial inquiry.—*Ex parte Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 897; *Ex parte Pettibone*, 12 Idaho, 264, 85 Pac. 902; *Ex parte Haywood*, 12 Idaho, 264, 85 Pac. 902.

Const., article 5, section 13, prohibiting the legislature from depriving the judicial department of any power or jurisdiction which rightfully pertains to it, was intended to preserve to the judicial department the right and power to finally determine controversies between parties involving their rights and upon whose claims some determination or judgment must be made, and was not intended to prohibit other departments of the state government than the judicial from exercising some judicial or quasi-judicial functions.—*McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

The question, as to whether the constitution has been complied with in proposing, submitting and adopting a constitutional amendment, is a judicial question, and no authority is vested in any officer, department of state, body politic, or tribunal, other than the courts, to consider and determine such matter.—*McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97.

The question as to whether or not it is expedient, wise, or the best business policy for the state board of land commissioners to sell lands in fee while there is an outstanding lease on the same and which lands cannot be occupied by the purchaser for a number of years after the sale and purchase, is a matter solely addressed to the judgment and discretion of the land board and is vested in them by the constitution and statute, and is not a question that can be considered, reviewed, or controlled by the courts.—*Pike v. State Board of Land Commrs.*, 19 Idaho, 268, Ann. Cas. 1912B, 1344, 113 Pac. 447; *State v. Hoover*, 19 Idaho, 299, 113 Pac. 455.

R. C. 1475, 1476, requiring that the printing, binding and stationery work of the county shall be done in the county where the same is to be used, are not in violation of any public policy of this state, and cannot for that reason be held invalid and void, and with the business and economic wisdom and policy of such statute the courts have nothing to do.—*In re Gemmill*, 20 Idaho, 732, Ann. Cas. 1913A, 76, 119 Pac. 298.

House Bill No. 92, approved February 21, 1913, entitled, "An act to provide for the establishment of drainage districts, and the construction and maintenance of a system of drainage, and to provide for the means of payment of the costs thereof, and declaring an emergency," authorizing the district judge of the judicial district in which a drainage district is located to appoint the drainage commissioners for the district, is

not in violation of the constitution, and is not an infringement by the judicial department of the state government upon the functions of the executive branch of the government.—*Elliott v. McCrea*, 23 Idaho, 524, 130 Pac. 785.

Editorial Notes.

Appointments by the legislature, judicial investigation of: 35 Am. St. Rep. 62.

Power of judiciary to fix rates to be charged by public service corporation: 8 L. R. A., N. S., 529.

(C) EXECUTIVE POWERS AND FUNCTIONS.

Act of April 5, 1855, providing for a prison commission, and appointing the governor and treasurer and a third person to be selected by them, prison commissioners, violates the organic act (Rev. Stats. U. S. 1857), giving the governor, by and with the consent of the legislative council, power to appoint territorial officers.—*Taylor v. Stevenson*, 2 Idaho, 180, 9 Pac. 642.

Laws 1903, pages 228, 229, sections 4, 5, vesting in the state engineer power to pass upon certain questions and matters relating to the use of public waters of the state in the first instance, are not in conflict with Const., article 5, section 2, as vesting the engineer with judicial powers.—*Boise City Irr. & Land Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Where a ministerial officer is called upon to decide and determine matters arising in the administration of his office, when such acts are not made final or binding upon the courts of the state, and full opportunity is given to any person aggrieved to have such matters adjudicated in the proper tribunals of the state, the acts of such officer are ministerial and not judicial.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

Laws 1903, page 223, which provides that a contest may be brought against the permit issued for the appropriation of waters and vests in the state engineer the power to cancel such permit, does not vest in the state engineer judicial power in contravention of Const., article 2, section 1, and article 5, section 2; but the acts of the state engineer thereunder are purely administrative, even though they include some quasi-judicial powers such as may be conferred on a ministerial officer.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

IV. POLICE POWER IN GENERAL.

Police power authorizing Sunday laws. See Sunday. Regulation of practice of medicine and surgery as within police power. See Physicians and Surgeons.

Police power to regulate as to fish and game. See Fish and Game.

Law authorizing seizure and destruction of gambling devices as within police power. See Gaming, II. Regulation of sale of liquors as exercise of police power. See Intoxicating Liquors, I.

Liquor license law as valid police regulation. See Intoxicating Liquors, II.

Requirement of fences along railroad tracks, as exercise of police power. See Railroads, VI.

Under the police power of the state, the legislature may restrict individuals in their conduct or in their business and such restrictions when reasonable are not unconstitutional.—*State v. Dolan*, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; *In re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

Editorial Notes.

Police power and the fourteenth amendment: 25 Am. St. Rep. 882, 888.

V. PERSONAL, CIVIL AND POLITICAL RIGHTS.

Laws 1890-91, page 57, section 43, prescribing a "test oath" for electors is not in the nature of a bill of attainder.—*Shepherd v. Grimmett*, 3 Idaho, 403, 31 Pac. 793; *Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

A city ordinance providing, "It shall be unlawful for any person maintaining any saloon, bar-room or drinking-shop, or any apartment thereto attached, to permit females to enter their said place of business," is unconstitutional, since it prohibits women from entering saloons for any purpose, even though such purpose be lawful, and hence is an unreasonable and unnecessary interference with individual liberty.—*State v. Nelson*, 10 Idaho, 522, 109 Am. St. Rep. 226, 67 L. R. A. 808, 79 Pac. 79.

The provisions of the primary election law, Laws 1909, page 196, in regard to personal expenditures of candidates to aid or promote their nomination are not repugnant to the provisions of Const., article 1, section 9, which declares that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."—*Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280.

R. C. 1475, 1476, which provide that the printing, binding and stationery work of counties shall be done within the state and county where used, does not interfere with or restrict the right of any person to freely contract.—*In re Gemmill*, 20 Idaho, 732, Ann. Cas. 1913A, 76, 119 Pac. 298.

The "liberty of the press" is not guaranteed by the constitution against the publication of deliberate falsehood and misrepresentation in regard to decisions of courts, even though the publishers may think that public and political interests would be subserved by such falsehood and misrepresentation.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

The "liberty of the press" is only the liberty which every man has to utter his sentiments, and can be enjoyed only in subjection to that precept both of law and morals, "So use your own in order that you may not injure another's."—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

VI. VESTED RIGHTS.

Pending suits as affected by law prescribing procedure in suits to settle water rights. See Waters and Watercourses, VI, (B).

No vested rights in laws preventing amendment or repeal. See ante, I.

No person has a vested right in any particular mode of procedure, and if, before the trial of a cause, a new law as to procedure is enacted and goes into effect, it will from that time govern the proceedings, unless the statute provides to the contrary.—*Boise City Irr. & Land Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

The law of evidence is a part of the remedy, and is within legislative control.—*Boise City Irr. & Land Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

It is now recognized as the law of this state that no person has any vested or inherent right to engage in the sale of intoxicating liquors, and that the business is entirely under the control of the state, and the legislature having vested the city of Boise with the power to tax, regulate, control, and restrain the business, the power, to the extent of the grant thus vested, will not be reviewed or interfered with by the courts as long as the council in exercising such power does not run counter to the provisions of the constitution and laws of the state.—*Darby v. Pence*, 17 Idaho, 697, 27 L. R. A., N. S., 1194, 107 Pac. 484.

No one has a vested right to charge an unreasonable or unconscionable rate to consumers while exercising a franchise to serve a public use; and to deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate or unconscionable rate, deprives him of no right, natural or acquired, and cannot be the impairment of a contract within the purview and meaning of the federal constitution, nor does it amount to depriving him of property without due process of law.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

VII. OBLIGATION OF CONTRACTS.

The legislature may change the manner of payment of territorial warrants; it may issue bonds payable at a different time than that specified in the original warrant, but it cannot by any provision relieve the territory from the obligation to pay, since this would "impair the obligation of contracts."—*Lamkin v. Sterling*, 1 Idaho, 92.

Where, under and by virtue of powers granted in its charter, an incorporated city makes a contract with certain parties and their assigns to construct certain waterworks, and to furnish the city with water for fire purposes at a certain rate, and the works when completed are accepted by the city, and the water supplied and paid for as stipulated for a series of years, the validity of the contract cannot be impeached or impaired by the enactment of a law by the legislature which went into effect three months after the contract was made.—*Bellevue Water Co. v. Bellevue*, 3 Idaho, 739, 35 Pac. 693.

The fact that R. S. 2653, as amended by Laws 1903, page 49, imposed additional requirements on foreign corporations that were already doing business in this state under the

provisions of the statute before amendment, is not violative of any contract right, for the reason that substantially the same duties are imposed on like domestic corporations, and there is therefore no discrimination against foreign corporations that had previously complied with the statute and placed themselves on an equal footing with like domestic corporations.—*Tarr v. Western Loan etc. Co.*, 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

The appointment of commissioners to fix water rates under R. C. 2839, which was enacted subsequent to the adoption of ordinance No. 86 of the city of Pocatello, does not impair the obligation of a contract previously executed, and is therefore not in violation of section 10, article 1, of the constitution of the United States.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

The remedies given by law for the enforcement of contracts created by bonding ordinances and the sale of bonds thereunder cannot be altered or diminished so as to impair the substantial rights or interests of the holders of such obligations.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

Editorial Notes.

Contracts, statutes, when deemed to impair: 79 Am. Dec. 495.

Contracts, statutes making pre-existing illegal: 120 Am. St. Rep. 468.

Homestead laws, when impair the obligation of contracts: 87 Am. Dec. 464.

Impairment of obligation of contracts by judicial decision: 4 Ann. Cas. 93; 9 Ann. Cas. 1121.

Impairment of ordinance granting privilege as impairment of contract obligation: 3 Ann. Cas. 88.

Privilege of using streets as contract: 50 L. R. A. 142.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

Laws 1890-91, page 57, section 43, prescribing a "test oath" for electors, is not an ex post facto law, forbidden by Const., article 1, section 16.—*Shepherd v. Grimmer*, 3 Idaho, 403, 31 Pac. 793; *Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

Senate Bill No. 133, section 2, approved March 4, 1911, and the similar section contained in Senate Bill No. 47, relating to the relinquishment of state lands and the selection of indemnity lands, are not in conflict with Const., article 11, section 12, which prohibits the legislature from passing any law "for the benefit of a railroad, or other corporation, or any individual or association of individuals, retroactive in its operation."—*Rogers v. Hawley*, 19 Idaho, 751, 115 Pac. 687.

Editorial Notes.

Retrospective statutes, when valid: 6 Am. Dec. 730; 10 Am. Dec. 131; 111 Am. St. Rep. 455.

Retrospective statute, reviving right to present claims against estates of decedents: 16 Am. Dec. 718.

Ex post facto laws, what are and when valid: 37 Am. St. Rep. 582.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

Quarantine law. See *Animals*, III.

Laws 1899, page 345, regulating the practice of medicine and surgery, does not grant special immunities to certain classes of persons.—In re Inman, 8 Idaho, 398, 69 Pac. 120.

Laws 1899, page 150, chapter 1, providing that the court shall allow as part of the costs money paid for filing and recording the claim and reasonable attorneys' fees, is not class legislation, within the prohibition of Const., article 1, section 18.—Thompson v. Wise Boy Min. & Mill Co., 9 Idaho, 363, 74 Pac. 958.

A village ordinance required the payment of a fixed license fee for retail liquor dealers, prohibiting the sale of liquors of any kind to be drank in, on, or about the premises where sold without first procuring a license on due application. The ordinance made no provision as to wholesale liquor dealers and permitted druggists to sell liquor without a license for certain purposes. Held, that the ordinance made no discrimination between parties engaged in the same kind of business and was not void as class legislation.—Village of St. Anthony v. Brandon, 10 Idaho, 205, 77 Pac. 322.

That part of Laws 1901, section 8, page 156, relating to the licensing of peddlers and solicitors, and confining the taking of orders for goods sold to merchants only, is class legislation, and in contravention of both the federal and state constitutions.—In re Abel, 10 Idaho, 288, 77 Pac. 621.

Laws 1901, page 155, section 8, providing for the licensing of peddlers and solicitors, but excepting from the operation of such act peddlers and hawkers in farm products, applies to farm products of other states as well as those of the state of Idaho, and is not class legislation.—In re Abel, 10 Idaho, 288, 77 Pac. 621.

Laws 1903, pages 74–81, authorizing the organization of mutual co-operative insurance companies for fire, tornado, fidelity, etc., insurance, is not class legislation.—Idaho Mut. etc. Ins. Co. v. Myer, 10 Idaho, 294, 77 Pac. 628.

Where an ordinance prohibits all dealers in intoxicating liquors, whether wholesale or retail, from allowing persons in that portion of their building in which the liquors are sold, other than members of the proprietor's family during prohibited hours, it is not class legislation, it applying to all dealers in intoxicating liquors.—State v. Calloway, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

An ordinance prohibiting liquor dealers from allowing persons in the place where liquors are sold during certain prohibited hours does not infringe any right, privilege or immunity secured to citizens by the federal constitution.—State v. Calloway, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

Laws 1907, page 223, prohibiting the keeping open of certain places on Sunday for business purposes, is not in conflict with the fourteenth amendment to the constitution of the United States, which forbids states to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.—State v. Dolan, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; In re Jacobs, 13 Idaho, 720, 92 Pac. 1003.

Laws 1907, page 223, prohibiting the keeping open on Sunday of certain places for business purposes, is not class legislation, does not discriminate against certain business, and is not unreasonable or violative of Const., article 3, section 19, prohibiting local or special legislation.—State v. Dolan, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; In re Jacobs, 13 Idaho, 720, 92 Pac. 1003.

Laws 1909, page 72, entitled "An act to provide for the payment of a grazing license fee on sheep entering the state of Idaho from other states and territories, and providing a penalty for the violation thereof," which in the body of the act requires all persons who bring or cause to be brought sheep from any other state or territory within the state of Idaho to pay a grazing fee of five cents per head, is not an inspection law, but is a discriminatory tax against property of another state, and an undue interference with interstate commerce, and is unconstitutional and void.—State v. Butterfield Livestock Co., 17 Idaho, 441, 134 Am. St. Rep. 263, 26 L. R. A., N. S., 1224, 106 Pac. 455.

There is no provision in the state or federal constitution which in any way limits the power of the legislature in making a classification of persons or corporations writing insurance within the state of Idaho, and placing in a separate class those persons or corporations who loan money upon policies written, and limit the charge to be made for the use of such loans to five per cent although such statute makes no limitation of the rate of interest to be charged upon money loaned upon other securities, except the general statute of the state regulating the rate of interest.—Continental Life etc. Co. v. Hattabaugh, 21 Idaho, 285, 121 Pac. 81.

Laws 1911, page 280, authorizing a commission form of government for cities, is not special or class legislation within the meaning of Const., article 3, section 19.—Kessler v. Fritchman, 21 Idaho, 30, 119 Pac. 692.

A corporation is not a "citizen" within the meaning of the constitution of the United States, which prohibits the enactment of laws which abridge the privileges and immunities of a citizen of the United States, and has no privileges or immunities secured to citizens, against legislation.—Continental Life etc. Co. v. Hattabaugh, 21 Idaho, 285, 121 Pac. 81.

X. EQUAL PROTECTION OF LAWS.

Where a provision for the allowance of attorneys' fees under Lien Laws 1899, page 150, chapter 1, section 12, does not single out particular debtors, but is made applicable to all debtors, it is not open to the objection

that it does not afford equal justice to all.—*Thompson v. Wise Boy Min. & Mill. Co.*, 9 Idaho, 363, 74 Pac. 958.

R. S. 1210, 1211, forbidding the herding and grazing of sheep within two miles of a residence, is not unconstitutional in that it denies the equal protection of the law.—*Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459.

A city ordinance regulating the hours in which intoxicating liquors shall be sold in the city and for Sunday closing, and providing a penalty for the sale thereof during prohibited hours, does not contravene U. S. Const., article 14, section 1, providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

Laws 1907, page 223, prohibiting the keeping open on Sunday of certain places for business purposes, does not violate Bill of Rights, Const., article 1, section 1, providing "all men are by nature free and equal and have certain inalienable rights, among which are life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."—*State v. Dolan*, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; *In re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

R. C. 6452, in fixing the punishment of a person who escapes from the state prison at the same length of time as the term for which he is serving at the time of his escape, denies equal protection of the law to persons under like circumstances, and in providing that the escape of a state prisoner is a crime and exempting federal prisoners therein confined, is special and discriminatory legislation and violates the fourteenth amendment of the United States constitution and the constitution of this state.—*In re Mallon*, 16 Idaho, 737, 22 L. R. A., N. S., 1123, 102 Pac. 374.

Where a state statute is in conflict with the provisions of the fourteenth amendment to the constitution and deprives a person of the right to labor, it deprives him of a constitutional right and is void.—*In re Case*, 20 Idaho, 128, 116 Pac. 1037.

R. C. 1458, prohibiting employment of aliens, is repugnant to the constitution and laws of the United States and is void.—*In re Case*, 20 Idaho, 128, 116 Pac. 1037.

R. C. 1475 and 1476, which provide that the printing, binding, and stationery work of counties shall be done within the state and the county in which it is to be used, does not deny to any person the equal protection of the law, and is not repugnant to the provisions of section 1 of the fourteenth amendment to the federal constitution.—*In re Gemmill*, 20 Idaho, 732, Ann. Cas. 1913A, 76, 119 Pac. 298.

Editorial Notes.

Fourteenth amendment considered with reference to special burdens, privileges, and restrictions: 25 Am. St. Rep. 870.

Equal privileges and immunities: 14 L. R. A. 579.

XI. DUE PROCESS OF LAW.

That part of section 536 of act January 30, 1885, providing that actions for the trial of title to an office "shall be tried by the judge of the district court at chambers and without the intervention of a jury," is unconstitutional and void.—*People v. Havird*, 2 Idaho, 531, 25 Pac. 294.

R. S. 2880, making railroad companies liable for injuries to cattle, etc., is unconstitutional, being a deprivation of the right to "due process of law."—*Catril v. Union Pac. Ry. Co.*, 2 Idaho, 576, 21 Pac. 416.

Laws 1901, page 191, providing for the reclamation and irrigation of arid lands in the state, and providing a means by which the benefits received may be adjudicated, is not in conflict with the fourteenth amendment to the United States constitution prohibiting the taking private property without due process of law under the guise of taxation.—*Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295.

Laws 1903, page 233, authorizing the water-master to bring suit to settle the rights of conflicting claimants to water rights on the service of summons by publication upon all defendants residing in the county where such suit is pending, cannot be upheld as a proper exercise of the police power of the state, since it violates the "due process of law" clause of both state and federal constitutions.—*Bear Lake County v. Budge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

Laws 1903, page 223, section 35, providing that in the prosecution of actions under the act to adjudicate the water rights of claimants the costs, disbursements and attorneys' fees shall be collected in the same manner as the expenses of water-masters are paid and that the same shall constitute a lien upon real estate, etc., violates the "due process of law" clause of the constitution in attempting to impose on the county the costs of proceedings to settle and adjudicate private rights of persons to the use of waters appropriated under state laws.—*Bear Lake County v. Budge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

Laws 1903, page 223, section 34, authorizing constructive service of summons on all persons, residents or nonresidents, claiming water rights, whose rights have not been adjudicated, violates the state and federal constitutional provisions that no person shall be deprived of life, liberty or property without due process of law.—*Bear Lake County v. Budge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

R. S. 1210, 1211, forbidding the herding and grazing of sheep within two miles of a residence, is not unconstitutional on the ground that it deprives the owners of sheep of their property without due process of law. *Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459.

The right to sell liquor is not an inherent right of the citizen, and to prohibit him from

keeping open his place of business from 12 o'clock midnight to 6 o'clock in the morning, and from 12 o'clock Saturday night until 6 o'clock the following Monday morning, does not deprive him of property without due process of law.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

Laws 1899, page 309, section 4, authorizing the summary seizure and destruction of gambling devices, is not in conflict with Const., article 1, section 13, providing that no person shall be deprived of life, liberty or property without due process of law.—*Mullen & Co. v. Moseley*, 13 Idaho, 457, 121 Am. St. Rep. 277, 13 Ann. Cas. 450, 12 L. R. E., N. S., 394, 90 Pac. 986.

A city ordinance prohibiting liquor dealers from keeping open their places of business from 12 o'clock midnight to 6 in the morning and during the whole of Sundays, does not deprive the liquor dealer of his property without due process of law.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 14 L. R. A., N. S., 109, 84 Pac. 27.

Laws 1907, page 223, prohibiting the keeping open on Sunday of certain places for business purposes, does not violate the fourteenth amendment to the constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.—*State v. Dolan*, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; *In re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

R. S. 2674, providing that a railroad company shall not collect toll or fare from a passenger when it fails or refuses to deliver the passenger a check for his baggage, is not a taking of property without due process of law in violation of the fourteenth amendment to the constitution of the United States. *Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

Laws 1905, page 106, entitled "An act to provide for the care of delinquent children," does not deprive a parent of the custody of his child without due process of law in violation of Const., article 1, section 13, since the order or decree of the probate court in such matters is one in personam, and acts upon the child alone, and the state acts as *parens patriae* only in cases where the child is destitute of that care and protection to which it is entitled.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

"Due process of law," as used in Const., article 1, section 13, of this state, and also in the constitution of the United States, as applied to judicial proceedings, means that every litigant shall have the right to have his cause tried and determined under the rules of procedure, the same as are applied to other similar cases; and when this is afforded to him, a defendant cannot claim that due process of law is not being observed.—*Eagleson v. Rubin*, 16 Idaho, 92, 100 Pac. 765.

Any destruction, interruption or deprivation of the common, usual and ordinary use of property is a taking of one's property in violation of the constitutional guaranty

(Const., art. 1, sec. 14), against taking private property without just compensation.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81.

On rehearing it was held that this action does not involve the taking of property without due process of law.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 235, 101 Pac. 87.

The fact that Laws 1899, page 417, section 11, as amended by Laws 1901, page 191, makes no provision for notice to the land owner of the time when the assessment for benefits from the proposed irrigation district will be made, does not render the statute unconstitutional, since the statute does require notice to be given of the proceedings to organize such district and notice of the hearing for the confirmation of the organization and proceedings of such district, at which hearing the court is required to examine all the proceedings involved in the organization of such district, including the assessment of benefits.—*Oregon etc. R. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

Notice of contest sent by registered mail to the last known postoffice address of the persons or corporation, to whom a water permit has been issued, of the time of hearing such contest before the state engineer, is sufficient notice and due process.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

Where the statute provides for an appeal from the decision of the state engineer, in a contest of a water permit, and provides that the appellant shall deliver personally or by registered mail a copy of the notice of appeal in the manner prescribed for the personal service or service by publication of a summons, it is sufficient notice to protect the rights of all parties concerned, and to give such persons full opportunity for a proper hearing in the courts established by the constitution of the state, and is due process of law.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

Laws 1903, page 223, providing for the recording in the state engineer's office of a permit and that a contest may be brought against the same, and requiring notice to be given to all persons shown to have an interest in said permit as shown by the records of the state engineer's office, provides for due process, as the records may be relied upon as showing the persons who claim or have an interest in said permit.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

R. C. 6452, prescribing the punishment of state prisoners for escape from prison, does not deny due process of law to persons charged with a violation thereof.—*In re Mallon*, 16 Idaho, 737, 22 L. R. A., N. S., 1123, 102 Pac. 374.

There can be no element of confiscation or taking property without due process of law in a case where a writ of mandate is issued to compel a water company to put in laterals and service connections from its main to the property line of an abutting owner at an expense of \$8.50, where he tenders the monthly water rate of \$1.50 in advance.—*Hatch v. Consumers Co., Ltd.*, 17 Idaho, 204, 104 Pac. 670.

To compel a public service corporation to live up to the law of its existence, and to discharge the duties for which it was organized and for which it received its franchise, can in no case amount to a confiscation of its property, or taking its property without due process of law, even though such requirement necessitates the corporation using a part or all of its property or investing its money in order to meet its duties and obligations.—*Hatch v. Consumers Co., Ltd.*, 17 Idaho, 204, 104 Pac. 670.

Laws 1911, chapter 228, page 732, section 42, subdivisions 1, 7 and 10, which regulate and fix the amount of interest to be charged on policy loans by life insurance companies, do not violate the provisions of the constitution of this state or of the United States, in that such provisions permit the taking of property without due process of law, for the reason that such provisions relate to the regulation of doing business within the state after July 1, 1911, a date subsequent to the passage of the act, and in no way affect any property, or right of contract, prior to said date.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

That provision of section 177 of the Special and Local Laws of Idaho, page 40, to wit, that "any deed derived from the sale of real property under this act shall be conclusive evidence of title except as against actual frauds or prepayment of taxes upon which such sale was made," etc., in so far as it would deny the right to defend title against a tax deed, held unconstitutional, as it would result in the confiscation of property without due process of law.—*Wilson v. Locke*, 18 Idaho, 582, 111 Pac. 247.

It is not within the power of the legislature to declare that a tax deed is conclusive evidence of a compliance with all of the requirements that are essential to the exercise of the taxing power, and thus deny the right to defend title against a tax deed as to all jurisdictional questions.—*Wilson v. Locke*, 18 Idaho, 582, 111 Pac. 247.

The fact that a defendant exhausts a part of his "day in court," or time in which he is allowed to appear and answer in a state court, in a vain endeavor to change the forum and to get into another court, cannot be charged against the adverse party, and a default entered against him for failure to appear in the case during such removal proceeding cannot be said to deprive the party of the equal protection of the law or of his day in court, as guaranteed by the fourteenth amendment to the federal constitution.—*Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89.

Corporations are persons within the provisions of the fourteenth amendment to the federal constitution.—*In re Case*, 20 Idaho, 128, 116 Pac. 1037.

All persons residing within the territorial jurisdiction of the United States are within the protection of the fourteenth amendment of the constitution, without regard to differences of race, color, or nationality.—*In re Case*, 20 Idaho, 128, 116 Pac. 1037.

The appointment of commissioners to fix water rates under R. C. 2839, which was en-

acted subsequent to ordinance No. 86 of the city of Pocatello, which fixed the rates to be charged by the Pocatello Water Company, does not have the effect of taking defendant's property without due process of law, in violation of section 1 of the fourteenth amendment to the federal constitution.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

Const., article 15, section 6, guarantees to every one engaged in supplying water under a sale or rental that the rates to be established shall always be "reasonable maximum rates," and that as a consequence thereof the property of one so engaged shall not be taken without due process of law.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

"Due process of law" does not require a jury in contempt proceedings, and there is no necessity for calling upon a jury to assist the court in the exercise of that power.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

R. C. 1279 provides that if any hog is found trespassing, the occupant or proprietor of the premises may take up the hog and hold it until payment of the expense and damages, together with fifty cents additional for each animal so taken up. R. C. 1280 provides for notice to be given by the person taking up such animal. R. C. 1281 provides for arbitration of the amount of damages, the time of payment thereof, and that such amount is declared a lien and that on non-payment thereof levy and sale shall be had to pay the fees, keeping charges and damages. R. C. 1282 provides that if the owner does not appear and substantiate his title and pay the charges within thirty days after the notice, the absolute ownership of the hogs shall be vested in the person taking up the hogs, provided he shall keep a copy of the notices posted as prescribed and that such notices shall have the force and effect of a bill of sale of such hogs. Held, not to provide for the taking of property without due process of law in contravention of Const., article 1, section 13.—*Fall Creek Sheep Co. v. Walton*, 24 Idaho, 760, 136 Pac. 438.

Editorial Notes.

Due process of law, what is: 24 Am. Dec. 538; 20 Am. St. Rep. 554.

Succession taxes: 33 L. R. A., N. S., 596.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

Laws 1899, section 12, page 150, providing that the court shall also allow as part of the costs the moneys paid for filing and recording the lien claim, and reasonable attorneys' fees, does not violate Const., article 1, section 18, which provides that courts of justice shall be open to every person, and right and justice shall be administered without sale, denial or prejudice.—*Thompson v. Wise Boy Min. etc. Co.*, 9 Idaho, 363, 74 Pac. 958.

The fact that R. C., 2839, which provides for the appointment of a commission for the purpose of fixing rates to be charged water consumers, requires that such commissioners shall be "taxpayers of the city," does not render the statute obnoxious to either the state or federal constitution on the ground

that it does not provide an impartial and unprejudiced tribunal.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

Editorial Notes.

Speedy trial, right to: 41 Am. Dec. 604.

Evidence, validity of statutes creating a presumption of guilt from certain acts: 36 Am. Rep. 102; 43 Am. Rep. 26.

Public trial, right to, and what are infringements upon it: 28 Am. St. Rep. 308.

CONTEMPT.

Under R. S. 5164, prescribing the punishment that may be inflicted by the court on persons guilty of contempt, the power of the court is limited to inflicting the fine and imprisonment therein mentioned and a judgment assessing damages to the injured party in such case is void as to such damages.—*Levan v. Richards*, 4 Idaho, 667, 43 Pac. 574.

Where the district court exceeds its jurisdiction in contempt proceedings, a writ of review will lie.—*Levan v. Richards*, 4 Idaho, 667, 43 Pac. 574.

Under R. S. 5168, providing that the judgment and orders of the court or judge made in case of contempt are final and conclusive, no appeal nor writ of review will lie from an order or judgment in contempt proceedings when the court keeps within its jurisdiction and no abuse of discretion is shown.—*Levan v. Richards*, 4 Idaho, 67, 43 Pac. 574.

Our statutes on contempt, both in justice's and probate courts, as well as contempt of courts generally, were copied from the statutes of California, and therefore the construction placed thereon by the courts of California at the time of their adoption by this state will be followed by the supreme court of this state.—*In re Niday*, 15 Idaho, 559, 98 Pac. 845.

R. S. 5165, providing that "when the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he shall have performed it, and in that case the act must be specified in the warrant of commitment," is applicable to the probate court in a case where a witness refuses to appear or testify or to produce letters or documents ordered by the court to be produced.—*In re Niday*, 15 Idaho, 559, 98 Pac. 845.

Under Laws 1893, page 134, sections 9, 10 (R. C. 6065, 6065a), providing the powers of officers taking depositions, the probate court or judge thereof has authority, on application of a commissioner authorized to take depositions, to order a witness to appear and testify, and upon his refusal so to do, to adjudge him guilty of contempt in disobeying the order.—*In re Niday*, 15 Idaho, 559, 98 Pac. 845.

The intent with which an article is published, though not a defense in a contempt proceeding, where the article is plainly in contempt of court, may be taken into consideration in determining the penalty.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

Where articles published concerning a decision of the supreme court are contemptuous in themselves, the intent of the publishers is no defense.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

Certain publications held to be a direct attack upon the court as a court, and that the court as a court could not bring a private action to protect itself, and that its only means of maintaining its authority is by contempt proceedings.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

The editorials and articles on which this proceeding is based directly charge that the court corruptly rendered the decision in the *Spofford-Gifford Case*, 126 Pac. 1060, and that it was rendered by reason of a political trade or bargain, and not on the law and facts. By such publications there was an attempt by wanton defamation and falsehood to insult and intimidate the judges, degrade the court, destroy its power and influence, and inflame and prejudice the people.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

In prosecution for contempt, held, that the *Spofford-Gifford Case*, 126 Pac. 1060, was pending until the 23d day of October, 1912, when the petition for rehearing was denied, and that many of said editorials and articles were published prior to that date, and that those published after said date were attached to said information simply to show the malicious and vicious intent of the defendants.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

Editorial Notes.

Contempt of court, constructive, by publications concerning pending cases: 2 Am. Dec. 391; 68 L. R. A. 261.

Pendency of cause as essential element of contempt by newspaper publication: 3 Ann. Cas. 763; 18 Ann. Cas. 664.

The power of the court to punish summarily for contempt is essential to its very existence, and that right exists without the interposition of a jury.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

The legislature has not the authority to restrict the inherent power of the court to punish for contempts, and it cannot abridge such power, so far as courts of record are concerned.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

Where certain acts of contempt are made a crime under our statute, the making of such acts punishable as crimes does not affect any power conferred on the court to impose or inflict punishment for contempt.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

The legislature may prescribe any reasonable procedure to be followed in contempt prosecutions; but it has failed to provide any procedure, and under R. C. 3925, when the procedure is not provided by the legislature, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

A proceeding to punish summarily for contempt is not a criminal action, and the statutes of the state do not require that such a

proceeding be brought in the name of the state.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

The information in a contempt proceeding held to state facts sufficient to charge contempt.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

Evidence held sufficient to show that the defendants are guilty of willful contempt of this court.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

Editorial Notes.

The power to punish contempt: 12 Am. Dec. 178; 1 L. R. A., N. S., 1135.

Contempt by newspaper publications: 97 Am. Dec. 630; 40 Am. Rep. 642; 50 Am. St. Rep. 572.

Habeas corpus to obtain relief from imprisonment for contempt: 87 Am. St. Rep. 179.

Courts and tribunals authorized to punish contempt: 117 Am. St. Rep. 950.

Prosecution for contempt as criminal proceeding within rule as to jeopardy: Ann. Cas. 1912B, 1008.

Good motive of person enjoined as defense to liability for breach of injunction: Ann. Cas. 1913D, 375.

Power of legislature to abridge courts' power to punish contempts: 36 L. R. A. 254.

CONTINUANCE.

In justice's court. See *Justices of the Peace*.

In criminal prosecutions. See *Criminal Law*.

Review of ruling. See *Appeal and Error*, XVI, (F), 2.

A motion for a continuance is addressed to the sound legal discretion of the trial judge.—*Herron v. Jury*, 1 Idaho, 164; *Cox v. Northwestern Stage Co.*, 1 Idaho, 376; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188; *Reynolds v. Corbus*, 7 Idaho, 481, 63 Pac. 884; *Richardson v. Ruddy*, 10 Idaho, 151, 77 Pac. 972; *Storer v. Heitfeld*, 17 Idaho, 113, 105 Pac. 55; *De Puy v. Peebles*, 24 Idaho, 550, 135 Pac. 264.

Upon an affidavit showing the absence of a material witness and that proper diligence has been exercised to procure his attendance, a party is entitled to a continuance.—*Lallien-thal v. Anderson*, 1 Idaho, 673.

Under R. S. 1777, as amended by Laws 1895, page 51, providing, *inter alia*, that an appeal from an order of the board of county commissioners may be heard in a summary manner before the judge, or his court, and "when in his opinion no serious injury will result from delay, the hearing shall be had at the next term of court, mandamus will not lie to compel a district judge to hear at chambers such an appeal, after an order made by such judge continuing the proceeding until the next term of court, it being his opinion that no serious injury would result from such delay.—*Board of Commrs. v. Mayhew*, 5 Idaho, 572, 51 Pac. 411.

An affidavit for a continuance on the ground of the absence of a witness, who

was a party to the action, stated that the witness was ready to come to the trial when notified, that "his duties are such as to require his constant attention, and he could not absent himself from his said business without great loss to said business," that immediately on the case being set for trial he was notified but that owing to the impossible condition of the roads, he did not receive said communication in time to reach the place of holding court. Held, that there was no abuse of discretion in denying the continuance.—*Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218.

Under the showing made on defendant's motion for a continuance, based on the absence of his counsel, there was no abuse of discretion in denying the motion.—*Campbell v. Kerns*, 13 Idaho, 287, 90 Pac. 108.

It is not an abuse of discretion to deny a motion for a continuance on the ground of absence of a witness where the witness has testified on a former trial, and the evidence that it is claimed he would give on a succeeding trial would be in conflict with his previous testimony.—*Huber v. Mother Aurelia*, etc., 13 Idaho, 276, 89 Pac. 942.

It is not error for the trial court to overrule a motion for a continuance on account of the absence of a witness where the only showing of diligence is that the witness agreed to be present.—*Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108.

A party is not entitled to a continuance on account of the absence of a witness, without showing due diligence and the use of legal means to secure the attendance of such witness.—*Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108.

It is not an abuse of the legal discretion vested in the trial court to deny an application for a continuance upon the sole ground that the applicant's counsel is ill, where no affidavit of merits is filed, showing that the applicant has a meritorious cause or defense and that other counsel cannot be procured who are able to try said case.—*Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108.

Editorial Notes.

Absence of counsel as ground for continuance: Ann. Cas. 1913C, 431.

An affidavit for a continuance because of the absence of a witness who is ill, which does not allege that the applicant knows this as a fact or disclose from whom he procured the information or that he himself or the person from whom he procured the information was qualified to say that such witness was too ill to attend the trial, is not sufficient on which to grant a continuance.—*Rankin v. Caldwell*, 15 Idaho, 615, 99 Pac. 108.

A motion for a continuance upon behalf of two defendants, which shows that the defendants agreed that the cause might be set down for trial, and in accordance therewith one of the defendants consented for said cause to be set for trial, and afterward notified his codefendant of such fact, and at such time such codefendant was absent from the state attending to the burial of a deceased brother, and for that reason was

unable to be present at the time the cause was set for trial, and it appearing that the defendants have a good defense to said action, and that the absent defendant can be present at the next term of the district court, and it further being shown what facts the absent defendant will testify to, and that such facts are pertinent and in support of the defendants' defense to said action, and it appearing that the application for a continuance is made in good faith, it is error for the trial court to overrule the motion for a continuance.—*Storer v. Heitfeld*, 17 Idaho, 113, 105 Pac. 55.

A party is not entitled to a continuance without showing due diligence and the use of legal means to procure the desired evidence, or a clear and sufficient excuse for not resorting to such legal means. A bare request to furnish the evidence is in no sense a compliance with the requirements of the law.—*Walsh v. Winston Bros. Co.*, 18 Idaho, 768, 111 Pac. 1090.

Editorial Notes.

Continuance because of illness of party:
42 L. R. A., N. S., 660.

CONTRACTS.

I. REQUISITES AND VALIDITY.

- (A) Nature and Essentials in General.
- (B) Parties, Proposals and Acceptance.
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- (D) Consideration.
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Contracts of Particular Classes of Persons:

Attorney. See Attorney and Client.

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Infants. See Infants.

Insane persons. See Insane Persons.

Married women. See Husband and Wife.

Insurance contracts. See Insurance, V.

Rights of surety on building contract. See Principal and Surety.

I. REQUISITES AND VALIDITY.

Validity of contract by school trustee with board of which he is a member. See Schools and School Districts, II, (C).

(A) NATURE AND ESSENTIALS IN GENERAL.

A stipulation in a contract requiring the submission of controversies thereunder to the engineer of one of the parties as umpire, and leaving the measurements, estimates and classification of the work to him, and providing that his measurements and classifications shall not estop the party employing him from questioning or disputing them, will not be enforced as against the other party thereto.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

A prospectus containing statements as to the character and nature of contracts proposed to be made and entered into by the company issuing the prospectus, standing alone, is not sufficient upon which to found a cause of action.—*Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho, 1, 107 Pac. 989.

The plans and specifications made by an architect must be definite and certain as to the kinds and qualities of materials to be used and the class of workmanship, the time within which the building must be completed, the method of making payments, and matters relating to the insurance of the structure during its construction and unless the plans and specifications are thus definite, the bid to construct the building would only indicate a willingness to negotiate further in regard to the matters not specified.—*Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82.

The rule of law that a promise is a good consideration for a promise requires that there should be an absolute mutuality of engagements, so that each party may have an action upon it, or neither will be bound.—*Houser v. Hobart*, 22 Idaho, 735, 127 Pac. 997.

An agreement entered into between competent parties, in order to be binding, must be mutual, and this is especially true when the consideration consists of mutual promises, and, if it appears that one party never was bound on his part to do the acts which

form the consideration for the promise of the other, the agreement is void for want of mutuality.—*Houser v. Hobart*, 22 Idaho, 735, 127 Pac. 997.

(B) PARTIES, PROPOSALS AND ACCEPTANCE.

Plaintiff undertook to collect money on notes and accounts of B., then in his hands, and apply the same, when collected, in satisfaction of the note sued on, agreeing that the maker was a creditor of B. B. was not shown to have assented to the application of such assets nor to have given plaintiff authority to agree that there was money due from him to defendant. Held, that such agreement was invalid.—*Bowman v. Ainslie*, 1 Idaho, 644.

An acceptance which varies from the terms of an offer is a rejection of the offer and is a counter-proposition which must in turn be accepted by the offerer in order to constitute a binding contract.—*Phelps v. Good*, 15 Idaho, 76, 96 Pac. 216.

(C) FORMAL REQUISITES.

An instrument under seal, not required by law to be sealed to give it effect, is no more binding upon the party sought to be charged thereby than if not under seal.—*Cox v. Northwestern Stage Co.*, 1 Idaho, 376.

Where defendant testified that plaintiff brought him a contract already prepared; that he and his codefendant and plaintiff entered into such contract; that plaintiff took the contract signed by defendants and left a copy with defendants, the contract was valid whether signed by plaintiff or not.—*Haskins v. Curran*, 4 Idaho, 573, 43 Pac. 559.

Evidence examined with reference to the genuineness and execution of a certain instrument, and held, that it is sufficient to support the findings of the trial court.—*Colins v. Brown*, 19 Idaho, 360, 114 Pac. 671.

(D) CONSIDERATION.

Gratuitous subscription as nudum pactum. See Subscriptions.

(E) VALIDITY OF ASSENT.

Sufficiency of pleading to raise issue of duress. See post, VI, (C).

Of insane persons. See Insane Persons.

Where one under the influence of threats or persuasion, and for the purpose of avoiding a present or threatened embarrassment, agrees to pay or recognize a claim which has no foundation either in equity or law, such contract is without consideration and void and will not be upheld on the ground that it is a compromise of a doubtful right.—*Vane v. Towle*, 5 Idaho, 471, 50 Pac. 1004.

A unilateral mistake in the making of a contract of which the other contracting party is entirely ignorant and to which he in no way contributes will not affect the contract or afford grounds for its avoidance or rescission, unless it be such a mistake as goes to the substance of the contract itself.—*Tatum v. Coast Lumber Co.*, 16 Idaho, 471, 23 L. R. A., N. S., 1109, 101 Pac. 957.

Duress may exist where one party threatens to cause the arrest of another on a charge of the commission of a crime, if such threats overpower his will, although the party threatened is in fact guilty of the offense with which he is accused and for which his arrest is threatened.—*Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069.

Under the modern rule of law, actual or threatened use or misuse of criminal process, legal or illegal, sufficient to overpower and overcome the will of the party threatened, constitutes duress.—*Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069.

Where a complaint states that a contract was entered into by reason of certain representations made of the existence of certain facts, and the plaintiff relies upon such representations, and such representations are the inducement which led the plaintiff to enter into said contract, and such representations are made directly affecting the subject matter of the contract and without which the contract would not have been made, then in that case the representations are material.—*Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Editorial Notes.

Contracts of intoxicated persons: 107 Am. St. Rep. 536; 54 L. R. A. 440; 25 L. R. A., N. S., 596.

Duress sufficient to invalidate contracts, what is, and what is not: 26 Am. Dec. 370.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.

The general rule that a contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so, is subject to the exception that when the statutory prohibition is found in a statute enacted for the purpose of raising revenue or the regulation of traffic or business, the court will treat the contract as valid unless it is manifestly the intention of the statute to make the contract void.—*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 37 L. R. A. 509, 49 Pac. 314.

R. S. 1636, 1640, require all persons engaged in the business of loaning money at interest, to pay a license tax and obtain a license before commencing such business. R. S. 6983 provides that persons doing business without a license when such is required are guilty of a misdemeanor. Plaintiff engaged in the business of loaning money without taking out the required license, loaned money to defendant on his notes, secured by mortgage. Held, that plaintiff could recover thereon, the act of loaning money at interest being neither malum in se nor malum prohibitum.—*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 37 L. R. A. 509, 49 Pac. 314.

A contract by the Secretary of State with a printing company to publish the state laws and journals, by the terms of which contract the secretary is to receive a part of the contract price for his work in preparing and copying the laws is prohibited by R. S.

365, providing that "members of the legislature, territorial, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members."—*Anderson v. Lewis*, 6 Idaho, 51, 52 Pac. 163.

A contract for the purchase of a newspaper plant provided in part that the seller thereof should bid for the county printing of K. county and that in case he was awarded said printing, he would assign the contract or sublet it to the purchaser of the plant. Held, that such provision in the contract had no tendency to prevent competition in bidding for the county printing and that the contract did not therefore contravene public policy.—*Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542.

Plaintiff agreed to purchase a newspaper plant from defendant, who in part consideration agreed to obtain for plaintiff the contract to publish certain classification lists of mineral lands, published by the United States land office. Defendant agreed to bid for the county printing and that in case he was awarded said printing, he would assign or sublet the contract to plaintiff. Plaintiff performed his portion of the contract and thereupon defendant refused to transfer the newspaper plant to plaintiff, on the ground that the contract was contrary to public policy and void. It was shown that the register of the land office was required by law to publish the lists of mineral lands, for which publication the government paid a fixed price; that no bids were authorized in letting such contracts; that the only requirement was that the newspaper be one of general circulation; that the paper in question was of general circulation in the county. The means and methods used by defendant in securing the publication were not disclosed, but the receiver of the land office testified that in awarding the contract of said mineral land classification lists, he was not influenced thereto by any influence exerted on him by defendant. Held, not sufficient to show that the contract was contrary to public policy.—*Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542.

A building contract provided that disagreements in regard to the valuation of the work added or omitted, or as to extension of time or the amount of loss or damage to either party, should be referred to three arbitrators, "the decision of any two of whom shall be final and binding." Held, that the latter provision was repugnant to R. S. 3229, which provides that every stipulation in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time for such enforcement, is void.—*Huber v. St. Joseph's Hospital*, 11 Idaho, 631, 83 Pac. 768.

Although the doctrine of champerty and maintenance does not prevail, the courts will refuse to grant relief or enforce contracts, where the contract is contrary to good morals or sound public policy.—*Merchants' Protective Assn. v. Jacobsen*, 22 Idaho, 636, 127 Pac. 315.

Editorial Notes.

Public policy, when contracts void because for services forbidden by: 66 Am. Dec. 505.

Illegal contracts, rights of parties to: 67 Am. Dec. 153; 12 L. R. A., N. S., 575.

Consideration tending to obstruct the administration of justice: 37 Am. Rep. 203.

Consideration which is partly illegal or has partly failed: 117 Am. St. Rep. 493.

II. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

When any doubt exists as to the meaning of a written contract, the conditions and motives of the contracting parties, as shown by its recitals or by outside evidence, must be looked into to ascertain what is the real intention of the parties, which, when ascertained, must prevail over the literal sense.—*Burke Land etc. Co. v. Wells, Fargo & Co.*, 7 Idaho, 42, 60 Pac. 87.

Where several writings constitute one contract they must be construed together.—*Hunt v. Capital State Bank*, 12 Idaho, 588, 87 Pac. 1129.

The court in construing the terms of a contract and the law applicable thereto will take into consideration the conditions and circumstances under which the parties were contracting, and construe their contract in the light thereof.—*Schurger v. Moorman*, 20 Idaho, 97, Ann. Cas. 1912D, 1114, 117 Pac. 122.

Courts of justice will not so construe a contract as to give some of the parties thereto an unconscionable advantage, unless by the clear terms of the contract such advantage was intended.—*Twin Falls etc. Co. v. Salsbury*, 20 Idaho, 110, 117 Pac. 118.

In the construction of a contract, the court should endeavor to arrive at the real intention of the parties, and, if there is room for doubt as to its true meaning, the facts and circumstances out of which such contract arose should be considered and the contract construed in the light of such facts and circumstances so that the intention of the parties to the contract may be ascertained, if possible, and given effect.—*Twin Falls etc. Co. v. Salsbury*, 20 Idaho, 110, 117 Pac. 118; *State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

Where a contractor undertakes to build a sidewalk for a property owner in an incorporated city, town, or village, he impliedly agrees to use such material as is required by the ordinance of the city wherein the walk is to be built, and that he will construct the same in accordance with the specifications of such ordinance.—*Long v. Owen*, 21 Idaho, 243, Ann. Cas. 1913D, 465, 121 Pac. 99.

Where it is possible so to do, ambiguous, uncertain, or apparently inconsistent provisions of a contract will be so construed as

to give protection to both parties and not to only one of the parties to such contract.—*Clark v. Paddock*, 24 Idaho, 142, 132 Pac. 795.

Editorial Notes.

Repugnant clauses in contracts, which shall prevail: 60 Am. St. Rep. 93.

(B) PARTIES.

Where a contract is made with one party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover, though he allege the injury to be only to a stranger to the contract.—*People v. Slocum*, 1 Idaho, 62.

A provision in a building contract entered into between the state and a contractor that, "If at any time there should be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify against such lien or claim," does not authorize or justify the state in withholding payments from the contractor and paying the same to laborers and materialmen, unless the state has become directly responsible to such laborers and materialmen by contract, either express or implied.—*Rathbun v. State*, 15 Idaho, 273, 97 Pac. 335.

Where a contract is entered into between B. as party of the first part and F. and forty-three other persons as parties of the second part, whereby the parties of the second part employ the party of the first part to construct a butter factory and feed-mill for the sum of \$4,000, and in such contract each of the persons signing said contract as parties of the second part agrees to pay the sum of \$100 as a part of the contract price, such contract is a joint contract in so far as employing the party of the first part to construct the butter factory and feed-mill, and is several as to the agreement to pay the contract price for such work.—*Buster v. Fletcher*, 22 Idaho, 172, 125 Pac. 226.

(C) SUBJECT MATTER.

Where a contract provides that a certain payment is to be made "out of the proceeds" of a certain crop of oats, such payment must be made out of the entire proceeds of the sale, and is not limited to the net proceeds thereof.—*Salisbury v. Spofford*, 22 Idaho, 393, 126 Pac. 400.

An agreement provided that, "For and in consideration of one dollar and other valuable considerations, I hereby agree to deliver to first parties, by good and sufficient warranty deed, a strip of land, described as follows," describing it. The agreement further provided that for and in consideration of the sum of one dollar and other valuable considerations, I further agree and contract to pay first parties the sum of \$600 as soon as they have constructed and put into operation an electric railway from Boise City to

said strip of land. Held, that the agreement embodies two separate and independent contracts.—*Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

(D) PLACE AND TIME.

Time is of the essence of the contract when the character of the property involved renders it liable to great fluctuations in value, and this is especially applicable to contracts for the purchase and sale of mining properties.—*Settle v. Winters*, 2 Idaho, 215, 10 Pac. 216; *Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425; *Olympia Min. Co. v. Kerns*, 24 Idaho, 481, 135 Pac. 255.

While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties themselves, or by the circumstances of the case.—*Settle v. Winters*, 2 Idaho, 215, 10 Pac. 216.

Where a contract provides for the performance of certain labor or delivery of certain articles on the one hand, and payment for the purchase price by the other party, the acts cannot be concurrently performed, and the question as to which act is to be performed first must be determined from the nature of the contract and the character of the subject matter.—*Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965.

It is a recognized rule of law that time is the essence of a contract, unless the contrary appears from the face of the contract, and in equity it may be said that time is not of the essence of a contract, and that it must affirmatively appear that the parties regarded time as an essential element in their agreement, or a court of equity will not so regard it. The above rule that time is the essence of a contract applies to building contracts in which a definite time for completing the work is stipulated for.—*Buster v. Fletcher*, 22 Idaho, 172, 125 Pac. 226.

Where a contract provides that a certain payment shall be made after "the entire crop of said lands shall have been harvested and marketed," such provision fixes the time of payment, and was not intended to limit the payment to the proceeds of the crop.—*Salisbury v. Spofford*, 22 Idaho, 393, 126 Pac. 400.

Editorial Notes.

Time, when stipulations show it is made the essence of contracts: 50 Am. Dec. 597.

Time, when of the essence of, in contracts for the sale of land: 104 Am. St. Rep. 265.

(E) CONDITIONS.

Where a railroad construction contract stipulated that the engineer of the railroad company should be the umpire to decide disputes and misunderstandings between the parties in relation to the provisions of the contract, and to decide the amount and quantity of work performed and material furnished, and that his decision should be binding and conclusive, the company was

bound to employ a competent, upright and trustworthy person as such engineer and to see to it that he performed the services expected of him at a proper time and in a proper manner; and where the evidence shows that the engineer employed failed to fill such requirements in toto, there is no error in a finding by the court that the estimates and classifications made by such engineer under the contract were wrong.—*Spaulding v. Coeur d'Alene Ry. etc. Co.*, 5 Idaho, 528, 51 Pac. 408.

(F) COMPENSATION.

A railroad construction contract defined the terms "loose rock," "solid rock," and "earth," and specified the compensation to be allowed therefor. In the course of excavation "hard-pan" was struck, which did not come within any of the terms defined in the contract. Plaintiff applied to defendant for a "hard-pan" classification and was informed that he should have a fair classification under the contract, as to the "hard-pan." Held, that plaintiff was entitled to a reasonable compensation for removing such hard-pan.—*Spaulding v. Coeur d'Alene Ry. etc. Co.*, 5 Idaho, 528, 51 Pac. 408.

Where a contractor agrees with a subcontractor and his assignors to proceed to secure by action, lien, compromise or otherwise the best settlement obtainable for certain demands against the company on whose property all the parties had been working, and to pay over to the subcontractor and his assigns their just proportion of all compensation, money or property recovered or received in excess of the estimates of said company's engineer and interest thereon, the recovery of a judgment does not fix the liability of the contractor, his liability being fixed by the amount or value of the property recovered or money received.—*Thompson v. Bradbury*, 5 Idaho, 760, 51 Pac. 758.

Where a contractor agrees with a subcontractor and his assignors to proceed to secure by action, lien, compromise or otherwise the best settlement obtainable for certain demands against the company on whose property all the parties had been working, and to pay over to the subcontractor and his assigns their just proportion of all compensation, money or property recovered or received, in excess of the estimates of said company's engineer and interest thereon, the subcontractor and others are not entitled to recover from the contractor, until he has recovered money or property from the company in excess of the estimates of such engineer.—*Thompson v. Bradbury*, 5 Idaho, 760, 51 Pac. 758.

Plaintiffs purchased a grading outfit, agreeing to complete the work then in progress under a contract between the sellers and other defendants. The contract of grading provided that only ninety per cent of the contract price was to be paid, ten per cent being retained until the work was finally completed. Plaintiffs' contract recited that part of the work had been completed and provided that plaintiffs should complete the contract and collect "all compensation therefor hereafter accruing." Held, that by the

words "hereafter accruing," the sellers retained all money theretofore earned under the contract, and that plaintiffs were only entitled to money earned from the time they assumed control.—*Erconbrack v. Faris*, 10 Idaho, 584, 79 Pac. 817.

Where a building contract provides that no allowance for delay in the completion of a building shall be made unless claim therefor is presented in writing within twenty-four hours after such delay, and the evidence shows that the delays were occasioned by the architect, who was the owner's agent, and that he led the contractors to believe that the required extension of time would be given without written application therefor, such application will be deemed to have been waived, and the owner will not be entitled to any deductions from the contract price on account of such delays.—*Huber v. St. Joseph's Hospital*, 11 Idaho, 631, 83 Pac. 768.

III. MODIFICATION AND MERGER.

(No paragraphs.)

IV. RESCISSION AND ABANDONMENT.

A party to a valid contract, in the absence of fraud or other special reason, cannot rescind at pleasure, especially where there has been a part performance, and still retain the benefits received under the agreement.—*Bowman v. Ayers*, 2 Idaho, 465, 21 Pac. 405.

Where the acts of one party to a contract are such as necessarily prevent the other from performing the contract on his part, the party thus prevented may abandon and rescind the contract and recover on a quantum meruit.—*Spaulding v. Coeur d'Alene Ry. etc. Co.*, 5 Idaho, 528, 51 Pac. 408.

The rule that neither party to a transaction will be permitted to take advantage of its invalidity while retaining the benefits applies only to voidable contracts and not to a transaction that is absolutely void.—*Independent School District v. Collins*, 15 Idaho, 535, 128 Am. St. Rep. 76, 98 Pac. 857.

Where a contract of employment is made jointly by forty-six persons, a majority of such persons have no authority to rescind such contract where there is a protest on the part of the remainder of such persons, and thus avoid liability arising out of such contract by reason of the agreement of the entire number.—*Buster v. Fletcher*, 22 Idaho, 172, 125 Pac. 226.

A party electing to rescind a contract on the ground of fraud and misrepresentation must place the other party as nearly as possible in statu quo. To do this, if he has received anything under the contract, whether it be property or securities, he must restore it. This rule, however, does not apply to all cases, especially where property is worthless, and where the defrauded party has so dealt with the subject matter of the contract that it has become impossible to put the other in statu quo.—*Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Editorial Notes.

Rescission of contracts, when, how, and by whom may be made: 50 Am. Dec. 672.

Rescission, how and within what time right of must be exercised: 74 Am. Dec. 657.

Rescission of contract by substitution of new contract between same parties: Ann. Cas. 1912A, 1258.

Contracts, abandonment or countermanding of one party: 94 Am. St. Rep. 119.

V. PERFORMANCE OR BREACH.

A tender of cattle upon a contract, within the time specified, is waived by a subsequent acceptance of them upon the contract. *Emery v. Langley*, 1 Idaho, 694.

Where a contract provides that the parties thereto, both residents of this state, were to form a mining corporation, the organization of such corporation under the laws of another state by one of the parties without the consent of the other was not a compliance with the contract.—*Olympia Min. Co. v. Kerns*, 13 Idaho, 514, 91 Pac. 92.

The fact that the owner of a building went into possession thereof with knowledge that the building contained latent defects in its construction and inferior material will not prevent his claiming damages for such defects as an offset against the contractor's action to recover the contract price therefor, unless an express waiver is shown or such other facts and circumstances as would amount to a waiver of damages.—*Steltz v. Armory Co.*, 15 Idaho, 551, 20 L. R. A., N. S., 872, 99 Pac. 98.

An acceptance of a building or structure that has been completed, or which contains latent defects either in the class or character of its workmanship or the quality of material used, will not be deemed a waiver of such latent defects, but on the contrary, the owner may maintain his action against the contractor for breach of the contract at such time as he discovers the extent of the defects or after he has had reasonable time and opportunity by due diligence to have discovered the same.—*Steltz v. Armory Company*, 15 Idaho, 551, 20 L. R. A., N. S., 872, 99 Pac. 98.

As a general rule, where the owner of a building accepts the same and takes possession thereof, and at the time of doing so the building is incomplete and contains patent and obvious defects, the acceptance will be deemed a waiver, and the contractor will be entitled to recover the amount earned on the contract.—*Steltz v. Armory Company, Ltd.*, 15 Idaho, 551, 20 L. R. A., N. S., 872, 99 Pac. 98.

Where one party to a contract voluntarily places himself in a position whereby he is unable to carry out the provisions of his contract, he is as liable for a breach thereof as though he had deliberately refused to comply with its provisions.—*Bell v. Shields*, 18 Idaho, 649, 111 Pac. 1076.

There is an implied understanding upon the employment of an architect that the work shall be suitable and capable of being used for the purposes for which it is intended, and apart from questions of public policy this principle would prevent the architect from recovering payment for plans and specifications prepared in violation of law, unless he was so directed to prepare them by the owner.—*Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82.

The architect should prepare a contract as a part of the plans and specifications, between the owner and the contractor for the construction of a proposed structure, in order to intelligently protect both parties thereto, as the owner, as a rule, has not a sufficient knowledge of such matters to know the details of such a contract.—*Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82.

The mere fact that a contract in which time is made of its essence provides for a forfeiture upon failure to perform will not of itself cause a forfeiture of the contract by failure on the part of one of the parties to perform promptly according to its terms. There must be a declaration or some acts or conduct of forfeiture made by the party to the contract, claiming the benefit of the forfeiture.—*King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292.

A forfeiture is a harsh remedy and will not be allowed except upon clear proof of the breach of the terms of the contract upon which such forfeiture shall be declared.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

Where a contract is entered into between B. as party of the first part and F. and others as parties of the second part for the construction of a butter factory and feed-mill, and such contract further provides that an executive committee of three shall be appointed by the parties of the second part "with full power and authority in a majority to represent them in all their interests herein, and from time to time inspect the work of the first party while he is building said factory and placing said machinery," and the contract further provides substantially that, in the event that B. should be delayed in the execution of his contract by reason of strikes, storms, unavoidable accidents, or other causes over which he had no control, the time limit for the completion of said factory would be extended for a period of time equal to such delay, and the executive committee notify B. that the weather is such that the construction of the building cannot be commenced, and that B. should not commence the same until a certain time in the future when the weather will permit and upon notification from such committee, and such committee notifies B. when to commence and B. proceeds in accordance with such notice and completes said building, such action of the committee is sufficient to excuse B. from commencing and completing said building within the time fixed in said contract.—*Buster v. Fletcher*, 22 Idaho, 172, 125 Pac. 226.

Editorial Notes.

Nonperformance, what excuses: 18 Am. Dec. 452.

Performance, prevention of, when gives a right to recover on: 59 Am. St. Rep. 283.

Building, substantial performance of: 30 Am. St. Rep. 616.

Building contractor, right of to recover for a substantial performance of his contract: 134 Am. St. Rep. 678.

Death of party: 23 L. R. A. 707.

VI. ACTIONS FOR BREACH.

Prospective profits. See Damages, VI.

(A) NATURE AND FORM OF REMEDY.

Right to abandon contract and recover on quantum meruit. See ante, IV.

Joinder of cause of action on express contract with action on quantum meruit. See Action, III.

It is a general rule of law that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain and sue and recover damages for the fraud. If he elects the former course, he must not sleep on his rights, but must move promptly. *Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Editorial Notes.

Remedies of party to contract upon anticipatory breach thereof or prevention of performance: Ann. Cas. 1913C, 384.

(B) PARTIES.

All parties jointly liable on a contract must be made defendants in an action thereon.—*People v. Sloper*, 1 Idaho, 158.

Where a complaint for services rendered under a joint contract alleges that, prior to the commencement of the action, the amount due one of the joint contractors had been fully paid and that he had no interest in said contract at the time of the commencement of the action, the other joint contractor or his assignee has the right to sue in his own name.—*Jacobs v. Shenon*, 3 Idaho, 274, 29 Pac. 44.

(C) PLEADING.

Unless the complaint shows that the agreement sued on was verbal, the court will presume that it was in writing, where the nature of the agreement is such that it could not be valid unless in writing.—*Bowman v. Ainslie*, 1 Idaho, 644.

A contract may be declared on according to its legal effect or in *haec verba*, but, to enable the pleader to adopt the latter mode, the instrument which is adopted as a part of the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege under the former mode of pleading by averment.—*More v. Elmore County Irr. Co.*, 3 Idaho, 729, 35 Pac. 171.

Where a complaint alleges that "defendants made and executed" the contract sued

on, such allegation imports a delivery of the contract.—*Elbring v. Mullen*, 4 Idaho, 199, 38 Pac. 404.

Where a contract is set out in *haec verba* it is not necessary that the pleading should aver its legal effect.—*Elbring v. Mullen*, 4 Idaho, 199, 38 Pac. 404.

In an action to recover advances made in behalf of plaintiff's copartners, by them agreed to be repaid, defendants pleaded as a defense that plaintiff subsequently agreed to buy their interest in the partnership property and to release them from all claims and dues by reason of said advancements and did then and there release them therefrom; and that he would pay them \$2,000 on deeds being placed in escrow in pursuance of said agreement; that he failed to pay the same. Held, that defendants should be allowed to prove such defenses.—*Haskins v. Curran*, 4 Idaho, 573, 43 Pac. 559.

A complaint alleged a verbal contract, whereby plaintiff was to deliver to defendant four hundred stulls at forty-five cents each; that a portion of said stulls was delivered and defendant then notified plaintiff that he did not want said stulls; that the amount of labor expended on the balance undelivered was \$110. Held, that no damage for breach of the contract was pleaded.—*Morrison v. American etc. Min. Co.*, 5 Idaho, 77, 47 Pac. 94.

Where the parties to a contract agree that payments for work done and material furnished thereunder shall be paid upon estimates of a certain engineer, to recover more the party suing must allege and prove fraud or mistake on the part of such engineer.—*Thompson v. Bradbury*, 5 Idaho, 760, 51 Pac. 758.

A contract may be declared upon according to its legal effect or in *haec verba*, and if a contract is attached to the complaint, and by apt allegations made a part thereof, the contract is sufficiently pleaded.—*Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105.

A complaint alleged a contract for the construction of grades, etc., along a railroad right of way, the work to be done under the direction of the engineers of the railroad company and the plaintiffs to be paid from time to time as the work so done by them should be ascertained from estimates to be made by the engineers. A specified sum was to be paid for "all loose rock work" and all work done of a similar character to the work done at D. station was to be classed as "loose rock work." The complaint alleged further the loose rock work so done under the contract amounted to a certain number of cubic yards, and that said number of yards should have been classed as loose rock work and paid for at the rate specified for such work. Held, that while the complaint did not directly allege that the specified number of cubic yards of loose rock work was similar in character to the work done at D. station and did not directly aver that there was a mistake in the estimates of the engineer, it contained equivalent allegations, the necessary inference being that the work so done

similar to that at D. station ought to have been classed as loose rock work and paid for at the specified rate and that it had not been so classified and paid for, and hence that the complaint stated a cause of action. *Lewis v. Utah Constr. Co.*, 10 Idaho, 214, 77 Pac. 336.

Where plaintiff alleges a sale and delivery and refusal of defendants to pay the purchase price, and defendants deny the purchase or receipt of the property, evidence to show illegality of the contract or that it is against public policy or failure of title in plaintiff is not admissible under the pleadings.—*Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608.

In an action by an irrigation company to recover the price of water furnished, defendant averred that plaintiff refused to deliver him any water till he signed a special contract, and through fear that he would be unable to raise any crops whatever on said land if he did not secure the water, and being in immediate need of the water, he signed said contract under protest. Held, sufficient to put in issue whether defendant was under such fear or duress as would avoid the contract.—*Green v. Byers*, 16 Idaho, 178, 101 Pac. 79.

Where an action is brought upon a contract, it is error for the trial court to admit in evidence in support of said complaint a contract of a different date for different terms and conditions than that which is pleaded in the complaint, without proper allegations being made in the complaint showing the relation of such proffered contract to the contract pleaded in the complaint.—*Phillips v. Brown*, 21 Idaho, 62, 120 Pac. 454.

(D) EVIDENCE.

Parol evidence to vary or contradict terms of contract. See Evidence, XI.

Extrinsic evidence is admissible to explain the recitals and promises of a written contract.—*Vincent v. Larson*, 1 Idaho, 241.

It is competent for a party to an executory contract to show by parol evidence that the consideration has been paid.—*Vincent v. Larson*, 1 Idaho, 241.

Where in an action for work done under an express contract, the amount to be paid therefor is in dispute, evidence as to the reasonable value of the work done is admissible. *Lewis v. Utah Constr. Co.*, 10 Idaho, 214, 77 Pac. 336.

Where a contract requires a written application for extension of time of performance, evidence is admissible to show a waiver of such written application either by the acts of the party or his agent.—*Huber v. St. Joseph's Hospital*, 11 Idaho, 631, 83 Pac. 768.

Where the specification for the electric wiring provides that "the wiring must all be according to the latest improved methods according to the city ordinance, and the rules and regulations of the underwriters, subject to their inspection," etc., and the court refuses to permit the defendant to show on cross-examination of the plaintiff that if the

rules and regulations referred to constitute the National Electric Code, which is accepted as fire underwriters' regulations, such code authorizes the wiring in several different ways and that different kinds of material, some more expensive than others, may be used, the refusal of the court to admit such evidence is error.—*Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82.

The testimony of a contractor or contractors, to the effect that certain plans and specifications are sufficient will not be taken as against the plans and specifications themselves, when they clearly show that they are not definite and certain, and against the recognized authorities on engineering, contracts and specifications, and architecture, and especially is that true where the plans and specifications will permit the bidder or contractor to figure on first-class and expensive material, and are not specific enough to prevent his using an inferior material of a less value.—*Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82.

Editorial Notes.

Construction of contracts, parol evidence, when admissible to aid: 5 Am. Rep. 241.

Words used in written contracts, evidence to explain: 122 Am. St. Rep. 545.

Warranty, parol evidence to show, notwithstanding written contract: 5 Am. St. Rep. 197.

(E) TRIAL.

In an action on a contract, an instruction "that the plaintiff, having proved the contract alleged in the complaint, and the payment of the sums alleged to have been paid out for expenses on the mining claims, as provided in said contract, the burden is on defendant to show that liability for repayment was avoided by some act that would relieve them in law from the liability under the contract," takes away from the jury facts which should be determined by them.—*Haskins v. Curran*, 4 Idaho, 573, 43 Pac. 559.

In an action on a contract, an instruction which attempts to confine the jury's consideration solely to the conversation between the parties in making the contract and to exclude consideration of the subsequent acts of the parties tending to carry out the alleged contract is erroneous.—*Idaho Merc. Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

Plaintiff alleged that the engineer of the defendant company, selected as umpire to determine all questions of controversy, acted fraudulently and arbitrarily in making estimates, measurements and classifications, and without previously making any proper inspection in which to make an honest judgment, and with intent to injure and defraud the plaintiff and deprive it of its just compensation, did arbitrarily and in violation of good faith make and cause to be made false and untrue estimates, measurements and classifications. Held, that a finding by the trial court on the foregoing issue "that the chief engineer wrongfully, arbitrarily and without having made proper observations,

and without sufficient knowledge upon which to found a just judgment, in respect to the kind, quality and classification of materials, and in violation of good faith and duty, did make, cause to be made and permit untrue and grossly erroneous estimates and classifications of the kind, character and amount of materials removed and placed, and work done," is sufficient to support a judgment in favor of the plaintiff for the true measurements and amount of work done and the proper and just classifications as found from the evidence in the case.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

Where the chief engineer of a defendant company has been selected as umpire for the purpose of making a final determination of controversies and differences in reference to the work, material, measurements and classifications, retains in his service an assistant engineer who is manifestly prejudiced and biased against the contractor, and where, after such chief engineer has been advised of the animus, bias and prejudice of his assistant against the contractor, he causes such assistant engineer to make the measurements, estimates and classifications of the work done by such contractor, and it manifestly appears that such estimates and classifications have been unfair and unjust and discriminating against the contractor, the court, when appealed to, will set the same aside and ascertain from the evidence submitted the true amount of work done or material furnished and the proper measurements and classifications thereof, and order judgment accordingly.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

Plaintiff alleges that the engineer of the defendant company, selected as umpire to determine all questions of controversy, acted fraudulently and arbitrarily in making estimates, measurements and classifications, and without previously making any proper inspection on which to make an honest judgment, and with intent to injure and defraud the plaintiff and deprive it of its just compensation, did arbitrarily and in violation of good faith make and cause to be made false and untrue estimates, measurements and classifications. Held, that such issue, if supported by the evidence, will authorize and justify the court in setting aside such final estimates, measurements and classifications and in hearing evidence and determining the true measurements and classifications.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

CONTRIBUTION.

The provisions of R. C. 4499, for contribution give additional relief, and are cumulative in that they give the party paying the benefit of the judgment to enforce contribution; and, on compliance with such provisions, he may have execution to enforce payment of the proportionate part of the judgment indebtedness from his codefendant. *Dunn v. Stufflebeam*, 17 Idaho, 559, 106 Pac. 1129.

Proceedings under R. C. 4499 for contribution will not bar an action to recover judgment against a joint judgment debtor who

has failed to pay his proportionate share of the judgment, where the party entitled thereto has failed to compel his codefendant to pay his proportionate share of the judgment under the provisions of said section.—*Dunn v. Stufflebeam*, 17 Idaho, 559, 106 Pac. 1129.

When application is made to the court for an order directing an execution to issue under R. C. 4499, providing for contribution between joint judgment debtors, the court may enter an order directing an execution to issue; but the court has no authority to enter a judgment against the judgment debtor for the proportionate part of the judgment he should pay.—*Dunn v. Stufflebeam*, 17 Idaho, 559, 106 Pac. 1129.

Editorial Notes.

Contribution among joint principals, one being insolvent: 20 Am. Dec. 559.

Contribution between persons liable for negligence: 16 Am. St. Rep. 254.

Contribution, actions for not founded on an express promise: 98 Am. St. Rep. 31.

Contribution between tort-feasors: Ann. Cas. 1913B, 938; 40 L. R. A., N. S., 1147.

Right of promoter to bring action at law against fellow-promoters for contribution: Ann. Cas. 1913E, 1167.

CONVERSION.

Of bankrupt's property. See Bankruptcy.

Wrongful conversion of personal property. See Trover and Conversion.

CONVICTS.

Competency and credibility as witness. See Witnesses.

Conviction in general. See Criminal Law.

Escape from prison. See Escape.

Establishment and management of prisons. See Prisons.

Pardon. See Pardon.

CORONERS.

Acting as sheriff. See Sheriffs and Constables, I, (O).

Evidence as to proceedings. See Homicide, VII, (D).

Failure to hold inquest not ground for discharge of person charged with murder. See Habeas Corpus.

The coroner has no authority to bind the county as to what shall be a reasonable fee in the case of a post-mortem examination ordered by him.—*Fairchild v. Ada County*, 6 Idaho, 340, 55 Pac. 654.

For testifying before a coroner's jury, a physician is entitled to only such fees as other witnesses receive, though he is also entitled to the reasonable values of his services in making a post-mortem examination where he has made such examination.—*Fairchild v. Ada County*, 6 Idaho, 340, 55 Pac. 654.

Under R. S. 8377 et seq., providing that county coroners shall hold inquests in certain cases and that they "may summon a surgeon

or physician to inspect the body and give a professional opinion as to the cause of the death," a physician who has been subpoenaed and ordered by the county coroner to inspect the body of a deceased person and give to the coroner's jury his opinion as to the cause of death, is entitled to the reasonable value of his services in making the inspection and may recover for such services in an action against the county.—*Fairchild v. Ada County*, 6 Idaho, 340, 55 Pac. 654.

Const., article 18, sections 6, 11, provide for the election of a coroner as a county officer and that he shall perform such duties as shall be prescribed by law. Const., article 5, section 2, specifies the courts in which the judicial power of the state shall be vested. Held, that a coroner is not a judicial officer. In re Sly, 9 Idaho, 779, 76 Pac. 766.

Under R. S. 8377 to 8386, which contain the law relating to coroner's inquests, it is the duty of the coroner to hold an inquest when he is informed that a person has been killed under such circumstances as to afford a reasonable ground to suspect that the death of a person has been caused by criminal means.—In re Sly, 9 Idaho, 779, 76 Pac. 766.

Editorial Notes.

Coroners, inquests of, and the evidence given thereat, admissibility of as evidence: 95 Am. St. Rep. 763; 41 L. R. A., N. S., 934.

CORPORATIONS.

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Citizenship of, within constitutional provision against deprivation of privileges or immunities. See Constitutional Law, IX.

Are persons within fourteenth amendment to federal constitution. See Constitutional Law, XI.

Liability for poll taxes of employees. See Taxation, III, (A); VIII, (B).

Liability for injuries to servants. See Master and Servant.

I. INCORPORATION AND ORGANIZATION.

Act January 12, 1866 (3 Sess. Laws, p. 241), section 1 declared certain persons therein named to be a corporation. Section 10 required such corporation within a certain time thereafter to give a bond. Held, that the giving of such bond was not a condition precedent to the investment of the persons so

named with corporate rights and power.—Boise City Canal Co. v. Pinkham, 1 Idaho, 790.

Individuals cannot, in collateral suits, avail themselves of any defects in the organization of a corporation. This may be done only by the power creating them and in a direct proceeding instituted for that purpose.—Boise City Canal Co. v. Pinkham, 1 Idaho, 790.

Where an act of the legislature has declared plaintiff to be a corporation, it cannot be shown in defense to a suit by such corporation that it has forfeited its rights by misuser or nonuser.—Boise City Canal Co. v. Pinkham, 1 Idaho, 790.

Editorial Notes.

Defective formation of corporations and its consequences: 33 Am. St. Rep. 176.

II. CORPORATE EXISTENCE AND FRANCHISE.

In this state there is no statute granting unincorporated associations any of the powers or privileges of corporations, and without such grant such associations cannot either possess or exercise any corporate franchises. Spotswood v. Morris, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

Where a party does business with a corporation in its corporate name, and the contract is executed on its behalf, such party is estopped from denying the incorporation of the company.—Toledo Computing Scale Co. v. Young, 16 Idaho, 187, 101 Pac. 257.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS AND RECORDS.

Oral evidence to vary corporate records. See Evidence, XI, (A).

IV. CAPITAL, STOCK AND DIVIDENDS.

(A) NATURE AND AMOUNT OF CAPITAL AND SHARES.

Under R. S. 2611 shares of stock in a corporation are personal property.—Watson v. Molden, 10 Idaho, 570, 79 Pac. 503.

The term "capital stock" does not mean "shares of capital stock," but means the actual money or property paid in and possessed by the corporation.—Weiser Nat. Bank v. Jeffreys, 14 Idaho, 659, 95 Pac. 23.

(B) SUBSCRIPTION TO STOCK.

Where a stockholder has for a considerable period of time prior to the failure of a corporation occupied the position of one of its stockholders, and exercised and enjoyed the rights, privileges and fruits of that relation, and received dividends on his stock, after the failure of the corporation it is too late to rescind his contract for the purchase of the stock on the ground of false representations. Meholin v. Carlson, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Where false and fraudulent representations are alleged as a defense, the purchaser must use the utmost diligence to discover the fraud and repudiate the contract, and, unless he does so, he cannot avoid payment of the pur-

chase price.—Meholin v. Carlson, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Editorial Notes.

Stock, subscriptions to and distinction between subscriptions and offers or agreements to subscribe: 81 Am. Dec. 392.

Stockholders, subscription of for stock, liability of upon: 40 Am. Dec. 358.

Stock of corporations, subscription to, nature and validity of: 136 Am. St. Rep. 736.

Right to withdraw stock subscription: 16 Ann. Cas. 532; 33 L. R. A. 721.

Effect of transfer of stock on liability for unpaid subscription: 47 L. R. A. 246.

(C) ISSUE OF CERTIFICATES.

A stock certificate was issued to a corporation by the president thereof and such president and the secretary of the corporation executed a promissory note to S. and deposited in escrow a new certificate of stock issued to S. and signed by such president and secretary as officers of the corporation, to be delivered to S. upon default in the payment of the note. The escrow agreement provided that such certificate upon the payment of the note should be returned to the president and the secretary testified that the stock thus pledged belonged to the president. Held, sufficient to support a finding that the stock pledged belonged to the president and should be deducted from the stock previously issued to him.—Haynes v. Griffith, 16 Idaho, 280, 101 Pac. 728.

Editorial Notes.

Compelling the issuing of stock: 133 Am. St. Rep. 723.

(D) TRANSFER OF SHARES.

Attachment of corporate stock. See Attachment and Garnishment.

Action to cancel contract of sale of real estate given in exchange for stock alleged to be worthless. See Cancellation of Instruments.

A transfer of stock under R. S. 2611 is not valid, except between the parties thereto, until the same is entered upon the books of the corporation, in manner and form required by said section.—Aulbach v. Dahler, 4 Idaho, 654, 43 Pac. 322.

R. S. 2611, providing that certificates of stock may be transferred by indorsement, but that such transfer is not valid except between the parties thereto until entered on the books of the corporation, is not intended to protect the public, or a private creditor of a stockholder, but rather to protect the corporation, its members and creditors.—Mapleton Bank v. Stanrod, 8 Idaho, 740, 67 L. R. A. 656, 71 Pac. 119.

Defendants agreed with plaintiffs, the owners of certain mining claims, to incorporate a company at their own expense and to use their efforts in the sale of treasury stock, the proceeds to be used in the development of the mine. Stock was issued to defendants, one of whom sold his entire holdings and the other a portion of his stock. Only a very small

portion of the proceeds was applied to the development of the mines and there was no money in the treasury for development work. Held, that an injunction should issue restraining the further sale of individual stock until the treasury stock as agreed upon is sold.—*Brown v. Bracking*, 11 Idaho, 678, 83 Pac. 950.

Editorial Notes.

Stock, duty of corporations to transfer on their books: 136 Am. St. Rep. 1027; 67 L. B. A. 656; 20 L. R. A., N. S., 996.

Stock, specific performance of contracts for the sale of: 135 Am. St. Rep. 689.

Stock, transfers of, to what extent may be restricted: 57 Am. St. Rep. 379.

(E) INTEREST, DIVIDENDS AND NEW STOCK.

Liability for payment of illegal dividends. See post, XI.

(F) LIEN OF CORPORATION.

Editorial Notes.

Lien of corporation on corporate stock: 11 Am. Dec. 581.

Foreclosure: Ann. Cas. 1912A, 53.

V. MEMBERS AND STOCKHOLDERS.

Borrower subscribing for shares of stock to obtain a loan as a debtor and not a stockholder. See Building and Loan Association.

(A) RIGHTS AND LIABILITIES AS TO CORPORATION.

Oral evidence to vary corporate records. See Evidence, XI, (A).

R. L. 1874-75, 618, section 16, making stockholders individually and personally liable for their proportion of all indebtedness incurred in conducting the business of the corporation, for which a joint or several action may be instituted, was superseded by R. S. 1887, Title 4 of the Civil Code, and a corporation organized under the prior law whose existence was continued under said Title 4, may, by its board of directors, assess the capital stock of the corporation for the legally incurred debts and liabilities thereof.—*Sparks v. Lower Payette Ditch Co.*, 3 Idaho, 306, 29 Pac. 134.

R. S. 2609, stating what are the liabilities of stockholders, refers to the personal liability of stockholders, and not to the liability of stock to assessments made thereon.—*Hall v. Eagle Rock etc. Co.*, 5 Idaho, 551, 51 Pac. 110.

Where plaintiff's complaint stated that defendant corporation had wrongfully sold a portion of his stock for nonpayment of assessments, compliance of defendant with R. S. 2614, providing the manner and time of assessments, was a matter of defense, and hence a demurrer to the complaint should not have been sustained for failure to allege that one-fourth of the capital stock had been subscribed.—*Corcoran v. Sonora Min. etc. Co.*, 8 Idaho, 651, 71 Pac. 127.

The requirements of R. S. 2614 et seq. must be strictly complied with in order to uphold the validity of assessments on corporate stock

made thereunder.—*Corcoran v. Sonora Min. & M. Co.*, 8 Idaho, 651, 71 Pac. 127.

Where the proposed action of a corporation to sell the stock of an insane stockholder for nonpayment of an assessment is founded upon and instigated by the alleged wrongful acts and conduct of a person who controls a majority of the capital stock, and a part of such majority stock was procured by such person from the insane stockholder and a cause of action for fraud and wrongful conduct is charged against the person so controlling a majority of the stock a temporary order restraining the corporation from making such sale is incidental to the main action and the trial court does not abuse its discretion in granting such order.—*Weber v. Della Mountain Min. Co.*, 11 Idaho, 264, 81 Pac. 931.

In an action commenced against a corporation and a third party as codefendants, alleging that the latter purchased stock in the defendant corporation from plaintiff at a time when he was of unsound mind and incompetent to transact business, and that the sale was void, and praying an injunction against the mining company restraining it from collecting an assessment levied by its board of directors subsequent to the void transfer of stock, it is essential that the plaintiff should plead some facts from which it would appear that but for the sale and transfer of such stock the assessment would not have been made, and that the purchaser of the stock wrongfully, fraudulently or unlawfully procured control of the company and its board of trustees, or wrongfully or unlawfully secured the election of a new board of trustees, and that the assessment would not have been made had it not been for such transfer of stock, in order to state a cause of action against the mining company and to entitle the plaintiff to an injunction against the company restraining the collection of such assessment.—*Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441.

The necessity for an assessment on the capital stock of the corporation cannot be questioned by a stockholder.—*Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441.

R. C. 2750 empowers the directions of a corporation to levy and collect assessments upon the subscribed capital stock of the corporation, though the same is fully paid up.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

Where an assessment on the stock of a corporation is in the nature of a call for the unpaid portion of the par value, the corporation may elect to waive the sale of the stock and proceed by action against the stockholder to recover the amount of the assessment.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

Under the common law and in the absence of statutory authority or power given by the articles of incorporation there can be no assessment against or on the paid-up stock of a corporation.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

There is no provision of law in this state which prohibits a corporation from making

a contract with its stockholders, by which it agrees that the stock issued is nonassessable, so as to preclude the stockholder from enforcing such contract against the corporation's right to assess such stock.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

Where a corporation issues certificates of stock and prints thereon, as a part thereof, the words "nonassessable," such words become matters of agreement and a part of the contract between the corporation and the stockholder, and may be enforced by the stockholder against the corporation's right to assess such stock.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

The levy of assessments, under the statutes of this state, against stock fully paid up is a proceeding in rem, by which the stock may be sold, but no personal liability attaches to the stockholder for any deficiency arising from the sale.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

Const., article 11, section 17, providing that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him," relates to and limits the personal liability of a stockholder, but in no way limits the power of the corporation to make assessments upon stock fully paid up, and to subject such stock to sale in default of the payment of such assessment.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

Under R. C. 2769, granting to corporations the power to sell the stock or shares of stockholders for the payment of assessments or installments, the word "assessments" means assessments upon fully paid up stock, as distinguished from calls or installments for portions of unpaid subscriptions.—*Wall v. Basin Min. Co., Ltd.*, 16 Idaho, 313, 22 L. R. A., N. S., 1013, 101 Pac. 733.

Where H. enters into a contract with a corporation and purchases certain property, and by the terms of the contract it is stipulated and agreed that the corporation shall subsequently organize another corporation and that H. shall thereupon surrender his contract and take a certain amount of stock in the new corporation in lieu of his property and contract rights, and it is stipulated and agreed that the new corporation shall have no power or authority to execute notes and mortgages on the property of the corporation, and the new corporation is subsequently formed, and, instead of the articles of incorporation providing that such corporation shall have no power or authority to execute notes and mortgages, they contain the reverse and provide that the corporation shall have the power and authority to execute notes and mortgages, and H. thereafter surrenders his original contract and accepts in lieu thereof the stock of the newly formed corporation, he cannot subsequently maintain an action against the new corporation to enjoin the corporation from exercising the powers enumerated in its charter and executing notes and

mortgages in accordance therewith.—*Hobbs v. Twin Falls Canal Co.*, 24 Idaho, 380, 133 Pac. 899.

Where a corporation is organized under the laws of this state and ratifies and affirms a promoters' contract as to assessments, such corporation is bound by the terms of the promoters' contract which provides "that the stock issued to us shall be subject to assessment up to twenty-five cents per share prior to any assessment on any other stock issued by the aforementioned company, until we have paid a total of twenty-five cents per share, when all the stock of the company will be subject to the assessment at the same time and on the same basis," and such assessment up to twenty-five cents is not paid and an assessment is levied against the general stock of the corporation, such latter assessment is void.—*Mantle v. Jack Waite Min. Co.*, 24 Idaho, 613, 135 Pac. 854.

Editorial Notes.

Stockholder, right of to maintain a bill to dissolve and to distribute assets: 91 Am. St. Rep. 33.

Stockholders, when may maintain suits against officers and agents to call them to an accounting or to set aside their acts: 41 Am. Dec. 367.

Assessment of stock, right of corporations to make: 76 Am. St. Rep. 126.

Right to inspect corporate books: 45 L. R. A. 446; 42 L. R. A., N. S., 332.

(B) MEETINGS.

Validity of directors' meeting. See post, VI, (A).

A stockholder in a corporation may combine his holdings with the holdings of one or more other stockholders for the purpose of electing officers and directors and controlling the management of the corporation.—*Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441.

Under R. C. 2735, providing that every bona fide stockholder "having stock in his own name on the stock books of the corporation, at least ten days prior to the election" of directors, is entitled to vote at such election, the stock book of the corporation is prima facie evidence of the ownership of shares therein by a person named as a stockholder and sufficient to support a finding of the court that such person was the owner of such stock and entitled to vote the same.—*Haynes v. Griffith*, 16 Idaho, 280, 101 Pac. 728.

Where an escrow agreement provides that a certificate of stock is to be held by a bank as security for the payment of a promissory note to S., and upon failure to pay such note the bank is authorized and instructed to deliver such certificate to S., in whose name the same has been issued, and the bank delivers the certificate to S. on failure of payment, and the transfer of stock represented by the certificate is made to S. on the books of the company, S. has a right to vote such stock or give his proxy to vote the same.—*Haynes v. Griffith*, 16 Idaho, 280, 101 Pac. 728.

Editorial Notes.

Meetings not properly called, validity of acts done at: 18 Am. Dec. 102.

Proxies, irrevocable: 56 Am. St. Rep. 138.

Elections, voting by proxy: 27 Am. Dec. 60; 29 L. R. A. 844.

Meetings, agreements to control future voting of stock at: 56 Am. St. Rep. 138.

Meetings special notice to attend, when may be omitted: 3 Am. St. Rep. 69.

(C) SUING OR DEFENDING ON BEHALF OF CORPORATION.

Where two competing corporations enter into a contract, and before the same is fully performed and the debt thereby contracted is due, one of the corporations obtains control of the other and elects a board of directors, and thereafter the directors and officers of the one corporation refuse to pay the debt contracted, and the directors and officers of the other corporation refuse to prosecute an action for the collection of such debts and obligation, such a conflict of interest and duty arises among the directors and officers, aside from and independently of any fraudulent motive, that a court of equity is warranted in permitting the minority stockholders to maintain their action on the contract.—*Just v. Idaho Canal etc. Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381.

A stockholder suing on behalf of his corporation which is unable or unwilling to bring suit, and pleading a good cause of action, may maintain the same, though he was not an owner of stock at the time the breach of duty was committed or the cause of action accrued, except in cases where it is shown that he purchased the stock with the purpose of bringing suit, or where his vendor was for some reason estopped from maintaining the action and the purchaser had notice of such bar.—*Just v. Idaho Canal etc. Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Editorial Notes.

Stockholder, actions by on behalf of corporations: 97 Am. St. Rep. 29.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

See, also, post, VI, (B).

Liability after dissolution for payment of illegal dividends. See post, XI.

Where an agreement was entered into by the bank and C. on the 16th of December, 1905, whereby the bank agreed to sell and issue to C. a certificate for ten shares of a new issue of its capital stock for \$140 per share, and C. agreed to execute and deliver to the bank his promissory note for \$1,400, that being the purchase price for said stock, and it was understood and agreed that said promissory note should be paid out of dividends arising on said stock, and that C. would not be called upon otherwise to pay said promissory note, and that he should be held out to the general public as a stockholder of said bank, that part of the contract as to the manner of payment for said stock is void, and an action may be sustained on said note to enforce the collection of the purchase price of said stock.—*Meholin v. Carlson*, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755.

In case of corporate insolvency, the equities of the creditors supersede those of the stockholder, even when his subscription has

been induced by fraud; and, when the subscriber has waited until suit has been brought by a receiver, then it is too late for him to plead fraud and misrepresentations.—*Meholin v. Carlson*, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Editorial Notes.

Stockholders, liability for debts of corporations: 49 Am. Dec. 308; 99 Am. Dec. 432.

Stockholders, actions against for debts of corporation: 43 Am. Dec. 694.

Stockholders, liability of: 9 Am. Dec. 96.

Judgment against corporation, effect of on stockholders: 97 Am. St. Rep. 463.

Statute of limitations in actions against officers and stockholders: 96 Am. St. Rep. 972.

Stockholders, liability of, enforcement of in other states: 37 Am. St. Rep. 168.

Stockholders, liability of to the creditors of the corporation: 3 Am. St. Rep. 806.

Liability of holders of stock of as collateral, for corporate debts: 1 Am. St. Rep. 783; 36 L. R. A. 139; 19 L. R. A., N. S., 249.

Liability of transferee of stock for corporate debts: 3 Ann. Cas. 1120.

Liability for corporate debts of stockholder who transfers stock to escape liability: 6 Ann. Cas. 428; 18 Ann. Cas. 341.

VI. OFFICERS AND AGENTS.

(A) ELECTION OR APPOINTMENT, QUALIFICATION AND TENURE.

Where the by-laws of a corporation provide that an annual meeting of the board of directors shall be held immediately after the annual meeting of the stockholders, and the annual stockholders' meeting, without transacting any business, adjourns until the books of the company can be put in proper shape and a fire loss of the company adjusted, the acts of a directors' meeting held by some of the directors immediately thereafter for the purpose of electing officers were void in the absence of the notice required by the by-laws for meetings other than the annual meeting of the board.—*Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733.

(B) AUTHORITY AND FUNCTIONS.

A written instrument, issued by the president and manager of a corporation, recited "that I, as president and manager of this institution, do agree to refund J. the sum of \$926.80 at one year's notice from date of said notice. This money shall draw what interest it makes in proportion to all the shares in the institution. (Signed) H. S. Woolley." Held, to be the obligation of the corporation, and that an action could be maintained thereon by the payee named therein against a stockholder under R. S. 2609.—*Jones v. Woolley*, 3 Idaho, 48, 26 Pac. 120.

The president and secretary of a mining company have no power to appoint an agent

or attorney in fact to sell and transfer the property of the corporation, without being themselves authorized so to do, by order or resolution of the board of directors duly adopted.—*Johnson v. Sage*, 4 Idaho, 44 Pac. 641.

The president of an ordinary corporation has implied power to transfer its negotiable instruments, so as to enable a purchaser for value to take the same freed from all equities or infirmities of which he had no notice.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 656.

S., as general manager, superintendent, secretary and treasurer of a corporation, employed laborers to cut timber and place the same in the river, and the laborers thereafter recovered judgments against the corporation for their labor and levied executions on the logs gotten out by them. Thereafter S. agreed with B., as trustee or agent for such judgment creditors, that B. was to take possession of the logs and float them down to the mill of the corporation, which was done, and the logs and timber were there sold by B. under such agreement. Held, that the contract was binding on the corporation, although S. did not sign it as superintendent or general manager thereof.—*Lewiston etc. Box Co. v. Garvey*, 13 Idaho, 257, 89 Pac. 940.

Editorial Notes.

Authority of officer to represent corporation as inferred from manner in which he has been permitted to act: Ann. Cas. 1913D, 646.

Implied authority of secretary of private corporation to act for or bind company: Ann. Cas. 1912D, 296.

(C) RIGHTS, DUTIES AND LIABILITIES AS TO CORPORATION AND ITS MEMBERS.

Under R. C. 7128, the indictment involved in this case held to be sufficient to charge the defendant with the crime of a felony, although it did not charge that said false report was intended to give, or that it had a tendency to give, a less or greater apparent value to the shares, bonds or other property of said corporation than such shares, bonds, or other property in fact possessed.—*State v. Paulsen*, 21 Idaho, 686, 123 Pac. 588.

Under R. C. 7128, a person who knowingly makes a report, prospectus, etc., which shall contain any statement that is false or willfully exaggerated, and which is intended to give, or which shall have a tendency to give, a less or greater apparent value to the shares, bonds or other property of such corporation than such bonds or property shall really and in fact possess, is guilty of a felony.—*State v. Paulsen*, 21 Idaho, 686, 123 Pac. 588.

Editorial Notes.

Directors, transactions between and corporations: 17 Am. St. Rep. 298.

Corporations, validity of contracts between a director and his corporation: 139 Am. St. Rep. 598.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

Liability of corporate directors for declaring illegal dividends. See post, XI.

VII. CORPORATE POWERS AND LIABILITIES.

(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

Conveyance by officers of religious society as act ultra vires. See Religious Societies.

A corporation can only exercise such powers as are specifically granted by the act of incorporation, or such as are necessary for the exercise of such powers, all other acts being ultra vires.—*Salmon River Min. etc. Co. v. Dunn*, 2 Idaho, 26, 3 Pac. 911.

When a corporation enters into a contract not authorized by its corporate grant or the statute, the doctrine of ultra vires cannot be raised by the person with whom it has dealt, as a means of avoiding his obligation, after the corporation has become insolvent.—*Meholin v. Carlson*, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Where D. contracted with a corporation that, in consideration of D. purchasing stock in the corporation and retaining and continuing his ownership thereof, the corporation would furnish him employment as assistant general manager as long as D. retained the ownership of such stock, at the same salary that the corporation might or should from time to time pay to one W., its general manager, and D. entered into the employment of the corporation under such contract and continued in the service of the company for about three years, and thereafter sued the corporation to recover his wages at the agreed and stipulated price, the corporation will be bound to pay such salary as was agreed and stipulated and will be estopped from setting up the plea of ultra vires.—*Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Idaho, 61, 108 Pac. 536.

Editorial Notes.

Indebtedness, power of corporations to give evidence of and security therefor: 111 Am. St. Rep. 309.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

A written instrument, issued by the president and manager of a corporation, recited "that I, as manager and president of this institution, do agree to refund Jacob Jones the sum of \$926.80, at one year's notice from date of said notice. It is the understanding that this money shall draw what interest it makes in proportion to all the shares in the institution. (Signed) H. S. Woolley." Held, that this was the obligation of the corporation.—*Jones v. Woolley*, 3 Idaho, 48, 26 Pac. 120.

A power of attorney to manage, control and lease the property of a mining company does not authorize the attorney in fact or agent to sell and transfer the property of

the corporation, either in trust or absolutely. *Johnson v. Sage*, 4 Idaho, 758, 44 Pac. 641.

A note payable to a corporation was properly indorsed by its president. The company transferred the note to its president for a valuable consideration. After such president had severed his connection with the company, he indorsed the note to a purchaser for value. Held, that there was no notice sufficient to put the purchaser on inquiry as to any infirmities in the note.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

Where the evidence shows that a corporation had full knowledge of the indorsement of a note by its president, that the indorsement was actually authorized by the board of directors, and that the same was for the benefit of the company, which received the consideration therefor, no formal resolution of the board of directors directing such indorsement is necessary, to enable the indorsee to recover on the note.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

Notice to one who is the promoter, principal incorporator, manager and resident director of a corporation is notice to the corporation.—*California etc. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50.

Where the vice-president, acting as president and general manager of a business corporation, makes sales of the stock in trade of such corporation, in the ordinary course of business, such corporation will not be permitted to escape a liability upon the contract made by such officer making such a sale, upon the ground that the same was made without the knowledge or concurrence of said corporation.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

The vice-president of a corporation, acting as president and general manager of such corporation, has authority to sell the stock in trade of such corporation in the ordinary course of business of such corporation, and to receive and to accept in payment therefor cash, or accounts against any other person.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

The power of the vice-president and general manager to sell the stock in trade of a corporation implies the power to accept payment therefor, and the power to sell and accept payment implies the power to determine the nature and character of such payment.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

Where a corporation, through its vice-president, acting as president and general manager, submits a bid for furnishing the manufactured articles of such corporation, and a contract is awarded to such bidder in excess of a bid submitted by another bidder, with the understanding and agreement made between the purchaser and the vice-president of such corporation, that such bid will be accepted, on condition that the corporation accept as part payment therefor an account held by the purchaser against the president of said corporation, and such contract is fulfilled by furnishing the goods so sold and partial payment is received therefor, such

corporation cannot question the authority of such vice-president to make such contract, in a suit to recover the balance due after such partial payment has been made.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

Where a corporation has full knowledge of a contract made by one of its officers and thereafter remains silent several months without attempting to repudiate the contract, it thereby ratifies the same.—*Valley Lumber Co. v. McGilvery* (on rehearing), 16 Idaho, 338, 101 Pac. 94.

A corporation cannot accept and ratify the contract of its officer or agent in so far as it is beneficial to it and repudiate the contract in so far as it imposes liability on its part.—*Valley Lumber Co. v. McGilvery* (on rehearing) 16 Idaho, 338, 101 Pac. 94.

Where the vice-president, acting as president and general manager of a corporation, deems it to the advantage of such corporation, in order to sell its manufactured goods, that an account due from the president to the purchaser of such goods shall be accepted as part payment for the purchase price of said goods, such officer will be presumed to have authority to make the same.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

Where there is no limitation upon the power of a vice-president of a corporation, acting as president and general manager, in the by-laws or articles of incorporation of said company, the court will presume that such officer has authority to dispose of the articles manufactured by said corporation in the ordinary course of trade, and accept in payment therefor cash or an account against an officer of said corporation held by the purchaser.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

Where a contract for the purchase of sawlogs was made with the bookkeeper of a corporation and the corporation had the logs scaled or measured, and received them, the corporation thereby ratified the contract made by its bookkeeper and is liable to the seller for the contract price of the logs.—*Rowley v. Stack-Gibbs Lumber Co.*, 19 Idaho, 107, 112 Pac. 1041.

A contractor engaged in construction work on defendant's canal abandoned the work and on the threat of the laborers employed by him that they intended to quit work, the engineer in general charge of such work employed the contractor's foreman to continue the work and to hire labor and purchase supplies and to issue time checks therefor. The general manager of defendant also authorized such foreman to purchase provisions and to finish the work and promised that the labor would be provided for and directed the foreman to issue time checks for the amount due. The bookkeeper of defendant company in charge of its office stated to plaintiff that the time checks would have to be paid and that it took no chances in purchasing the same. No other persons were shown to have acted for defendant in connection with said work and the labor was performed and accepted by defendant. The

VIII. INSOLVENCY AND RECEIVERS.

Liability of stockholders for corporate debts. See ante, V, (D).

Of foreign corporations. See post, XII, (J).

Appointment, rights, duties and liabilities of receivers in general. See Receivers.

Right of receivers to continue business of corporation. See Receivers, IV.

Appointing receiver on dissolution. See post, XI.

Where a corporation has passed into the hands of a receiver, it is error to join such corporation with the receiver in an action to recover moneys alleged to be due to such receiver.—*Idaho Gold Reduction Co. v. Crogham*, 6 Idaho, 471, 56 Pac. 164.

On objection to an order confirming a receiver's sale of stock, the evidences showed that the receiver acted in the utmost good faith in the sale and for the best interests of the insolvent estate and its creditors. It further showed that during the three years since his appointment, the receiver had been trying to sell said stock in conjunction with stock owned by other persons, sufficient in all to give control of the corporation whose stock was offered, and that the stock so sold would bring more than if sold separately. The creditors objecting to the sale were persons seeking control of the corporation and were not acting in the interests of the insolvent estate or its creditors. Held, that an order confirming the receiver's sale would not be disturbed.—*First Nat. Bk. v. Bunting & Co.*, 7 Idaho, 387, 63 Pac. 694.

Where a receiver has possession of all the assets of an insolvent corporation, a nonresident creditor of such corporation, who has submitted himself to the jurisdiction of the courts of this state and has obtained title to shares of stock in the corporation under an execution sale in proceedings begun in another state subsequent to the appointment of a receiver in this state, will not be thereby entitled to the assets of the corporation to the detriment of persons who have filed and proved their claims against the corporation in the court having possession of such assets. *Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157.

Refusal to allow a stockholder to inspect the books of a corporation is not of itself sufficient ground for the appointment of a receiver but is a circumstance to be considered on application for such appointment.—*Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733.

Where a corporation is not in active operation and the capital stock of the corporation is equally divided between contending factions and most of the assets are cash, the appointment of a receiver pendente lite is authorized under R. S. 4329, sections 5, 6, which provide that a receiver may be appointed by the court in which an action is pending, in case of dissolution or insolvency of a corporation, or imminent danger of insolvency, or forfeiture of corporate rights and also in all other cases where receivers have heretofore been appointed by the usages of court of equity.—*Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733.

Where a stockholder, in an application for the appointment of a receiver, charges con-

spiracy, incompetency and fraud, the appointment of a receiver does not act as a dissolution of the corporation, the receiver being appointed simply to manage the affairs of the company during the pendency of the litigation.—*Hall v. Nieu Kirk*, 12 Idaho, 33, 118 Am. St. Rep. 188, 85 Pac. 485.

Under R. S. 4329, subdivisions 5 and 6, authorizing the appointment of a receiver where a corporation is insolvent or in imminent danger of insolvency, or in cases where receivers have heretofore been appointed by the usages of courts of equity, the allegations of a complaint examined and held amply sufficient to show that the corporation is grossly mismanaged and in imminent danger of insolvency.—*Hall v. Nieu Kirk*, 12 Idaho, 33, 118 Am. St. Rep. 188, 85 Pac. 485.

Where it is shown that a conspiracy exists between the directors and officers of a corporation to loot the corporation of its profits; that under their management large debts have accrued against the company and contrary to the order of the board of directors; that salaries of the officers and of the employees have been increased and employees not required by the business retained on the pay-roll; that the business of the company has decreased from \$15,000 a month to about \$5,000; that credit has been indiscriminately given to the amount of about \$20,000, much of which is absolutely worthless; that stock belonging to the company has been fraudulently issued to certain stockholders and that the affairs of the company have been grossly mismanaged, a receiver should be appointed. *Hall v. Nieu Kirk*, 12 Idaho, 33, 118 Am. St. Rep. 188, 85 Pac. 485.

A complaint on promissory notes and account stated prayed judgment against a lumber company for over \$61,000 with interest and attorneys' fees and further showed that the company was indebted in various amounts to different persons, aggregating a sum of \$350,000, all past due and payable, and that the company could not meet its obligations for want of sufficient funds and that if a receiver was not appointed, the creditors of the company, by attachment process, would prevent the operation of the lumber company's plant and the conversion of its assets into money and the payment of its creditors to the great loss of the company. The complaint further alleged that the assets had a fair market value of over \$1,000,000 above the liabilities, if time and opportunity were given to sell the same. Held, not to show insolvency or imminent danger of insolvency and hence the appointment of a receiver under R. S. 4329, subdivision 5, was unauthorized.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

A court has no jurisdiction to appoint a receiver of a private corporation which is solvent and a "going concern," and where it is apparent that the appointment of a receiver is to prevent creditors from enforcing their claims by due process of law.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

A court of equity has no jurisdiction to appoint or continue a receiver of a private

corporation for the purpose of giving it time to raise money to pay its debts.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

A court of equity will not appoint a receiver for a private corporation not engaged in public service, and continue the business any further than to preserve its assets and sell the same for the benefit of its creditors. *Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

In a proceeding for the appointment of a receiver of a private corporation, the proper rule as to insolvency is that where it is unable to meet its paper as it matures, and its assets are in such a condition that they are not available either as security or collateral for the purpose of borrowing or for the purpose of conversion, and in addition to that it is apparent that there would not be sufficient money realized by sale under execution to meet these liabilities, it is practically insolvent.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

Where a plaintiff alleges that it has acquired an interest in an irrigation system by the purchase of water rights therein, and the irrigation company owning such system becomes insolvent and is unable to protect and care for its property and comply with its contracts with the plaintiff to furnish water, the district court or the judge thereof has power and jurisdiction to appoint a receiver for such irrigation company to preserve and care for and operate its property pending the litigation as to the plaintiff's interest in said property.—*Idaho Fruit Land Co., Ltd. v. Great Western Beet Sugar Co.*, 17 Idaho, 273, 105 Pac. 562.

A suit to recover the purchase price of corporate stock may be maintained by the receiver of a bank, and any secret agreement between the bank and a purchaser of stock limiting the purchaser's liability on his unpaid subscriptions is void as against corporate creditors.—*Meholin v. Carlson*, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Five directors of a corporation passed a resolution declaring a dividend of \$24 per share and ordered and directed that the same be paid to the stockholders, and at the same time declared that a necessity existed for securing a loan of \$10,000, and directed that the loan be procured from the five directors present, and that such directors should have the loan to the corporation, and the directors thereafter procured the required amount of money from other persons and executed their joint and several promissory notes to the persons from whom they procured their loans and paid the money over to the corporation. After the maturity of the notes they were paid by two of the joint and several makers thereof, and the corporation became insolvent and went into the hands of a receiver, and the two directors who paid the notes presented the entire account to the receiver and asked that it be allowed in their favor, and at the same time each of the five directors who had procured these loans and who had agreed to each make a loan to the corporation were largely indebted to the corporation. Held, that the indebtedness of the

corporation was to each individual director and stockholder, and not to the payees of these promissory notes, and that the receiver was entitled to an offset against such indebtedness in the amount of the indebtedness of the respective directors, and that the claim should have been so allowed.—*Claiborn v. Utah Assn. of Credit Men*, 22 Idaho, 158, 124 Pac. 788.

The fact that a corporation cannot or does not meet its obligations as they fall due does not of itself establish the fact that it is insolvent.—*Union Trust & Savings Bank v. Idaho Smelting & Refining Co.*, 24 Idaho, 735, 135 Pac. 822.

The fact that a corporation has failed to pay interest on its bonds as the same fell due would constitute a circumstance as a part of the proof showing that such corporation was insolvent; but, standing alone as an isolated fact set up in the pleading, it is not sufficient from which a court may draw the conclusion or find that the corporation so failing to pay interest was insolvent.—*Union Trust & Savings Bank v. Idaho Smelting & Refining Co.*, 24 Idaho, 735, 135 Pac. 822.

Editorial Notes.

Receivers of corporations when and at whose instance may be appointed: 79 Am. St. Rep. 49, 70; 118 Am. St. Rep. 198.

Receivers for corporation, when may be appointed: 72 Am. St. Rep. 49, 70.

Insolvent corporations, power of courts to compel payment by subscriptions and the levy and payment of assessments at the instance of creditors: 100 Am. Dec. 552.

Power of receiver of corporation to issue certificates: Ann. Cas. 1913C, 40.

IX. REINCORPORATION AND REORGANIZATION.

Liability of purchasing corporation. See, also, ante, VII, (D).

Liability on consolidation. See post, X.

Where a new corporation is formed by stockholders and directors of an existing corporation, and the directors of the new corporation are the same persons who were a majority of the directors of the old corporation, and ninety-eight per cent of the issued stock of the new corporation is held by the same persons who were stockholders in the old corporation, and the new corporation purchases all the franchises and property of the old corporation and pays therefor in shares of the capital stock of the new corporation and in cash to the amount of eighty-seven and one-half per cent of the par value of \$150,000 worth of first mortgage bonds of the new corporation, such transaction amounts in fact and law to a reorganization of the old corporation, and the new corporation is liable for a judgment against the old corporation which was rendered for damages on account of personal injuries inflicted by the old corporation.—*Seymour v. Boise R. R. Co.*, 24 Idaho, 7, 132 Pac. 427.

X. CONSOLIDATION.

A corporation issued checks to plaintiff. Eight months thereafter the corporation transferred all of its assets to another corporation for a valuable consideration and the latter assumed certain debts of the former, but not the obligation to pay the checks of plaintiff. There was no allegation of fraud in the transfer nor any proof showing that the latter assumed payment of the checks on which they were sued. Held, that the purchasing corporation was not liable on the checks.—*Anderson v. War Eagle Con. Min. Co.*, 8 Idaho, 789, 72 Pac. 671.

Where one corporation purchases all the assets of another and there is no attempt to defraud creditors by such transfer, the fact that the same person acts as manager of both corporations is not sufficient to show that the purchasing corporation assumed all the liabilities of the old corporation.—*Anderson v. War Eagle Min. Co.*, 8 Idaho, 789, 72 Pac. 671.

Editorial Notes.

Consolidation of corporations: 79 Am. Dec. 421.

Consolidation of corporations, effect of: 89 Am. St. Rep. 604.

Consolidation of corporations, effect of on pre-existing indebtedness: 59 Am. St. Rep. 550.

Right of corporations to consolidate in absence of legislative authority: Ann. Cas. 1913A, 1192.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

Appointment of receiver does not work dissolution.
See ante, VIII.

Where the trustees and stockholders of a corporation make application to the district court for its dissolution, under R. S. 5185 et seq., the court is authorized by R. S. 4329, subdivision 5, to appoint a receiver when necessary to take charge of the property of such corporation.—*Security Savings etc. Co. v. Piper*, 4 Idaho, 463, 40 Pac. 144.

In an action by a stockholder for the dissolution of a corporation, the court found the existence of the corporation as such, the amount of the capital stock and the number of shares of each stockholder. The decree directed the distribution of a part of the assets in specie among certain stockholders, without any finding as to the value thereof, and that the balance of the property be sold and the proceeds distributed among the shareholders on the basis of a copartnership distribution, some of the shareholders being ignored in such distribution. Held, error, under R. S. 4330, providing for the appointment of a receiver on the dissolution of a corporation and prescribing the duties of such receiver.—*Clow v. Redman*, 6 Idaho, 568, 57 Pac. 437.

An averment that a corporation wholly ceased doing business and discontinued its organization states a conclusion merely, and is not a sufficient averment of the dissolu-

tion of the corporation.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

Under R. C. 2732, prohibiting corporate directors from making dividends except from surplus profits, and from paying to the stockholders any part of the capital stock, and making the directors liable individually for violation of this provision in the event of dissolution of the corporation, except where they have caused their dissent to be entered in the minutes, it is not necessary to render a director liable that he should be such at the dissolution of the corporation.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

In a complaint by the receiver of a corporation to recover illegal dividends, it was not necessary to allege that at the time said illegal dividends were paid, the corporation was insolvent.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

Where a statute prohibits the directors of the corporation from declaring a dividend from its capital stock, it is not necessary for a recovery against them that the assets of the corporation be first exhausted or its liability be first adjudicated.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

The foundation of an action brought under R. C. 2732, is based on the illegal payment of dividends in fraud of the creditors, and the receiver, as the representative of the creditors, may maintain an action to recover the amount of such dividends so illegally paid.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

In a complaint by the receiver of a corporation to recover illegal dividends it was not necessary to allege that at the time said illegal dividends were paid the creditors were then creditors of the corporation.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

A complaint alleging that a corporation is insolvent; that it has paid illegal dividends out of its capital stock; that all of its assets have been disposed of and applied in partial payment of its indebtedness, and that there remains indebtedness still due, states a cause of action under R. C. 2732 against the directors declaring such dividends.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

Under R. C. 2732, certain liabilities are imposed on certain directors in event of dissolution of the corporation, and under the provisions of that section it is not necessary that the dissolution should have been a voluntary one, declared by a court of competent jurisdiction, but, when a corporation ceases business because of its insolvency and is put in the hands of a receiver, it is "dissolved" within the meaning of R. C. 2732, relating to the personal liability of stockholders.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

Editorial Notes.

Dissolution, effect of: 12 Am. Dec. 239; 7 Am. St. Rep. 717; 69 L. R. A. 124.

Dissolution of corporations, effect of upon debts and pending actions: 40 Am. Dec. 737.

XII. FOREIGN CORPORATIONS.

Foreign insurance companies. See Insurance.

Agent of noncomplying foreign insurance company held not an innocent purchaser of premium note.
See Bills and Notes, V, (D).

(A) IN GENERAL.

(No paragraphs.)

(B) POWER TO EXCLUDE, RESTRICT OR REGULATE.

Const., article 11, section 10, providing no foreign corporation shall do business in this state without having one or more known places of business and an authorized agent on whom process may be served, and providing, further, that no foreign corporation shall have any greater rights or privileges than domestic corporations of the same or similar character, clearly expresses the policy of this state to be that foreign corporations must subject themselves to the jurisdiction and laws of this state before they can have any recognition or legal existence within its borders.—Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873.

Even in the absence of any constitutional declaration of the subject, the legislature has the power to impose conditions and restrictions on foreign corporations as a prerequisite to their doing business.—Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873.

A corporation is a creature of the laws of the state or sovereignty where created, and has no legal existence beyond the limits of such state or sovereignty, except such as are granted to such corporations by the laws of the states in which such corporations apply for permission to carry on their business, and the assent of the state or sovereignty may be upon such terms and conditions as such state or sovereignty may deem proper, and such conditions may be prescribed by law.—Continental Life etc. Co. v. Hattabaugh, 21 Idaho, 285, 121 Pac. 81.

Editorial Notes.

Foreign corporations, power of the states to discriminate against: 95 Am. Dec. 536.

(C) CONSTITUTIONAL AND STATUTORY PROVISIONS.

Act requiring designation of agent not applicable to railroad companies. See Railroads, II.

Laws affecting foreign corporations as interfering with interstate commerce. See Commerce.

Laws 1905, page 36, entitled: "An act relating to foreign corporations doing business in the state of Idaho," provides that every foreign corporation doing business in the state at the time of the passage of the act which had failed or neglected to file its articles of incorporation and designation of statutory agent, as provided by R. S. 2653, amended by Laws 1903, page 49, and which has complied, or in good faith attempted to comply with the constitution and laws of this state prior to the passage of the said act of 1905, should be relieved from all the penalties, forfeitures and obligations previously imposed upon it by law, and that all acts and contracts made by such corporation

should be as valid and effectual as if said corporation had duly complied with the constitution and laws. Held, that the title does not express or indicate the subject matter of the act and hence violates Const., article 3, section 16, which requires that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.—Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873.

Const., article 11, section 10, prohibits foreign corporations from transacting business in this state without having one or more places of business therein and an authorized agent in the state on whom process may be served, and further provides that no foreign company or corporation shall have greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state. Held, that this provision of the constitution is self-acting, and self-operative, to the extent that it requires the facts therein enumerated to actually exist at the time such corporation begins to transact business within the state.—Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873.

R. C. 2792, prescribing what a foreign corporation must do before being entitled to do business or maintain actions in this state, is mandatory and must be substantially complied with.—Morris-Roberts Co. v. Mariner, 24 Idaho, 788, 135 Pac. 1166.

(D) CARRYING ON BUSINESS WITHIN STATE.

See, also, post, XII, (E).

A foreign corporation manufacturing farm machinery in another state and selling the same to citizens of this state on orders to be approved by it, taken by its agents, and shipping the machinery pursuant to such orders to the purchaser or to the agent, to be delivered to the purchaser, is engaged in interstate commerce and is not "doing business" in this state within the provisions of R. S. 2653, as amended by Laws 1903, page 49, which requires a foreign corporation, before doing business in this state, to file its articles and designate some person on whom process may be served.—Bell City Mfg. Co. v. Frizzell, 11 Idaho, 1, 81 Pac. 58.

The prosecution of an action in this state for the collection of a debt contracted in another state and payable in that state, does not constitute "doing business" in this state, within the meaning of the Const., article 11, section 10, and R. C. 2792.—Bonham Nat. Bank v. Grimes Pass etc. Min. Co., 18 Idaho, 629, 111 Pac. 1078.

Where a foreign corporation acquires a mortgage by assignment and comes into this state for the sole purpose of foreclosing such mortgage, it is not doing business in this state within Const., article 11, section 10, and R. C. 2792.—Diamond Bank v. Van Meter, 19 Idaho, 225, 113 Pac. 97.

Editorial Notes.

What constitutes doing business in state by foreign corporation: Ann. Cas. 1912A, 553; 2 L. R. A., N. S., 127; 10 L. R. A., N. S., 693; 23 L. R. A., N. S., 834.

(E) COMPLIANCE WITH CONSTITUTION AND STATUTES.

See, also, ante, XII, (D).

Where a foreign corporation has failed to comply with the requirements of Const., article 11, section 10, and R. S. 2653 as amended by Laws 1903, page 49, requiring foreign corporations to designate the statutory agent and to file a copy of their articles with the Secretary of State and county recorder, the contracts entered into by such corporation are not void but the corporation is deprived of its remedy in the courts on an action to enforce contracts made by them while in default of compliance with the requirements of law.—*Katz v. Herrick* (on rehearing), 12 Idaho, 1, 86 Pac. 873.

Evidence in an action by a foreign corporation held sufficient to support a finding of the trial court to the effect that plaintiff had complied with the constitution and laws of the state relative to foreign corporations doing business in this state.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.* (on rehearing), 14 Idaho, 5, 93 Pac. 789.

A foreign corporation which had complied with all the requirements of R. S. 2653 prior to its amendment by Laws 1903, page 49, need only comply with the additional requirements imposed by the amended act and need not repeat the acts performed by it prior to the passage of the amendment.—*Kiesel v. Bybee*, 14 Idaho, 670, 95 Pac. 20.

A foreign corporation, engaged in interstate commerce only, is not required to comply with the laws of this state in regard to filing its articles of incorporation and designating an agent upon whom service of process may be made in order to transact interstate business.—*Toledo Computing Scale Co. v. Young*, 16 Idaho, 187, 101 Pac. 257.

Const., article 11, section 10 and R. C. 2792, prohibiting a foreign corporation "doing business in this state" without first filing its articles of incorporation and designating an agent, do not apply to a foreign corporation doing interstate business or a corporation that sells an article in another state to a citizen of this state and which thereafter finds it necessary to resort to the courts of this state for the collection of the debt.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

Record examined and held to show that plaintiff corporation had not substantially complied with R. C. 2792, relating to foreign corporations.—*Morris-Roberts Co. v. Mariner*, 24 Idaho, 788, 135 Pac. 1166.

Editorial Notes.

Institution of action by foreign corporation before compliance with domestic statute as suspending statute of limitations against such action: *Ann. Cas.* 1913A, 1326.

(F) TITLE TO REAL PROPERTY.

Where a foreign corporation acquired real property in this state prior to Laws 1903, page 49, amending R. S. 2653, it will be entitled to defend its title thereto though it

had not complied with the constitution and laws of the state relating to foreign corporations.—*Bismark Min. Co. v. North Sunbeam Co.*, 14 Idaho, 516, 95 Pac. 14; *War Eagle Con. Min. Co. v. Dickie*, 14 Idaho, 534, 94 Pac. 1034.

Laws 1903, page 49, amending R. S. 2653, provide that foreign corporations failing to comply with the provisions of said statute "cannot take or hold title to any realty within this state prior to making such filings, and any pretended deed or conveyance of real estate to such corporation prior to making such filings shall be absolutely null and void." Held not retroactive nor does it divest or forfeit previously acquired titles.—*War Eagle Con. Min. Co. v. Dickie*, 14 Idaho, 534, 94 Pac. 1034.

Prior to the amendment of R. S. 2653 by Laws 1903, page 49, neither the constitution nor the statutes rendered a conveyance void which was made to a foreign corporation doing business in this state without having complied with the requirements of the constitution and statutes relating to foreign corporations.—*Bismark Min. Co. v. North Sunbeam Co.*, 14 Idaho, 516, 95 Pac. 14; *War Eagle Con. Min. Co. v. Dickie*, 14 Idaho, 534, 94 Pac. 1034.

A vendor who has sold real estate to a noncomplying foreign corporation and received the purchase price therefor cannot question the right of the corporation to hold the property.—*Keating v. Keating Min. Co.*, 18 Idaho, 660, 112 Pac. 206.

R. C. 2792, which prohibits a noncomplying foreign corporation from taking title to realty within this state prior to filing its articles, does not apply to a foreign corporation which bids in real estate at execution sale for the collection of a judgment due to the corporation and which judgment arises out of an interstate transaction.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

R. S. 2653, as amended by Laws 1903, page 49, which section is R. C. 2792, requires foreign corporations to file their articles of incorporation and designate an agent upon whom process may be served. A foreign corporation received conveyances to certain mining claims dated April 21, 1906, and filed its articles of incorporation with the county recorder of the county in which such real estate is situated, and also with the Secretary of State on said date, and on June 16, 1906, filed its designation of a statutory agent in said county and filed said deeds for record, and on the 18th of said month filed a copy of such designation of agent with the Secretary of State. Held, a sufficient compliance with the provisions of said section and that said conveyances are not void under the provisions thereof.—*Pennsylvania etc. Min. Co. v. Gallagher*, 19 Idaho, 101, 112 Pac. 1044.

(G) ESTOPPEL.

In a case where a person has secured a loan from a noncomplying foreign corporation and has failed to pay the same as provided for by his contract, even though the

corporation has failed to qualify as provided by law in order to entitle it to do business in this state, the borrower will not be heard in a court of equity to admit the contract and the indebtedness and at the same time prosecute his action to cancel the mortgage given to secure the indebtedness simply because the corporation failed to comply with the statute in qualifying to do business.—*Tarr v. Western Loan & S. Co.* 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

The fact that a party to a contract with a noncomplying foreign corporation has made numerous payments of interest installments before being used, and without objection on the ground of the noncompliance of the corporation, does not constitute a waiver of the right to plead the corporation's failure to comply with the statute and constitution of this state in order to entitle it to do business within the state.—*Tarr v. Western Loan & S. Co.*, 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

(H) RIGHT TO SUE.

Const., article 11, section 10, prohibits foreign corporations from transacting business in this state without having one or more places of business therein and an authorized agent in the state on whom process may be served, and further provides that no foreign company or corporation shall have greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state. R. S. 2653, as amended by Laws 1903, page 49, requires every foreign corporation, before doing business in this state, to file a copy of its articles of incorporation with the Secretary of State and with the county recorder of the county in which its principal place of business is established, and also to file written designation of agent on whom process may be served, and further provides that no contract or agreement made in the name or for the use or benefit of such corporation prior to such filing can be sued on or enforced in any court of this state. Held, that a foreign corporation cannot maintain an action in the courts of this state for the breach of a contract entered into by such corporation within the state without first having complied with said constitutional and statutory provisions.—*Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873.

The statute of this state requiring foreign corporations to do and perform certain acts before commencing to do business in this state is mandatory, and must receive a substantial compliance before such corporations will be allowed to maintain their actions in this state to enforce contracts entered into prior to their compliance with the law.—*Tarr v. Western Loan & S. Co.*, 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

A foreign corporation at the time it entered into a contract had filed its designation of agent and principal place of business as required by statute, and had filed a copy of its articles of incorporation with the Secretary of State of the State of Idaho duly certified to by the Secretary of State of the territory where

the corporation was organized but such copy was not certified to by the county recorder of any county of this state and no certified copy of its articles of incorporation had been filed with the recorder of any county of this state. Held, that the corporation had failed to substantially comply with the requirements of the statute and that it therefore cannot maintain an action to enforce any contract entered into by it while thus in default.—*Tarr v. Western Loan & S. Co.*, 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

The constitutional and statutory provisions with reference to the qualifications of a foreign corporation to do business in this state are mandatory and must be complied with in order to enable such corporation to maintain an action in this state for the enforcement of its contracts.—*Tarr v. Western Loan & S. Co.*, 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

(I) ACTIONS BY OR AGAINST.

R. S. 2653, provides that "such foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations. R. S. 4123-4125, gives a resident defendant sued within this state the right to have a trial of his case in the county of his residence. R. S. 2633, subdivision 2, gives domestic corporations the right to sue and be sued in any court as a natural person may. Held, that on complying with R. S. 2653, a foreign corporation has the right to change the place of trial to the county where its principal business is located.—*Easley v. New Zealand Ins. Co.*, 4 Idaho, 205, 38 Pac. 405; overruled, *Boyer v. N. P. Ry. Co.*, 8 Idaho, 74, 70 L. R. A. 691, 66 Pac. 826.

R. S. 2653 provides, inter alia, that a foreign corporation doing business in this state must designate some person residing in the county where the principal place of business of such corporation in this state is conducted, upon whom process may be served; and that service upon such person shall be valid service upon such corporation. R. S. 4144, subdivision 2, provides that the summons in an action must be served by delivering a copy thereof if the suit is against a foreign corporation doing business and having a managing or business agent, cashier or secretary within this state to such agent, cashier or secretary. Held, that, where the judgment-roll on appeal from a default judgment against a foreign corporation shows that the sheriff served the summons, with a copy of the complaint, "by delivery to and leaving with T., the president of said G. V. B. Mining Company, a corporation, a copy of said summons," etc., there is no showing that the summons was served upon any agent or person upon whom such service could be legally made, and hence a judgment rendered on such service is void.—*Applington v. G. V. B. Min. Co.*, 6 Idaho, 216, 55 Pac. 241.

By complying with the requirements of R. S. 2653, relative to the appointment of an agent upon whom process may be served, a foreign corporation obtains the same rights

as a citizen, so far as the venue of action is concerned, but no superior rights to the citizen.—*Webster v. Oregon Short Line Co.*, 6 Idaho, 312, 55 Pac. 661.

Under R. S. 4639, subsection 3, providing that in case of injury to the person or property, an action in justice court may be commenced in the precinct or city where the injury was committed, or where the defendant resides, a foreign corporation doing business in this state may be sued in a justice's court in the precinct in which an injury to property occurs through its negligence, though such precinct may be in a county other than that of its principal place of business and other than that in which its duly designated agent to receive process for it resides.—*Webster v. Oregon Short Line Co.*, 6 Idaho, 312, 55 Pac. 661.

In the absence of any statutory provision fixing the place of trial in actions against foreign corporations in any particular county, an action may be maintained against such corporation in any county in which it is doing business.—*Boyer v. N. P. Ry. Co.*, 8 Idaho, 74, 70 L. R. A. 691, 66 Pac. 826; *Boyer v. N. P. Ry. Co.*, 8 Idaho, 81, 66 Pac. 1028.

A foreign corporation doing business in this state does not acquire a fixed place of residence in this state by designating an agent upon whom process may be served, as required by R. S., section 2653, so as to entitle it to insist on the trial of any case brought against it at the place claimed to be such residence.—*Boyer v. N. P. Ry. Co.*, 8 Idaho, 74, 70 L. R. A. 691, 66 Pac. 826; *Boyer v. N. P. Ry. Co.*, 8 Idaho, 81, 66 Pac. 1082.

Where a complaint alleges the merger of two foreign corporations and that by reason of such merger the absorbing company became liable for the debts of the absorbed company, but the proof fails to show a merger in fact or what the law of the state under which the absorption was made provides, the absorbing company cannot be held liable on a check of the old company issued eight months before its assets were purchased by the second company.—*Anderson v. War Eagle Com. Min. Co.*, 8 Idaho, 789, 72 Pac. 671.

Where a complaint by a foreign corporation fails to allege compliance with the laws of this state in regard to designating an agent on whom service may be had and the filing of its articles of incorporation, such complaint is demurrable under R. S. 4174 on the ground that the plaintiff has not legal capacity to sue.—*Valley Lumber etc. Co. v. Driessel*, 13 Idaho, 662, 13 Ann. Cas. 63, 15 L. R. A. N. S., 299, 93 Pac. 765; *Valley Lumber etc. Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24.

Unless the fact of the compliance of a foreign corporation with our state law is put in issue by demurrer on answer, it is waived.—*Valley Lumber etc. Co. v. Driessel*, 13 Idaho, 662, 13 Ann. Cas. 63, 15 L. R. A. N. S., 299, 93 Pac. 765; *Valley Lumber etc. Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24.

In an action by a foreign corporation, a general demurrer does not raise the question of plaintiff's legal capacity to sue.—*Valley Lumber etc. Co. v. Driessel*, 13 Idaho, 662, 13 Ann. Cas. 63, 15 L. R. A. N. S., 299, 93 Pac. 765; *Valley Lumber etc. Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24.

Where a foreign corporation alleges in its complaint its compliance with the laws of the state relative to doing business herein, a denial thereof on information and belief raises no issue.—*Nelson Bennett Co. v. Twin Falls etc. Co.* (on rehearing), 14 Idaho, 5, 93 Pac. 789; *Bismark Min. Co. v. North Sunbeam Co.*, 14 Idaho, 516, 95 Pac. 14; *Toledo Computing Scale Co. v. Young*, 16 Idaho, 187, 101 Pac. 257.

In an action by the indorsee of a promissory note, defendant, for one of his defenses, set up the fact that the payee was a foreign corporation, doing business in this state without having complied with the laws relative to foreign corporations. Such defense was stricken on motion. Defendant moved for a nonsuit on the same ground, which motion was denied. He then asked to amend his answer, setting up the same defense, and offered to pay the costs incurred should a continuance be necessary by reason of such amendment. Held, an abuse of discretion to deny the amendment.—*Union Stockyards Nat. Bank v. Bolan*, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508.

Where the complaint of a foreign corporation fails to allege compliance with the constitution and laws of this state relating to foreign corporations, and defendant pleads such noncompliance as an affirmative defense, a finding that defendant introduced no evidence to show noncompliance is sufficient on that issue to support a judgment in favor of plaintiff, since under the pleadings the burden of proving such defense is on defendant.—*Kiesel v. Bybee*, 14 Idaho, 670, 95 Pac. 20.

Where the complaint of a foreign corporation fails to allege compliance with the constitution and statutes of this state relating to foreign corporations, and defendant fails to demur, but raises the objection by pleading such noncompliance as an affirmative defense to plaintiff's right of recovery, the burden of proving such allegation is on defendant.—*Kiesel v. Bybee*, 14 Idaho, 670, 95 Pac. 20.

Where a foreign corporation commences an action in this state and discloses upon the face of its pleading that it is a foreign corporation, it must then either show a compliance with the state laws entitling it to do business within the state or else show by the facts constituting its cause of action that the contract sued upon does not arise out of a domestic transaction, or by reason of doing any business within this state. If, therefore, the contract sued upon shows upon its face that it is a foreign contract and that it did not arise out of domestic business or a domestic transaction, the complaint will not be demurrable on account of the failure of the plaintiff to show compliance with the foreign corporation laws of this state.—*Bonham Nat. Bank v. Grimes Pass etc. Min. Co.*, 18 Idaho, 629, 111 Pac. 1078.

An allegation in a complaint that the plaintiff is a foreign corporation doing business in this state, and "that said company has complied with the statutes of the state of Idaho, requiring a certified copy of its articles of incorporation to be filed in the office of the Secretary of State of the state of Idaho, and has duly designated its legal agent for the state of Idaho, said designation being of record at the office of the Secretary of State of the state of Idaho," is not a sufficient allegation of compliance with the constitution and statutes of this state, in order to entitle it to do business in the state, and is obnoxious to a special demurrer.—*Consolidated Wagon & Machine Co. v. Kent*, 23 Idaho, 690, 132 Pac. 305.

Editorial Notes.

Foreign corporations, application of statute of limitation to: 52 Am. Dec. 256.

(J) INSOLVENCY AND RECEIVERS.

Upon an application for the appointment of a receiver of the property of a foreign corporation, where the title and possession of such corporation to property is attacked, it is error for the trial court to refuse to consider the answer of such foreign corporation on the ground that it has failed to comply with the laws of this state regulating foreign corporations doing business within the state.—*Idaho Fruit Land Co., Ltd., v. Great Western Beet Sugar Co.*, 17 Idaho, 273, 105 Pac. 562.

Where a foreign corporation appropriates water for sale, rental or distribution, and builds a system for the purpose of selling, renting and distributing such water, the right to collect rental or compensation for the use of water supplied by such system is a franchise; and, where such corporation leases such system to another corporation engaged in the appropriation and distribution of water for rental and sale, and the latter corporation becomes insolvent and permits the system to become in disrepair and unfit to be used in the distribution of such water, the court has jurisdiction and power to appoint a receiver of the entire property of both corporations pending litigation to determine the interest a purchaser of water may have acquired in such system.—*Idaho Fruit Land Co., Ltd., v. Great Western Beet Sugar Co.*, 17 Idaho, 273, 105 Pac. 562.

Editorial Notes.

Lien of corporations on corporate stock: 11 Am. Dec. 581.

Foreclosure in equity of lien on stock in favor of corporation: Ann. Cas. 1912A, 53.

Right of foreign corporation to question validity of statute regulating foreign corporations: Ann. Cas. 1913C, 1287.

Power of corporations to deal in shares of other corporations: 28 Am. Rep. 15; 36 Am. St. Rep. 134.

Power of corporations to purchase their own capital stock: 33 Am. St. Rep. 339; 17 Ann. Cas. 1261; 18 L. R. A. 254.

COSTS.

- I. NATURE, GROUNDS AND EXTENT OF RIGHT IN GENERAL.
- II. PERSONS ENTITLED.
- III. PERSONS, PROPERTY AND FUNDS LIABLE.
- IV. SECURITY FOR PAYMENT.
- V. AMOUNT, RATE AND ITEMS.
- VI. TAXATION.
- VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.
- VIII. PAYMENT AND REMEDIES FOR COLLECTION.
- IX. IN CRIMINAL PROSECUTIONS.

Fee and compensation of particular persons or officials. See Clerks of Court; Witnesses; Sheriffs and Constables; Officers; Coroners; Justices of the Peace; Notaries.

Court stenographers. See Courts.

Jurors. See Jury.

Other particular actions or proceedings. See various titles, as Attachment; Certiorari; Divorce; Ejectment; Eminent Domain; Execution; Injunction; Mandamus; Specific Performance.

Payment of Costs as Condition of Granting Relief:

Change of venue. See Venue.

Continuances. See Continuances.

New trial. See New Trial.

Opening or setting aside default judgment. See Judgment.

Review of justice's proceedings. See Justices of the Peace.

Right of guardian to charge costs and expenses of appeal against estate of ward. See Guardian and Ward.

Payment of costs by county does not prevent appeal. See Counties, VI.

What are costs within employer's liability insurance contract. See Insurance, XIII.

I. NATURE, GROUNDS AND EXTENT OF RIGHT IN GENERAL.

Necessity of actual payment of witness fees. See post, V.

Defendants recovered judgment against certain persons, including the husband of plaintiff. Execution was issued and levied upon certain mining property of plaintiff "as community property," plaintiff claiming such property as her separate property. Plaintiff sued under R. S. 4538 to enjoin the sale and vacate the writ of execution as to such property. Defendants demurred but did not answer. Held, that no costs should have been adjudged against defendants under R. S. 4539.—*Young v. First Nat. Bank Hailey*, 4 Idaho, 323, 39 Pac. 557.

Under R. S. 4901, 4904, which provide inter alia that no costs can be allowed in an action for damages where plaintiff recovers less than \$100, plaintiff cannot recover costs where there is a several verdict against numerous defendants, assessing each less than \$100.—*Richards v. Scott*, 7 Idaho, 726, 65 Pac. 433.

An assignee of a cost bill, on which an execution may be issued under R. S. 4091, takes it subject to a right of offset against said cost bill existing at the time of the assignment.—*Northwestern etc. Bank v. Rauch*, 8 Idaho, 50, 66 Pac. 807.

The taxing of costs in a case where both parties have gained part of their contention, is largely in the discretion of the court.—*Campbell v. First Nat. Bank*, 13 Idaho, 95, 88 Pac. 639.

The power to impose costs must be found in some statute or some rule of court authorized by statute.—*Cronan v. District Court*, 15 Idaho, 462, 98 Pac. 614.

The allowance of costs is a matter dependent wholly upon the statute and where there is no statute authorizing it, no costs can be allowed.—*Schmelzel v. Board of County Commrs.*, 16 Idaho, 32, 133 Am. St. Rep. 89, 17 Ann. Cas. 1226, 21 L. R. A., N. S., 199, 100 Pac. 106.

Record examined in this case, and held, that the costs in the lower court should have been divided between the parties, and taxed equally against each of the parties to the action.—*Simmons v. Simmons*, 23 Idaho, 485, 130 Pac. 784.

Where plaintiff sued to restrain defendants from maintaining a cribbing or breakwater in a river, and defendants answered, traversing the principal allegations of the complaint and filing a cross-complaint alleging that plaintiff was maintaining an obstruction on his side of the stream which caused damage to defendants, and prayed an injunction and \$11,000 damages, and the court concluded that neither party was injured or damaged by the other and dismissed the suit, it was error to tax all the costs against plaintiff, but each party should have been required to pay his own costs under R. C. 4901, 4903, authorizing a division of costs.—*Fischer v. Davis* (on rehearing), 24 Idaho, 216, 133 Pac. 910.

II. PERSONS ENTITLED.

On appeal. See post, VII.

III. PERSONS, PROPERTY AND FUNDS LIABLE.

Judge not liable in action for mandate against him. See *Mandamus*, III.

Liability of receiver for costs on taking appeal without leave of court. See *Banks and Banking*, II.

IV. SECURITY FOR PAYMENT.

Under R. C. 4915, providing that security for costs may be demanded when the plaintiff resides outside the state or is a foreign corporation, the amount of such bond and the conditions thereof are prescribed by the statute, and the court cannot fix the amount thereof less than \$300.—*Kissler v. Budge*, 24 Idaho, 246, 133 Pac. 125.

Where a demand was made under R. C. 4915, for security for costs, and the plaintiff misconstrued and misapprehended the requirements of the statute as to the amount of the

bond and filed a bond in the sum of \$100, and after a lapse of thirty days the defendant moved for a dismissal of the action, and the trial court denied the application, and thereafter required the plaintiff to immediately file an undertaking in the sum of \$300, and the plaintiff forthwith filed such an undertaking, the failure to file the \$300 bond within the thirty-day period did not ipso facto oust the court of jurisdiction, and the subsequent filing of the required bond prior to a dismissal of the action entitled the plaintiff to proceed with the prosecution of its action.—*Kissler v. Budge*, 24 Idaho, 246, 133 Pac. 125.

The undertaking provided for by R. C. 4915 and 4916 may be waived by the defendant, either by failing to demand the same or by proceeding in the action or with the trial of the case to such an extent as to render it unfair or inequitable to allow him to thereafter make the demand, and stop the trial or proceedings in the case.—*Kissler v. Budge*, 24 Idaho, 246, 133 Pac. 125.

Where a defendant demands security for the payment of costs under R. C. 4915, and the plaintiff fails, neglects, or refuses to give the required undertaking for a period of thirty days, the defendant is thereafter entitled to have the action dismissed upon proof that the demand has been made, and that the plaintiff has failed and neglected to give the statutory bond.—*Kissler v. Budge*, 24 Idaho, 246, 133 Pac. 125.

Editorial Notes.

Sufficiency of cost bond with respect to form and contents: *Ann. Cas.* 1913D, 575.

V. AMOUNT, RATE AND ITEMS.

Expenses of keeping attached property. See *Attachment and Garnishment*, V.

To entitle a party to tax as costs the fees or charges of a stenographer, it must appear that the same were incurred under Laws 1891, page 233.—*McDonald v. Burke*, 3 Idaho, 266, 28 Pac. 440.

Expenses incurred by a party to a suit in the employment of experts are not taxable as costs.—*McDonald v. Burke*, 3 Idaho, 266, 28 Pac. 440.

Where a party procures the attendance of witnesses who do not testify, the expense of such witnesses is not recoverable from the losing party and should not be taxed against him, unless some sufficient reason is shown that would legally excuse their failure to testify.—*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.

It is not necessary that the costs of an action or the per diem compensation of a witness should be actually paid by the successful party before he can recover the same; it is sufficient that they were necessarily incurred and claimed or demanded by the persons performing the services for which they were incurred.—*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.

Where an officer or witness expressly says that he makes no charge for services or attendance, the successful party cannot tax against the losing party the fees which such persons would have been entitled to if they had charged therefor.—*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.

Laws 1895, page 69, section 5, which provides that the amount paid for the stenographic report shall be taxed as costs in the case, against the party finally defeated, applies to a suit for an injunction heard before a judge at chambers.—*Raft River Land & Cattle Co. v. Langford*, 6 Idaho, 30, 51 Pac. 1027.

A successful party should not be disallowed fees for witnesses who are subpoenaed and attended upon the trial for the reason alone that they were not sworn and examined in the case, but a satisfactory showing should be made as to the reasons for their attendance and the causes which made it unnecessary for them to testify.—*Bechtel v. Evans*, 10 Idaho, 147, 77 Pac. 212.

The expense of taking depositions used in the trial is a proper item of costs.—*Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938.

Costs may be taxed for mileage of witnesses who reside in an adjoining county of the state and more than thirty miles from the place of trial, and who have attended the trial in response to a subpoena or on the request of the party producing the witnesses.—*Anderson v. Ferguson-Bach Co.*, 12 Idaho, 418, 10 Ann. Cas. 395, 86 Pac. 41.

The party in whose favor a judgment is recovered is entitled to have costs taxed for mileage of witnesses who reside in an adjoining county and more than thirty miles from the place of trial, and who have attended the trial in response to a subpoena or on request of the party producing the witnesses under R. S. 4912, 6139.—*Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho, 418, 10 Ann. Cas. 395, 86 Pac. 41.

In an action to foreclose a lien, a motion was made to retax costs, based on the grounds, first, that mileage and per diem had been allowed to a number of subcontractors, who, while not parties to the action, were really interested in the outcome of the case, and were therefore such interested parties as not to be entitled to mileage and per diem as witnesses; second, that mileage had been claimed for attendance of witnesses a distance of more than thirty miles. Held, that the motion was properly denied.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

Where the court, under Laws 1903, page 223, section 37, orders a survey by the state engineer of ditches, canals and irrigable lands, the cost of such survey is properly chargeable to the several litigants in the case in proportion to the quantity of water allotted to them and it is not necessary that a cost-bill be filed therefor under R. S. 4912, as amended.—*Farmers' etc. D. Co. v. Nampa etc. Irr. Dist.*, 14 Idaho, 450, 94 Pac. 761; *Farmers' etc. D. Co. v. Riverside Irr. Co.*, 14

Idaho, 462, 94 Pac. 765; *Farmers' etc. D. Co. v. Pioneer Irr. Dist.*, 14 Idaho, 463, 94 Pac. 764; *Farmers' etc. D. Co. v. New York Canal Co.*, 14 Idaho, 464, 94 Pac. 764.

The successful party is not entitled to recover for the fee paid the clerk of the district court for certifying certain papers that he desires to attach to his complaint or petition, at least until after opposing counsel has denied the correctness of such copies.—*Cronan v. District Court*, 15 Idaho, 462, 98 Pac. 614.

In original proceedings in this court, presented upon a typewritten complaint or petition, the successful party is not entitled to recover seventy-five cents per page allowed by the rules of this court for printing transcripts, as it is the duty of the plaintiff in such proceedings to present his complaint or petition in some proper or legible form, and the rule in regard to printing the transcript does not apply in such cases.—*Cronan v. District Court*, 15 Idaho, 462, 98 Pac. 614.

In an original proceeding in the supreme court for a writ of prohibition, the cost of a printed brief cannot be taxed as costs, since it has been the custom of such court to receive typewritten briefs.—*Cronan v. District Court*, 15 Idaho, 462, 98 Pac. 614.

Attorney's fees cannot be recovered in an action unless authorized by statute or by express agreement of the parties, except in extreme cases where there is willful wrong, gross negligence, or fraud.—*Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463.

Where a party failed to appear at the time and place designated in a notice for taking deposition and cross-examine the witness, and thereafter duly and regularly served notice of the taking of the deposition of the same witness, and in pursuance thereof took the deposition of such witness which consisted of a cross-examination of the witness on the deposition previously given, the costs and expense of taking such subsequent deposition should not be allowed as a part of the costs of the case.—*Vaughn v. Johnson*, 20 Idaho, 669, 37 L. R. A., N. S., 816, 119 Pac. 879.

Editorial Notes.

Taxation as costs of fees, mileage, etc., of witnesses subpoenaed but not called on to testify: 6 Ann. Cas. 1017.

Attorneys' fees out of fund in creditors' suits: 54 L. R. A. 817.

VI. TAXATION.

Appealability or orders relative to costs. See Appeal and Error, III, (D).

Time for appeal. See Appeal and Error, VII, (A), 5.

Appeal from judgment does not bring up order taxing costs. See Appeal and Error, X, (C).

R. S. 4912, requiring a party dissatisfied with the costs claimed to file a motion for the taxation of the same within three days after the filing of the cost bill, is not exclusive nor mandatory and the party dissatisfied may proceed under R. S. 4229, providing that a party may at any time within six months

after the adjournment of the term, apply to the court or judge for relief from any judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.—*McDonald v. Burke*, 3 Idaho, 266, 28 Pac. 440.

Where a party entitled to costs fails to file his memorandum thereof within the time prescribed by R. S. 4912, he thereby waives his right to costs, and the clerk has no right thereafter to insert them in the record of judgment.—*Cantwell v. McPherson*, 3 Idaho, 321, 29 Pac. 102.

Defendant moved the court for a retaxation of costs, agreeing that if the motion should be allowed he would pay the damages and costs found due on retaxation, to which proposition plaintiff consented. The court retaxed the costs and struck out \$123. Defendant immediately paid the judgment and costs, less the amount so struck out. Plaintiff then demanded a writ of execution for the balance of said costs disallowed by the court. Held, that the writ was properly refused, as the plaintiff was bound by his agreement to accept the defendant's proposition.—*Bowen v. Weatherman*, 3 Idaho, 469, 31 Pac. 814.

The probate court has no authority to retax costs after entering judgment, but should carefully tax costs allowed by law before entering judgment in accordance with R. S. 4732.—*Bowen v. Weatherman*, 3 Idaho, 469, 31 Pac. 814.

Where the items of a cost-bill are denied by the affidavit of the party against whom such costs are claimed, the burden of showing the correctness of such items is on the party claiming them.—*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.

R. S. 4912 restricts the recovery of costs to those necessarily incurred, and, where the items of a cost-bill are contested, none of such items should be allowed unless the court or judge is satisfied, from the evidence produced on the hearing of the motion, that such contested items have been necessarily incurred.—*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.

On motion to tax costs, the court is not required to take judicial notice of the fact that a certain witness was present at the trial or that he was present for a certain number of days.—*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.

Where the final judgment in an action is in favor of defendants and plaintiffs fail to recover anything, a cost-bill filed by plaintiffs should be stricken from the files on motion.—*Thiessen v. Riggs*, 5 Idaho, 487, 51 Pac. 107.

Where judgment went in favor of defendants and there was no affidavit or evidence controverting the affidavit verifying defendants' cost-bill, the items of which appear to be legal, a motion to retax the costs should be denied.—*Thiessen v. Riggs*, 5 Idaho, 487, 51 Pac. 107.

Upon application, and a showing that the cost-bill filed by the prevailing party is erroneous, the court should tax the costs, and may require the clerk and sheriff to furnish

itemized statements of their charges.—*Berry v. G. V. B. Min. Co.*, 5 Idaho, 691, 51 Pac. 746.

A cost-bill need not show each specific item paid to the clerk or sheriff.—*Berry v. G. V. B. Min. Co.*, 5 Idaho, 691, 51 Pac. 746.

Defendant moved to strike plaintiff's cost bill from the files on the ground that it was not properly itemized, and in the event of such motion being overruled, that the costs be taxed. The trial court overruled "said motion." Held, that the trial court had overruled the motion to tax costs, since all the relief asked for in the motion was denied.—*Berry v. G. V. B. Min. Co.*, 5 Idaho, 691, 51 Pac. 746.

A memorandum of costs introduced on the hearing of a motion for taxation thereof under R. S. 4912, as amended, makes a prima facie case for the party taxing costs and where no evidence is introduced to overcome the case so made, it is error to strike out witness fees included therein.—*Elliot v. Collins*, 6 Idaho, 157, 53 Pac. 453.

Where special findings are made by the jury in an action to abate a nuisance, they do not become the verdict of the case, until adopted by the court and hence, a memorandum of costs filed and served within five days after the adoption of such verdict by the court is in sufficient time under R. S. 4912, requiring such memorandum to be filed and served within five days after the verdict. *Peters v. Lefang*, 6 Idaho, 364, 55 Pac. 857.

A memorandum of costs in which witness fees are charged should not only show the amount due each witness, but should show the number of days that each attended court and the number of miles traveled by each.—*Stickney v. Berry*, 7 Idaho, 303, 62 Pac. 924.

R. S. 4912, amended by Laws 1899, pages 231, 232, providing that the party in whose favor judgment is rendered must file and serve a verified memorandum of costs within five days after verdict or notice of decision, is mandatory and a bill of costs not filed within five days after notice of the decision should be stricken out.—*Stickney v. Berry*, 7 Idaho, 303, 62 Pac. 924.

The fact that at the time a decision was made plaintiff was absent in one of the eastern states, and his attorney was therefore unable to secure the necessary data to make out the memorandum of costs, is no excuse for failure to file such memorandum within five days from notice of the decision, as required by R. S. 4912, amended by Laws 1899, pages 231, 232.—*Stickney v. Berry*, 7 Idaho, 303, 62 Pac. 924.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Right to set off costs recovered on former appeal. See post, VIII.

The supreme court has the right to allow damages in cases where appeals have been taken merely for delay, and no transcript ever called for.—*Cady v. Scaniker*, 1 Idaho, 169.

Affidavits cannot be read in support of a motion for damages for failure to prosecute an appeal.—*Cady v. Scaniker*, 1 Idaho, 168.

Where a party on appeal unnecessarily and excessively increases the costs thereof, the court will protect the adverse party from payment of such excess.—*Sommercamp v. Catlow*, 1 Idaho, 716.

Where a stipulation for the modification of a decree is made after the taking of an appeal therefrom, costs of the appeal will be awarded to appellant.—*Kelly v. Leachman*, 4 Idaho, 402, 39 Pac. 1113.

Where the transcript on appeal is not made out and printed in the manner required by the rules of court, full costs for printing the transcript will not be allowed.—*Thiessen v. Riggs*, 5 Idaho, 487, 51 Pac. 107; *Hallet v. Larcom*, 5 Idaho, 492, 51 Pac. 108.

Appellant's attorney presented to the attorney for respondent a transcript on appeal for certification, and the attorney for the respondent refused to certify the transcript, or to point out any errors therein. Held, that under supreme court rule 27, paragraph 9, that the appellant should recover from the respondent the cost of procuring a certification of the transcript.—*Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459.

Under supreme court rule 9 and under R. S. 4825, providing that damages may be added to the cost where it appears that an appeal was taken merely for delay, damages may be allowed where the appellant has failed to furnish a record of the case within the time prescribed by statute and the rules of the supreme court.—*Day v. Gridley*, 6 Idaho, 489, 56 Pac. 77.

Where the transcript on appeal is not arranged in chronological order, contains the title of the cause a number of times, numerous affidavits of verification, and the stenographic minutes of the court reporter, the cost of printing and procuring such transcript will not be allowed.—*Wells, Fargo and Co. v. Alturas etc. Co.*, 6 Idaho, 506, 56 Pac. 165.

Where the transcript on appeal contains the original complaint, which has been superseded by the amended complaint also in the transcript, and further contains the affidavits verifying the different pleadings, and repeats the title of the action a number of times, the costs of printing such transcript will be denied.—*McCormick v. Friedman*, 7 Idaho, 686, 65 Pac. 440.

An appeal will not be dismissed for including in the transcript papers which are not necessarily a part thereof; but the party inserting such papers must pay for the printing thereof.—*Taylor v. McCormick*, 8 Idaho, 37, 66 Pac. 805.

R. S. 4901, 4904, provide that costs may be allowed plaintiff in district court in an action for the recovery of money or damages, when he recovers more than \$100. R. S. 4776 entitles the prevailing party in probate or justice court to his costs. R. S. 4842 provides that on appeal from justice's or probate court, an undertaking in the sum of

\$100 for the payment of the costs on appeal must be filed or, if a stay of proceedings is desired, in the sum of twice the amount of the judgment including costs. Held, that where a judgment for more than \$100 rendered in justice court is reduced below that amount on trial de novo in the district court, the plaintiff is entitled to recover the costs of the action.—*Lovell v. Joyce*, 9 Idaho, 386, 74 Pac. 1073.

When an appeal is prosecuted from a judgment on an order sustaining a demurrer to the complaint appellant can only recover the necessary costs in presenting the appeal.—*Hill v. Standard Min. Co.*, 12 Idaho, 223, 85 Pac. 907.

Where a transcript was presented to the attorney for the respondent for certification and he refused to join in the certificate and also failed to serve on the appellant a written statement of the particulars in which said transcript was claimed to be incorrect, if it was so claimed, the costs of procuring a certificate from the clerk will be taxed against respondent under supreme court rule 27, paragraph 10.—*West v. Dygert*, 13 Idaho, 641, 92 Pac. 753.

Under Laws 1899, page 163, section 5, the fees paid for procuring a transcript of the evidence from the court reporter to be used on motion for a new trial, in case an appeal is taken, are costs incurred on the appeal and are taxable as such.—*Dunbar v. Griffiths*, 14 Idaho, 120, 93 Pac. 654.

R. S. 4904, which provides that no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than \$100, applies to actions originally brought in the district court and not to actions brought in the probate or justice's court and taken by appeal to a higher court. *Roseborough v. Whittington*, 15 Idaho, 100, 96 Pac. 437.

R. C. 4904, making the allowance of costs discretionary in certain cases, applies in cases of orders granting a new trial.—*Wolfe v. Ridley*, 17 Idaho, 173, 20 Ann. Cas. 39, 104 Pac. 1014.

Where a trial court grants a new trial, it is within the sound discretion of the court as to whether or not he will require the party in whose favor the order is made to pay a part or all of the costs incurred upon the previous trial.—*Wolfe v. Ridley*, 17 Idaho, 173, 20 Ann. Cas. 39, 104 Pac. 1014.

When a party procures a typewritten copy of the stenographic record to be used in the preparation of his bill of exceptions, or statement of the case, and intends to have the cost thereof taxed as costs in the case on appeal, he must serve the copy of the stenographic record upon the adverse party when he serves his proposed bill or statement, so that the adverse party may have the benefit of it in preparing amendments, or in ascertaining whether the proposed bill or statement is correct.—*Keane v. Pittsburg Lead Min. Co.*, 18 Idaho, 711, 112 Pac. 214.

A transcript of a record in narrative form, made by the reporter, is not a compliance with R. C. 3984, requiring the reporter to

furnish a typewritten copy of the stenographic record, and the cost of procuring said record in narrative form will not be allowed as costs on appeal.—*Keane v. Pittsburg Lead Min. Co.*, 18 Idaho, 711, 112 Pac. 214.

Editorial Notes.

Imposition of costs as condition of granting new trial for insufficiency of evidence: 7 Ann. Cas. 183; 20 Ann. Cas. 41.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

A money judgment may be set off pro tanto on motion against a judgment for costs recovered by the opposing party on a former appeal of the same action.—*Northwestern etc. Bank v. Rauch*, 8 Idaho, 50, 66 Pac. 807.

IX. IN CRIMINAL PROSECUTIONS.

To entitle a defendant acquitted in a criminal case to a review of an order refusing to allow defendant the expense of subpoenaing and per diem and travel of witnesses, the record should show an exception taken to such order.—*State v. Godard*, 4 Idaho, 750, 44 Pac. 643.

Editorial Notes.

Costs, allowance of in equity and at law: 16 Am. Dec. 405.

Charges recoverable by prevailing party as costs: 88 Am. Dec. 181.

Order opening default and granting a new trial on payment of costs as making payment of costs condition precedent to new trial: Ann. Cas. 1912B, 249.

Imposition of terms on granting continuance: Ann. Cas. 1913A, 308.

Joint or several judgment for costs in case of two or more defendants jointly convicted of crime: Ann. Cas. 1913C, 78.

COUNTERFEITING.

Forgery of instruments in writing of private persons. See Forgery.

An indictment charged that defendant "knowingly and willfully did have in his possession and secretly did keep [enumerating the instruments], then and there being instruments for the purpose of counterfeiting uncoined gold," etc. Held, insufficient, as not charging that these instruments were kept for the purpose of counterfeiting, etc.—*People v. Page*, 1 Idaho, 102.

An indictment charging that defendant is guilty of a "felony," instead of naming the real offense—that of having and secretly keeping instruments for the counterfeiting of gold-dust, feloniously, etc., is demurrable.—*People v. Page*, 1 Idaho, 102.

Knowingly and secretly keeping instruments, adapted and intended for the unlawful business of counterfeiting, is presumptive evidence of intention to use them for that purpose, which presumption defendant is called upon to rebut.—*People v. Page*, 1 Idaho, 102.

Simply passing counterfeit gold-dust is not a criminal offense; the uttering must be accompanied with knowledge that the article is counterfeit, and must have been uttered with the intention to defraud.—*People v. Sloper*, 1 Idaho, 158.

In the crime of uttering or attempting to utter counterfeit gold-dust, no definite amount of proportion or relative difference in the actual value of genuine gold-dust and that which is counterfeit is required; it is sufficient that it be debased and that the party uttering it knows this, and passes it for genuine.—*People v. Page*, 1 Idaho, 189.

In a criminal prosecution, it was correct to instruct the jury that if they believed beyond a reasonable doubt that the defendant had, and passed, or attempted to pass, a debased or counterfeit article of gold-dust, knowing its spurious character, the conclusion necessarily followed that he intended to defraud.—*People v. Page*, 1 Idaho, 189.

The crime of uttering or attempting to utter counterfeit gold-dust consists in the possession of counterfeit or spurious gold-dust, knowing it to be such, and passing it, or attempting to pass it, with intent to defraud.—*People v. Page*, 1 Idaho, 189.

Editorial Notes.

Proof of corpus delicti: 68 L. E. A. 56.

COUNTIES.

I. CREATION, ALTERATION, EXISTENCE AND POLITICAL FUNCTIONS.

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- (B) Creation, Existence and Incidents in General.
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VI. ACTIONS.

See Elections; Municipal Corporations; Schools and School Districts.

Establishment and maintenance of bridges. See Bridges.

— Of ferries. See Ferries.

— Of roads and highways. See Highways.

— Of private roads. See Private Roads.

Care and maintenance of county poor. See Paupers. Incorporation of villages. See Municipal Corporations, I.

I. CREATION, ALTERATION, EXISTENCE AND POLITICAL FUNCTIONS.

Legislative apportionment. See States, II.

(A) CONSTITUTIONAL AND STATUTORY PROVISIONS.

See, also, post, I, (C).

The validity of an act creating a county cannot be brought in question when neither the county itself, the officers thereof nor the state is made a party to the suit.—*Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565.

Laws 1895, pages 32, 170, establishing the counties of Blaine and Lincoln, are valid and constitutional.—*Blaine Co. v. Heard*, 5 Idaho, 6, 45 Pac. 890; *People v. Alturas Co.*, 6 Idaho, 418, 44 L. R. A. 122, 55 Pac. 1067.

Act of March 22, 1901, entitled "An act to create and organize the county of Clearwater and define the boundaries of Shoshone, Idaho and Nez Perce counties," is invalid, since it fails to declare in express language the creation of such proposed county and the court cannot by interpolation carry out the evident intent of the legislature in a matter affecting the substance of the act.—*Holmberg v. Jones*, 7 Idaho, 752, 65 Pac. 563.

Laws 1903, page 204, providing for the annexation of a portion of Shoshone county to Nez Perce county, should be read and construed in the light of and in connection with R. S. 3605, 3606, as amended by Laws 1895, page 58, which relate to the same subject matter, and is not in conflict with either of said sections.—*Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712.

Const., article 18, section 3, providing that "when any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its ratable proportion of all then existing liabilities of the county from which it is taken," is as much a prohibition against the legislature imposing such indebtedness on the county to which the detached territory is annexed as it is against leaving the entire indebtedness to be paid by the old county from which the

portion is stricken off.—*Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712.

(B) CREATION, EXISTENCE AND INCIDENTS IN GENERAL.

The fact that the counties of the state as they existed at the time of the adoption of the constitution were recognized as legal subdivisions of the state does not prevent the legislature from changing those counties, creating new ones, or abolishing old ones.—*Wright v. Kelley*, 4 Idaho, 624, 42 Pac. 565.

After establishing Blaine county by act of March 5, 1895, the legislative, executive and judicial departments of the state repeatedly recognized the existence of such county; the act was declared constitutional by the supreme court and the people within the county for four years exercised all the powers and functions of a county government. Held, that the act having been treated as valid for four years, the state was estopped to question the regularity of its passage.—*People v. Alturas County*, 6 Idaho, 418, 44 L. R. A. 122, 55 Pac. 1067.

(C) ALTERATION AND CREATION OF NEW COUNTIES.

Act of March 3, 1891, entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county seats," etc., under which act it was attempted to divide a county and attach the part cut off to another county, without submitting the proposition to a vote of the people in the segregated part, is in violation of Const., article 18, section 3.—*People v. George*, 3 Idaho, 72, 26 Pac. 983.

Laws 1893, page 170, creating Bannock county, provides in section 4 thereof that the governor shall appoint the officers of said county. Held, not in conflict with Const., article 3, section 19, providing that the legislature shall not pass local or special laws regulating county business, or the election of county or township officers; creating offices, or prescribing the powers and duties of officers in counties, etc.—*Sabin v. Curtis*, 3 Idaho, 662, 32 Pac. 1130; *Allen v. Curtis*, 3 Idaho, 671, 32 Pac. 1133.

The legislature has power to create new counties, and may authorize the governor to appoint county officers therefor to serve until the election of county officers at the first biennial election held thereafter and until the officers elected shall qualify.—*Sabin v. Curtis*, 3 Idaho, 662, 32 Pac. 1130; *Allen v. Curtis*, 3 Idaho, 671, 32 Pac. 1133.

Const., article 18, section 1, provides that "the several counties of the territory of Idaho, as they now exist, are hereby recognized as legal subdivisions of this state." Section 2 requires a vote of the electors of the county at a general election before a county seat can be removed. Laws 1905, page 76, abolished Kootenai county and created and organized out of the territory of said county, the counties of Lewis and Clark, provided for the appointment of officers of the said new counties, the apportioning of the debt of the old county and the location of the county seats thereof. Held, that the

said act is unconstitutional and void in that it attempts to abolish and destroy an organized county of the state.—*McDonald v. Doust*, 11 Idaho, 14, 69 L. R. A. 220, 81 Pac. 60.

(D) ADJUSTMENT OF RIGHTS AND LIABILITIES.

By act of Congress (1st Sess. Laws 1888–89, p. 147), Nez Perce county was divided and Latah county created. Section 7 of said act attached the latter county to the former for judicial purposes, until the next meeting of the judges of the supreme court. Section 5 provided that Latah county should pay Nez Perce county her just proportion of the net indebtedness of the latter county. Held, that Latah should pay Nez Perce her just proportion of the judicial expenses of Nez Perce county until December 31, 1888.—*Nez Perce County v. Latah County*, 3 Idaho, 413, 31 Pac. 800.

Where a county is divided by act of the legislature, and the act provides that the boards of commissioners of the counties created by the division shall apportion the debt of the divided county to ascertain what proportion each county shall pay, it is a public duty on the part of the commissioners of each of the counties to take the steps prescribed by the law for the ascertainment of such indebtedness.—*In re Counties v. Alturas County*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349.

Where a county is divided and the act provides that the boards of commissioners of the counties created by the division shall apportion the debt of the divided county in order to ascertain the proportion of each county, an action to compel the appointment of accountants as provided by the act of division is not barred by R. S. 4060, providing that "actions for relief not hereinbefore provided for must be commenced," etc., nor by R. S. 4061, providing that the statute of limitations shall run against the state.—*In re Counties v. Alturas County*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349.

Mandamus will lie to compel boards or county commissioners to appoint accountants to ascertain and apportion the indebtedness of a county, divided by legislative act, where such act provides that such accountants be appointed.—*In re Counties v. Alturas County*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349.

A board of accountants, whose appointment is provided for by law and whose duty it is to ascertain the amount of indebtedness of a certain county, at a certain time, and apportion such indebtedness among such county and other named counties, on a given basis, performs only clerical acts, and such board cannot defeat the object for which it was constituted by attempting to pass, directly or indirectly, on the validity of such indebtedness.—*Blaine Co. v. Smith*, 5 Idaho, 255, 48 Pac. 286.

Where a county is created out of the territory of another county and made liable for its share of the indebtedness of the original county and subsequently such new county loses a portion of its territory by the crea-

tion of other counties, it remains liable for the indebtedness due to the original county, and the new counties are neither necessary nor proper parties to an action brought to enforce the payment of such indebtedness.—*Blaine Co. v. Smith*, 5 Idaho, 255, 48 Pac. 286.

By Laws 1889, page 35, the counties of Elmore and Logan were created out of portions of Alturas county, and another portion of the last-named county was added to Bingham county. The law provided for the proper apportionment of the indebtedness of Alturas county. Laws 1895, page 87, provided that after the filing of the certificate of the proportion of the indebtedness due from the said various counties to Alturas county, the auditors thereof, under the supervision of their respective boards of commissioners, must draw and issue warrants in favor of Alturas county therefor. Laws 1895, page 31, abolished the counties of Alturas and Logan and created Blaine county, as the successor of Alturas county, with all its rights and liabilities. Pursuant to Laws 1895, page 57, amending R. S. 3603, the board of county commissioners of Blaine county ascertained the indebtedness of Blaine county under the report of the accountants appointed for that purpose and declared and ordered such indebtedness to be legal and valid. On appeal such order was affirmed by the district court. Held, that, in making said order, the board of commissioners was acting in a quasi-judicial capacity and within the jurisdiction vested in the board by positive law; and therefore, that Bingham county, being chargeable with notice of the action of the board of commissioners and the district court in the premises, should not be permitted to make a collateral attack on said order or on the judgment of the district court affirming the order.—*Blaine Co. v. Smith*, 5 Idaho, 255, 48 Pac. 286.

Where the action of the board of commissioners, auditors, assessor and collector and treasurer of a county is necessary to a complete settlement of the indebtedness of the county to another county, and the commissioners have refused to cause the issuance of proper warrants by the auditor, mandamus will lie to compel the officers to act and in such proceeding, to avoid multiplicity of suits and repeated applications for peremptory writs, the court will direct all such officers to comply with the requirements of the law enjoined on each of them with a view to settling the indebtedness.—*Blaine Co. v. Smith*, 5 Idaho, 255, 48 Pac. 286.

The act organizing a new county out of territory of an existing county provided that the debt of the old county should be ascertained and apportioned by the district court at its next regular term after the organization of the new county. This was done and the amount found due from the new county duly certified, but there existed at the time an unascertained indebtedness from the old county to another county, which fact was also certified by the district court, together with the further finding that when the amount of such indebtedness was ascertained, the new county would be liable for its portion thereof. Held, that the new county was

liable for its portion of such indebtedness when the amount thereof was ascertained.—*Bingham County v. Bannock County*, 5 Idaho, 627, 51 Pac. 769.

Where a new county is created out of an existing county, the liability of one county to the other for its share of the indebtedness is one created by statute, and action thereon must be brought within three years from the date of the adjustment and settlement of the matters between the counties under R. S. 4054, subdivision 1.—*Canyon County v. Ada County*, 5 Idaho, 686, 51 Pac. 748.

Where the boards of county commissioners of two counties have adjusted and settled matters growing out of the organization of one of such counties, such settlement and adjustment will not be disturbed in the absence of a showing of fraud or mistake.—*Canyon County v. Ada County*, 5 Idaho, 686, 51 Pac. 748.

The conclusion reached by a board of accountants appointed to apportion a debt between two counties upon a given basis is not final but may be impeached for fraud or mistake.—*Blaine County v. Lincoln County*, 6 Idaho, 57, 52 Pac. 165.

Accountants appointed under Sess. Laws 1895, pages 170-174, creating Lincoln county out of territory of Blaine county, to apportion the indebtedness of the old county between it and the new county, upon a given basis, are not clothed with either legislative or judicial functions, their duties being merely clerical.—*Blaine Co. v. Lincoln Co.*, 6 Idaho, 57, 52 Pac. 165.

Under Laws 1903, page 204, annexing a portion of Shoshone county to Nez Perce county, the school moneys in the county treasury not distributed prior to said act becoming operative and which would have belonged to school districts in the territory annexed, had there been no annexation, belongs to Shoshone county and must be prorated as other money in the treasury of said county; but any school moneys in the hands of the treasurer that have been raised by a special tax in any of the annexed districts belong to the district raising it.—*Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Under Laws 1903, page 124, annexing a portion of Shoshone county to Nez Perce county, moneys collected from taxpayers in the annexed district for county and state purposes since November 19, 1904, the date said act became operative, belong to Shoshone county.—*Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Under Laws 1903, page 124, annexing a portion of Shoshone county to Nez Perce county, delinquent taxes affecting property in the annexed portion belong to Shoshone county and it has authority to collect them. *Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Laws 1903, page 124, section 5, annexing a portion of Shoshone county to Nez Perce county, provides that all moneys in the treasury of Shoshone county at the time this act

takes effect shall be apportioned in the same ratio as county property and county indebtedness. Held, that the money in the treasury of Shoshone county at the time this act became operative is to be divided as above provided and is not to be deducted from the total indebtedness of the county before the apportionment of such indebtedness.—*Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Under Laws 1903, page 124, annexing a portion of Shoshone county to Nez Perce county and providing for the apportionment of the county property and indebtedness, the term "county property" includes property acquired by tax deeds and the value of tax certificates owned by the county, but does not include delinquent taxes due Shoshone county.—*Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Laws 1903, page 124, annexing a portion of Shoshone county to Nez Perce county, became a law on May 8, 1903, sixty days after the adjournment of the legislature, but did not go into full effect and operation until November 19, 1904, the day on which the canvassing board of Shoshone county declared the result of the election to the governor and therefore the accountants appointed to apportion the indebtedness between the two counties must ascertain the indebtedness of Shoshone county at the latter date.—*Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Under Laws 1903, page 204, annexing a portion of Shoshone county to Nez Perce county, the assessment-roll of Shoshone county for the year 1903 is made the basis of the valuation of the property assessed therein. Held, that the accountants appointed to apportion the indebtedness had no authority to deduct therefrom the valuation of property deemed by them to be not taxable nor to consider whether or not the assessment-roll contained illegal assessments.—*Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Under Laws 1903, page 204, annexing a portion of Shoshone county to Nez Perce county, Nez Perce county must issue its warrants on its general fund for its pro rata share of the indebtedness found due.—*Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73.

Const., article 18, section 3, providing that "when any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its ratable proportion of all then existing liabilities of the county from which it is taken," continues the liability of the detached territory for its ratable proportion of the debts of the county from which it was taken.—*Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712.

Under R. S. 3605 and 3606, as amended by Laws 1895, page 58, and re-enacted by Laws 1899, page 138, providing for the issuance of funding and refunding county bonds, and for continuation of liability therefor by the whole territory included within the jurisdiction at the time of the issuance of the bonds; and Laws 1903, page 204, pro-

viding for the annexation of a portion of Shoshone county to Nez Perce county and for the apportionment of the debt of the former county between it and the segregated portion thereof, it was competent and proper for the legislature to authorize and require Nez Perce county and its officers to act as the agent, representative or trustee of and for the territory annexed in the adjustment and settlement of its business and fiscal relations with the parent county.—*Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712.

Laws 1903, page 204, providing for the annexation of a portion of Shoshone county to Nez Perce county, for the apportionment of the debt of Shoshone county between said county and the segregated portion thereof and authorizing and directing the board of commissioners of Nez Perce county to cause warrants to be drawn by the auditor of that county in favor of Shoshone county for the amount ascertained to be due by the accountants provided for in the act, does not contravene Const., article 18, section 3, providing that when any part of a county is stricken off and attached to another county, the part stricken off shall be held liable to pay its ratable proportion of all the then existing liabilities of the county from which it was taken.—*Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712.

Under Laws 1903, page 204, providing for the annexation of a part of Shoshone county to Nez Perce county and requiring by section 4 thereof that the commissioners of Nez Perce county shall issue their warrants in favor of Shoshone county for the amount found due from the segregated territory to the parent county, such warrants become the liability of Nez Perce county only to the extent of its duties and obligations as agent or trustee for the segregated territory in the collection of the tax, as the same may be levied and certified from time to time by Shoshone county in accordance with the provisions of said statute.—*Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712.

Under Laws 1903, page 204, providing for the annexation of a portion of Shoshone county to Nez Perce county, the cash received from money in the treasury at the time of annexation was available for the payment of current expenses and intended to compensate Nez Perce county for its outlay in maintaining county government in the annexed territory during the time for which it could not levy and collect taxes from that territory.—*Shoshone County v. Schuldt*, 12 Idaho, 507, 86 Pac. 418.

Under Laws 1903, page 204, providing for the annexation of a portion of Shoshone county to Nez Perce county, warrants drawn by Nez Perce county in favor of Shoshone county for the proportionate part of the indebtedness to be borne by the detached territory are payable out of a special fund to be raised from taxation, and the cash received from Shoshone county by Nez Perce county from money on hand at the time of annexation is not available for the payment of such warrants.—*Shoshone County v. Schuldt*, 12 Idaho, 507, 86 Pac. 418.

Where a county is enlarged by annexing a portion of another county, the annexed portion is liable to pay its proportionate share of the indebtedness of the county to which it is annexed.—*Blake v. Jacks*, 18 Idaho, 70, 138 Am. St. Rep. 177, 108 Pac. 534.

Under R. C. 1963, which pledges the faith, credit and all taxable property within the limits of the county as it was constituted at the time the indebtedness was incurred for its payment, all taxable property subsequently brought into the county is liable for its proportionate share of such indebtedness. *Blake v. Jacks*, 18 Idaho, 70, 138 Am. St. Rep. 177, 108 Pac. 534.

Editorial Notes.

Legal results of change of county boundaries and of the erection of a new county out of part of an old one: 85 Am. Dec. 100.

New counties, their relation and that of their officers to old counties: 20 Am. St. Rep. 676.

Time of apportionment of assets or liabilities of counties in case of division: 18 Ann. Cas. 324.

Liability of territory annexed to county to pay proportion of share of existing debts: 27 L. R. A., N. S., 1147.

Division of territory of county as affecting its assets and liabilities: 39 L. R. A., N. S., 285.

(E) PRECINCTS AND DIVISIONS FOR SPECIAL PURPOSES.

Where a board of county commissioners has failed to establish justices' precincts in their county, as required by R. S. 1759, subdivision 2, and Laws 1890-91, page 60, section 11, but have designated all precincts established as election precincts, and such precincts are treated as justices' precincts, and two justices of the peace and one constable are elected therein, such precincts will be held to be justices' precincts as well as election precincts.—*State v. Vineyard*, 9 Idaho, 134, 72 Pac. 824.

II. GOVERNMENT AND OFFICERS.

(A) ORGANIZATION AND POWERS OF GOVERNMENT IN GENERAL.

Mandamus to county boards or officers. See *Mandamus*.

(B) COUNTY SEAT.

The election held in the state on October 1, 1890, by proclamation of the governor, was the general election for that year, and the county commissioners of Logan county were authorized to submit the question of the permanent location of the county seat for said county to the voters at said election. *Doan v. Commrs. Logan Co.*, 3 Idaho, 33, 26 Pac. 167.

Section 6 of the act creating Elmore and Logan counties, approved February 7, 1889, which fixed the temporary location of the county seats of said respective counties and provided for an election to fix the perma-

ment county seats, was not abrogated by Const., article 18, section 2, providing that no county seat shall be removed unless upon petition of a majority of the qualified voters, and unless two-thirds of the voters, etc., shall vote in favor thereof.—*Doan v. Commrs. Logan County*, 3 Idaho, 38, 26 Pac. 167.

Const., article 18, section 2, relating to the removal of county seats, does not apply to the location of a county seat consequent on the organization of a new county.—*Doan v. Commissioners Logan Co.*, 3 Idaho, 38, 26 Pac. 167.

R. S. 4807 provides that an appeal may be taken from the district court to the supreme court from a final judgment in an action or special proceeding. Const., article 5, section 9, provides that the supreme court shall have jurisdiction to review upon appeal any decision of the district courts. Laws 1899, page 59, section 111, provides that the decision of the district court in election contests shall be final. Held, that the latter law did not take away the right to appeal from an order of the district court ordering an election to determine the question of the removal of a county seat.—*Wilson v. Bartlett*, 7 Idaho, 269, 62 Pac. 415.

Where a petition for the removal of a county seat is presented to a court, and all of the signers thereto state, over their signatures, that they are qualified electors of such county, the petitioners make a prima facie case, and no further evidence of the qualifications of such signers is required, unless a contestant appears as provided by law and enters his contest.—*Wilson v. Bartlett*, 7 Idaho, 271, 62 Pac. 416.

Const., article 18, section 2, provides that no county seat shall be removed unless upon a petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal. Const., article 6, section 2, provides that every male citizen, who has actually resided, etc., if registered as provided by law, is a qualified elector. Laws 1899, page 39, sections 34, 35, provide that registration is prima facie evidence of the right to vote and that the registrar shall register only qualified electors. Laws 1899, page 57, section 106, provides that a petition for the removal of a county seat must contain the names of legal voters at general elections equal in number to a majority of all votes cast at the last general election in such county. Held, that the terms "elector" and "qualified elector" are used interchangeably, and hence, that the signers of a petition for the removal of a county seat need not be registered voters.—*Wilson v. Bartlett*, 7 Idaho, 271, 62 Pac. 416.

An affidavit of contest to a petition for the removal of a county seat must show that the list of names desired to be contested, if stricken from the petition, would reduce the number of names on the petition to less than the number required by law; and, if it does not do that, the trial court should deny the contest.—*Wilson v. Bartlett*, 7 Idaho, 271, 62 Pac. 416.

The fact that some of the signers of a petition for the removal of a county seat used ditto marks in indicating their residence will not vitiate the petition.—*Wilson v. Bartlett*, 7 Idaho, 271, 62 Pac. 416.

Laws 1899, page 33, relating to the holding of general and special elections, etc., is still in force and effect and governs with respect to the size, form and manner of preparation of ballots for county seat removals.—*Whitla v. Quarles*, 15 Idaho, 604, 98 Pac. 631.

Laws 1899, page 33, section 48, relating to the holding of general and special elections, as amended by Laws 1905, page 315, has no application to county seat removals, and by such amendment it was not intended to change or alter the form of ballot used at such elections.—*Whitla v. Quarles*, 15 Idaho, 604, 98 Pac. 631.

Under Const., article 18, section 2, the petition for a removal of a county seat must be signed by a majority of the qualified electors of the county at the time the petition is filed.—*Lippincott v. Carpenter*, 22 Idaho, 675, 127 Pac. 557.

Withdrawals from the petition for the removal of a county seat may be made at any time prior to the submission of the petition to the court.—*Lippincott v. Carpenter*, 22 Idaho, 675, 127 Pac. 557.

Under the provisions of the constitution and statute, more than one application may be made for an order of election for the removal of a county seat, and upon the hearing it is the duty of the court to consider all of such petitions at the same hearing, and to determine which, if either, contains a majority of the qualified electors of the county.—*Lippincott v. Carpenter*, 22 Idaho, 675, 127 Pac. 557.

Under R. C. 467, a petition for a removal of a county seat must be signed by a number of legal voters of such county equal in number to a majority of all votes cast at the last general election, and that statute provides a rule of evidence for establishing a prima facie case, and the court upon that showing would be justified in ordering an election, unless it was shown to the court that the number of qualified electors in the county had increased since the last general election, and in that case the petition must contain a majority of the qualified voters as shown by the legal evidence produced on the hearing of such petition.—*Lippincott v. Carpenter*, 22 Idaho, 675, 127 Pac. 557.

The legislature has plenary power in the creation of new counties, except as limited by the provisions of the constitution, and in creating new counties it has the authority to establish the permanent county seat, or it may delegate that power to the qualified electors of such new counties, and an election for such purpose is not held for the purpose of removing a county seat permanently located, but for the purpose of locating a permanent county seat.—*Leach v. Village of Nez Perce*, 24 Idaho, 322, 133 Pac. 926.

In proceedings to determine the validity of an election to fix a permanent county seat,

held, that the evidence does not show that fraud or corruption was practiced at said election.—*Leach v. Village of Nez Perce*, 24 Idaho, 322, 133 Pac. 926.

Const., article 18, section 2, and R. C. 357, refer to the removal of a county seat from its permanent location, and not to the permanent location of a county seat where the legislature has temporarily fixed the county seat of a new county, and left it with the electors to select the permanent county seat.—*Leach v. Village of Nez Perce*, 24 Idaho, 322, 133 Pac. 926.

Laws 1911, page 77, creating Lewis county, provided that an election should be had to determine the permanent location of the county seat. Held, that the electors at said election were not required to reside in the county six months and in the precinct ninety days, but if they had the other qualifications, and had resided in the state six months and in Lewis county thirty days, they were qualified to vote at such election.—*Leach v. Village of Nez Perce*, 24 Idaho, 322, 133 Pac. 926.

Under Laws 1911, page 77, creating Lewis county, the legislature delegated the authority to locate the permanent county seat of said county to the electors of said county qualified to vote at a general election.—*Leach v. Village of Nez Perce*, 24 Idaho, 322, 133 Pac. 926.

Ilo and Vollmer are adjoining towns and the citizens thereof selected a block of ground for the erection of county buildings in Vollmer and adjoining Ilo. Pursuant to Laws 1911, page 77, creating Lewis county, an election was held to determine the permanent location of the county seat of said county. The names of said two towns, and also the name of Nez Perce appeared on the ballot. Held, that the votes cast at said election for Ilo and Vollmer cannot be consolidated and counted together.—*Leach v. Village of Nez Perce*, 24 Idaho, 322, 133 Pac. 926.

Editorial Notes.

Equity jurisdiction of election contests relating to county seat: *Ann. Cas.* 1912C, 692.

(C) COUNTY BOARD.

1. Nature and Constitution in General.

Board of commissioners as board of equalization.
See Taxation, V, (F).

A board of county commissioners is a tribunal created by statute, with limited jurisdiction, and only quasi-judicial powers, and cannot act except in strict accordance with the statute.—*Gorman v. Commrs. Boise County*, 1 Idaho, 553.

Under Const., article 7, section 12, providing that the boards of county commissioners for the several counties of the state shall constitute boards of equalization for their respective counties, and article 18, section 6, providing for a board of county commissioners, the board of equalization and the board of county commissioners are separate and distinct boards with separate and distinct functions and duties.—*General Custer*

Min. Co. v. Van Camp, 2 Idaho, 40, 3 Pac. 22; *Feltham v. Board of Commrs. Washington Co.*, 10 Idaho, 182, 77 Pac. 332.

2. Appointment, Qualification, Tenure and Removal.

Summary removal of public officer. See *Officers, I, (G).*

Illegal fees and claims for services. See, also, post, *II, (C), 3.*

Appealability of judgments and orders in proceedings to remove public officers. See *Appeal and Error, III, (E).*

See Elections.

Under the act creating officers, section 9, parts 2 and 3, page 593, the county commissioners and not the governor had power to receive the resignation of a county commissioner and appoint a successor.—*People v. Gillespie*, 1 Idaho, 52.

The electors of the whole county are entitled to vote for one county commissioner for each district, and such vote must be abstracted as provided for the vote for other county officers.—*Cunningham v. George*, 3 Idaho, 456, 31 Pac. 809.

R. S. 7459, prescribing the grounds and procedure for the removal of public officers, is constitutional.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

Where information for the removal of a county commissioner under R. S. 7459 fails to state a cause of action by reason of the facts not being sufficiently set forth, a demurrer should be interposed; but, in a case where the information could not be amended so as to state a cause of action, or the court could, under no circumstances, have jurisdiction, a motion to dismiss might be entertained.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

The plea of ignorance of the law will not protect a member of the board of county commissioners from removal from office, when it is shown that he has repeatedly violated the plain provisions of the law.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

Under R. S. 396, providing that no person shall be accepted as surety on an official bond except he shall during the year immediately preceding have been assessed and paid taxes, in his own right, upon property to the amount for which he has become surety, it is a breach of the official duty of a member of the board of county commissioners to approve an official bond, the sureties on which have not paid taxes according to the requirements of the statute.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

Where the board of county commissioners have employed an attorney for the county in a civil case, and one of the commissioners advances money to such attorney for his services therein on demand of the attorney at a time when the board was not in session, and such commissioner is subsequently reimbursed by the board on his claim presented therefor, such transaction is not ground for removal of the commissioner under R. S. 7459.—*Tannahill v. Black*, 7 Idaho, 598, 65

Pac. 1113; *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434.

An information under R. S. 7459, providing for the removal of public officers, charged that defendant knowingly, intentionally and willfully, as a member of the board of commissioners, neglected and refused to make or establish for Elmore county sanitary rules and regulations to prevent the spread of contagious or infectious diseases. R. S. 1511, as amended by Laws 1903, page 365, provides that the board of health must make such sanitary rules and regulations "as they may deem necessary," etc. Held, that the board of health being a continuing body and its rules and regulations continuing until supplanted by new ones, the presumption obtains, in the absence of any allegation to the contrary, that the present board of commissioners are operating under rules adopted by its predecessor.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

The failure of a county commissioner to furnish proper vouchers with his claim against the county as required by R. S. 1763, amended by Laws 1899, page 405, is not a cause for removal under R. S. 7459.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

The failure of a county commissioner to "properly" itemize a claim against the county, as required by R. S. 733, which provides that the commissioners must not hear or consider any claim, unless upon an account properly made out, giving all the items of the claim, is not a cause for removal under R. S. 7459.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

Under R. S. 7459, providing for the removal of public officers guilty of charging or collecting illegal fees or refusal or neglect to perform official duties, an information against a member of the board of county commissioners alleging that the board refused to make or establish any sanitary rules and regulations "necessary and proper" to prevent the outbreak of contagious diseases, clearly indicates that some rules or regulations had been made, and does not state a cause of action.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

R. C. 7459, authorizing the removal of certain officers for collecting illegal fees, applies to a claim or charge made by a public officer for services, or under any contract with the municipality of which such officer is an official, where such officer makes a claim against the municipality whereby the officer seeks to recover a compensation not provided or authorized by law, and for which no payment or fee is provided by law. *Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334.

Where the statutes of the state impose certain duties upon the board of county

commissioners, and require certain reports and the performance of certain duties, the county commissioners have no right or authority to exercise the arbitrary judgment that such reports are unnecessary and impracticable, for the reason that it is the duty of a public officer to obey the law, and he cannot justify his acts upon the ground that he does not believe that it will be necessary to obey such law.—*Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334; *Crowley v. Empey*, 23 Idaho, 190, 129 Pac. 340.

Where a county commissioner wrote an insurance policy on county property, as agent for the insurance company, and presented and collected a claim for the premium thereon to the county, such claim was not for a fee within the meaning of R. C. 7459, providing for the removal of certain officers for collection of illegal fees.—*Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334.

3. Compensation.

Of county officers and agents in general. See post, II, (D), 2.

Of particular officers. See Clerk of Court; Coroners; Sheriffs and Constables, etc.

Under Laws 1893, page 39, allowing each member of the board of county commissioners six dollars per day for each day actually and necessarily engaged in the transaction of county business, a county commissioner must show that he was actually and necessarily so engaged in order to be entitled to per diem compensation.—*Fisher v. County Commrs. Bannock Co.*, 4 Idaho, 381, 39 Pac. 552; *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111.

On an appeal from an order of the board of county commissioners allowing a member of said board mileage and per diem compensation the cause must be tried anew under R. S. 1779.—*Fisher v. County Commrs. Bannock Co.*, 4 Idaho, 381, 39 Pac. 552.

A notice of appeal from the order of a county board allowing the claim of a member thereof for services, on the ground that said allowance was illegal and prejudicial to the public interests, was supplemented with a specific statement, alleging that during the time for which the board allowed such member for services he was not actually and necessarily engaged in county business. Held, that the notice of appeal was sufficiently specific.—*Fisher v. County Commrs. Bannock Co.*, 4 Idaho, 381, 39 Pac. 552.

The law does not contemplate that members of the board of county commissioners may perform services for the county as individuals, and then charge for it as commissioners.—*Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111.

Under Laws 1891, page 179, county commissioners are entitled to the per diem and mileage therein allowed only when acting as a board actually in session and transacting county business.—*Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111.

Where a county was engaged in litigation, and the necessity for the present payment

of a small amount of costs arose, and a member of the board of county commissioners advanced the required sum, the allowance of the sum so advanced by the board on a proper claim therefor will not be disturbed on appeal.—*Osborn v. Ravenscraft*, 5 Idaho, 612, 51 Pac. 618.

Laws 1899, page 405, fixing the maximum and minimum salaries of all county officers and leaving the amount thereof to be fixed by the county commissioners of each county, is unconstitutional and against public policy in so far as it authorizes the county commissioners to fix their own salaries.—*Stookey v. Board of Commrs.*, 6 Idaho, 542, 57 Pac. 312.

Under Const., article 18, section 7, and Laws 1899, page 405, that part of act of February 23, 1893, which allows mileage to county commissioners, is repealed.—*Stookey v. Board of Commrs.*, 6 Idaho, 542, 57 Pac. 312.

A member of the board of county commissioners cannot perform services for the county in taking care of roads and bridges or performing the duties of any other office and receive therefor the per diem allowed to county commissioners.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

It is illegal for a county commissioner to present to the board of commissioners claims for mileage, claims for services rendered as viewers or roads or bridges, or claims for cash advanced by him as attorney fees.—*Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680; *Tannahill v. Black*, 7 Idaho, 290, 62 Pac. 1116; *Tannahill v. Johnson*, 7 Idaho, 291, 62 Pac. 1116.

Under Laws 1901, page 227, defining "actual and necessary expenses," a claim of a county commissioner for board when absent from his residence in the performance of his official duties is properly allowed.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

An order made by the board of county commissioners allowing one of its own members illegal compensation is void for want of jurisdiction, and may be collaterally attacked. *Kootenai County v. Dittmore*, 12 Idaho, 758, 88 Pac. 232; *Kootenai County v. Sisson*, 12 Idaho, 768, 88 Pac. 233.

Where a member of the board of county commissioners presents a claim against the county for the purchase price of a book press, or for services in inspecting roads and bridges at four dollars per day, or for services in viewing roads and bridges on behalf of the county, or for superintending the transcribing of records where the county is created out of another county, or for any other services, and such claims are not specially provided by law to be paid by the county, such claims are void, for the reason that the statute provides for the compensation of the commissioner by fixing his salary and expenses as his full compensation.—*Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334; *Crowley v. Empey*, 23 Idaho, 190, 129 Pac. 340.

A member of the board of county commissioners cannot file or claim a compensation for extra services rendered to the county which are not authorized by law, where such member is paid a salary under the law for his services as such member of the board, although such extra services are rendered for the benefit of the county.—*Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334; *Crowley v. Empey*, 23 Idaho, 190, 129 Pac. 340.

Where a member of the board of county commissioners enters into a contract with the board of county commissioners of which he is a member, for the sale of personal property to the county by such member, and such contract is void under R. C. 255, 1946 and 1956, the board of county commissioners has no authority to allow the claim for such purchase price as a claim against the county.—*Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334; *Crowley v. Empey*, 23 Idaho, 190, 129 Pac. 340.

4. Duties, Powers and Functions.

Power of county board to grant or refuse liquor license. See *Intoxicating Liquors*, IV.

Right of court to review action of board in granting or refusing liquor license. See *Intoxicating Liquors*, IV.

Authority of county commissioners to contract for bridge. See *Bridges*.

Duty of board as to bond of assessor. See *Taxation*, V, (B).

Employment of counsel in civil and criminal actions. See post, III, (B).

Validity of contracts. See post, III, (B).

Levy of road taxes. See *Highways*, IV.

A board of county commissioners has no power or authority to pass upon the misfeasance or malfeasance of an officer.—*Gorman v. Board of Commrs. Boise County*, 1 Idaho, 553.

A county cannot be held responsible for the action of its board of commissioners in appointing one person to an office which legally belonged to another.—*Gorman v. Commrs. of Boise County*, 1 Idaho, 655.

Boards of county commissioners have no authority to devolve on an appointee of their own the duties and functions which the law has already fixed to another office.—*Meller v. Board Commrs. Logan County*, 4 Idaho, 44, 35 Pac. 712.

Boards of county commissioners are entireties and can only act collectively and as empowered by law.—*Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111; *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

In the employment of counsel by county commissioners under Const., article 18, section 6, the board of county commissioners can only bind the county when acting as a board and not as individuals and their action therein must be made a matter of record.—*Conger v. Latah County Commrs.*, 4 Idaho, 740, 48 Pac. 1064.

It is doubtful whether the board of commissioners of a county, as such, have authority, in the name of the board, to commence a suit or proceeding for the benefit of the

county.—Board of Commrs. v. Mayhew, 5 Idaho, 572, 51 Pac. 411.

The board of county commissioners has no authority to pass on the validity of any statute.—Howell v. Board Commrs. Ada Co., 6 Idaho, 154, 53 Pac. 542.

One member of the board of county commissioners cannot employ a physician to care for smallpox patients at the expense of the county.—Castle v. Bannock County, 8 Idaho, 124, 67 Pac. 35.

Under R. S. 1759, subdivision 13, the board of commissioners may settle a case pending against the county on appeal, and where they do settle such a case and no beneficial results can come from a determination of the issues made on the appeal, the appeal will be dismissed.—Board of Commrs. v. Bassett, 14 Idaho, 324, 93 Pac. 774.

The board of county commissioners has only such powers as are expressly or impliedly conferred upon it by statute.—Prothero v. Board of Commrs., 22 Idaho, 598, 127 Pac. 175.

Under R. C. 1917, subdivision 9, the board has jurisdiction and power to examine and audit the accounts of all county officers having the care, management, collection, or disbursement of moneys belonging to the county or appropriated by law, or otherwise, for its use and benefit, and they may employ an accountant for such purpose.—Prothero v. Board of Commrs., 22 Idaho, 598, 127 Pac. 175.

Under the law prescribing the duties of state examiner, he is required to make an annual written report to the governor, and embody therein an abstract of the condition and statistics of the "several county and state finances" as ascertained by him, which report is intended to keep the governor informed as to the financial condition of the counties and state, and he is not required to make any report to the boards of county commissioners of the results of his examination of the books and accounts of the county officers.—Prothero v. Board of Commrs., 22 Idaho, 598, 127 Pac. 175.

The statutes providing for a state examiner and prescribing his duties do not expressly or impliedly repeal the power of boards of county commissioners imposed by R. C. 1917, authorizing the board to examine the accounts of county officers.—Prothero v. Board of Commrs., 22 Idaho, 598, 127 Pac. 175.

5. Meetings, Minutes, Records, Orders and Decisions.

Effect of failure to make record of granting of ferry license. See Ferries.

Introduction of minutes in prosecution for embezzlement. See Embezzlement.

Nullity of order allowing salary to assessor. See Taxation, VIII, (A).

Proceedings for the establishment of highways. See Highways, I.

Requisites of record authorizing bonds for bridge. See Bridges.

The order of a board of county commissioners, requiring the officers-elect to give bonds in particular sums is of no force except as to the officers-elect at the time of making such order.—Gorman v. Board of Commrs. of Boise County, 1 Idaho, 553.

The board of county commissioners is required, by law, to keep a record of its proceedings, and no presumption arises as to the regularity of any of its proceedings, not appearing of record, even though parties may have acted on the supposed order of such board.—Gorman v. Board of Commrs. of Boise County, 1 Idaho, 553.

A synopsis of the proceedings of the board of county commissioners should be published in only one newspaper of the county.—Miller v. Smith, 7 Idaho, 204, 61 Pac. 824.

Where a portion of an order of a board of county commissioners is invalid, and the valid portion contains the essential elements of a complete ordinance, the invalid portion may be rejected and the remainder stand as valid and operative.—Johnston v. Savidge, 11 Idaho, 204, 81 Pac. 616.

R. S. 1757 provides that special meetings of the board of county commissioners may be ordered by a majority of the board and that the order therefor must specify the business to be transacted and none other than that specified must be transacted thereat. An order was made calling a special meeting to take action on the question whether the board should submit to the electors the question of bonding the county for the purpose of raising funds to purchase a site for a new courthouse and the erection thereof. At said special meeting, the board submitted to the electors the question whether bonds should be issued "for the purpose of purchasing a site, erecting a courthouse and jail and furnishing the same." The order for and notice of special meeting did not mention the jail. The facts show that the jail is to be a part of the courthouse and a room in the same building. Held, that the proceedings of the board and the bonds issued after election in favor thereof are valid.—Shoshone County v. Rollins, 11 Idaho, 314, 82 Pac. 105.

An order appointing a road overseer need not contain the recital that there was a vacancy in that office, the presumption being that the board acted within the law and that a vacancy did exist.—Meservey v. Gulliford, 14 Idaho, 133, 93 Pac. 780.

R. S. 1912 requires the board of county commissioners to keep a "minute-book" in which must be recorded all orders and decisions made by them, and the daily proceedings had at all regular and special meetings. R. S. 853 requires the clerk to keep a "road-book" recording separately all proceedings relating to roads. Held, that the "minute-book" was admissible to show the appointment of a road overseer.—Meservey v. Gulliford, 14 Idaho, 133, 93 Pac. 780.

Where it clearly appears by an order of adjournment that the regular business of the board of county commissioners has not been completed, and that the same will be con-

sidered at a future date, fixed by an order of adjournment, and there is no adjournment sine die, and no new session has begun, such adjournment will be construed as a recess adjournment and a continuation of the regular session.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

The session of the board of commissioners will close by an adjournment sine die, by the opening of another session under the law, or by failure to meet under a recess adjournment.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

Under R. S. 1757, providing for special meetings of the board of county commissioners, a special meeting is a meeting called upon order of a majority of the board after the close of a regular session, to be held at such time as the order may fix.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

An adjourned meeting of the board of commissioners under R. S. 1756 is a meeting to be provided for while the board is in session, by a proper order, said meeting to be held after the close of the regular session.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

R. S. 1755, providing for regular meetings of the board of commissioners, contemplates that when the board meets in regular session, it will transact the public business with such reasonable dispatch as the public welfare may demand, but does not limit the duration of the regular sessions of the board or fix or limit the time during which the board may adjourn or take a recess during the regular session.—*Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

An order of the board of county commissioners as follows: "On motion the board adjourned until November 1, 1906, for the purpose of allowing claims for courthouse construction and any other regular business which the board may choose to take up," does not constitute said meeting of November 1, 1906, an adjourned meeting under R. S. 1756. *Gilbert v. Canyon County* (on rehearing), 14 Idaho, 429, 94 Pac. 1027; *Murphy v. Canyon County*, 14 Idaho, 449, 94 Pac. 1033.

Under R. C. 1911 and 1912 the board of county commissioners are required to keep a minute-book in which must be recorded all orders and decisions made by them and the daily proceedings had at all regular and special meetings, but the statute does not make this requirement a jurisdictional matter; in other words, the statute does not make the recording upon the minute books a prerequisite to the validity of the acts and proceedings of the board; while the statute does direct that such matters be recorded, yet the proceedings are not invalid by reason of the failure to so record such matters.—*Sims v. Milwaukee Land Co.*, 20 Idaho, 513, 119 Pac. 37.

6. Appeal from Decisions.

Appeal from order incorporating village. See *Municipal Corporations*, I, (A).

Appeal from order of board refusing appointment of deputy sheriff. See *Sheriffs and Constables*, I, (C).

— From order allowing or disallowing claim against county. See post, V.

— From order fixing salaries. See post, II, (D), 2.

Appeal or review of order of board of equalization. See *Taxation*, V, (F).

Collateral attack on decision of board in highway proceeding. See *Highways*, I.

Right of taxpayer to appeal from order of board selecting list of jurors. See *Jury*, IV.

Time for taking appeal from decision of district court reversing order of commissioner establishing private roads. See *Private Roads*.

A county cannot be made a party in an appeal from an order of the board of commissioners.—*Gorman v. Commissioners Boise County*, 1 Idaho, 627.

Under the statute relating to appeals from orders of the board of county commissioners, no other written pleadings or statements are required except the notice of appeal, the fact of appeal and the grounds thereof; questions of law may be presented either by a motion to dismiss, by inspection, or by demurrer.—*Gorman v. Commissioners Boise County*, 1 Idaho, 655.

A writ of error will lie to review the judgment of the district court upon an appeal from an order made by the board of commissioners.—*Eupert v. Commissioners Alturas County*, 2 Idaho, 19, 2 Pac. 718; *Van Camp v. Commissioners Custer County*, 2 Idaho, 29, 2 Pac. 721.

An appeal is the only means by which relief can be had from the action of a board of county commissioners.—*Picotte v. Watt*, 3 Idaho, 447, 31 Pac. 805; *Rogers v. Hays*, 3 Idaho, 597, 32 Pac. 259.

Under R. S. 1776, the discretion of the board of county commissioners in making orders is subject to be reviewed by the courts. *Meller v. Board Commrs. Logan Co.*, 4 Idaho, 44, 35 Pac. 712.

R. S. 1759, subdivision 19, as amended by Laws 1895, page 50 (Pol. C. 1585), authorizes the board of county commissioners at the adjournment of each session to publish a brief statement of all its acts and proceedings. Held, that where such statement was published before the final adjournment, the twenty days for taking an appeal from an order of the board did not begin to run from the date of such publication and that an appeal taken within twenty days from the date of final adjournment was in time.—*Ravenscraft v. Board of Commrs.*, 5 Idaho, 178, 47 Pac. 942.

Under R. S. 1777, as amended by Laws 1895, page 51, no undertaking is required on an appeal from an order of the county commissioners by a taxpayer, where the appeal is made for the purpose of protecting the interests of the county, nor is an undertaking required in such case on appeal to the supreme court.—*Ravenscraft v. Board of Commrs.*, 5 Idaho, 178, 47 Pac. 942.

Any person aggrieved by an order or proceeding of a board of county commissioners may appeal therefrom forthwith without waiting for the publication of a statement of the proceedings of the board.—*Ravenscraft v. Board of Commrs.*, 4 Idaho, 178, 47 Pac. 942.

Upon the trial of an appeal from an order of the county commissioners, findings of fact should be made unless waived as provided by R. S. 4408.—*Reynolds v. Board of Commrs.*, 6 Idaho, 787, 49 Pac. 730.

Under Laws 1899, page 249, amending R. S. 1778, providing that when an appeal is taken from the decision of the board of commissioners the clerk of the board must transmit to the district judge the notice of appeal, the order, decision or proceeding appealed from, together with the accounts, etc., an appeal which does not contain the order appealed from in the transcript should be dismissed.—*Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76; *Ellis v. Bingham Co.*, 7 Idaho, 86, 60 Pac. 79.

Under R. S. 1777, providing that when an appeal is made for the purpose of protecting the interests of the county and of the people, no undertaking need be given, one appealing from an order of the board of county commissioners, disallowing his claim for services as road contractor, must file an undertaking on appeal.—*Davis v. Elmore County*, 9 Idaho, 764, 75 Pac. 910.

R. S. 1777, amended by Laws 1899, page 248, provides that appeals may be taken to the district court, or judge thereof, from orders made by boards of commissioners, by serving on the clerk of the board a notice of appeal, and that "when the appeal is made for the purpose of protecting the interests of the county and of the people, no requirement shall be made of the appellant for security of costs, except that when the district judge shall be of opinion that such appeal is not made in good faith, but is for delay and vexation, he may require the appellant to enter into an undertaking with good sureties in an amount sufficient to secure the payment of costs, and in all other cases like undertaking shall be required." Held, that giving an undertaking to secure payment of costs is not jurisdictional and depends wholly on the order of the judge, which can be made only after jurisdiction has been acquired by service of notice of appeal.—*Great Northern Ry. Co. v. Kootenai Co.*, 10 Idaho, 379, 78 Pac. 1078; *Kootenai Valley Ry. Co. v. Kootenai Co.*, 10 Idaho, 386, 78 Pac. 1080.

An appeal from an order of the board of county commissioners is perfected upon service of notice of appeal.—*Great Northern Ry. Co. v. Kootenai County*, 10 Idaho, 379, 78 Pac. 1078; *Humbird Lumber Co. v. Kootenai County*, 10 Idaho, 490, 79 Pac. 396.

R. S. 1778, as amended by Laws 1899, page 249, requiring the clerk to transmit the papers on appeal from an order of the board of commissioners to the district judge within five days after the service of the notice of appeal is not jurisdictional, and failure or neglect on the part of the clerk should not deprive the appellant of the benefits of the appeal.—

Humbird Lumber Co. v. Kootenai County, 10 Idaho, 490, 79 Pac. 396.

Under R. S. 1776, as amended by Laws 1899, page 248, the remedy for review of the action of a board of county commissioners on a matter of which they had jurisdiction is by appeal.—*School Dist. No. 25 v. Rice*, 11 Idaho, 99, 81 Pac. 155.

Where a board of county commissioners created a justice precinct at a special or adjourned meeting of the board and not at a regular meeting thereof, such action was not void, but voidable, and the remedy of any person aggrieved thereby was by appeal and not by an action in the nature of quo warrant.—*Johnston v. Savidge*, 11 Idaho, 204, 81 Pac. 616.

R. S. 1776, providing for appeals from orders of the board of county commissioners, applies only to persons and taxpayers and does not contemplate the county itself as a municipal corporation taking an appeal from the action or order of its own board of commissioners.—*McNutt v. Lemhi County*, 12 Idaho, 53, 84 Pac. 1054.

Under R. S. 1776, as amended by Laws 1899, page 248, providing for appeals from acts or orders of the board of county commissioners, the county cannot take an appeal from an action or order of its own board of commissioners.—*Kootenai County v. Dittmore*, 12 Idaho, 758, 88 Pac. 232; *Kootenai County v. Sisson*, 12 Idaho, 768, 88 Pac. 233.

Under R. C. 1951, an appeal may be taken to the district court or a judge thereof, and such appeal may be tried either by the court or the judge.—*Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126.

7. Disabilities, Civil Liabilities and Criminal Responsibility.

County commissioners are not individually liable in damages for injuries sustained by reason of defective bridges or highways.—*Gorman v. Board of Commissioners*, 1 Idaho, 655; *Worden v. Witt*, 4 Idaho, 404, 95 Am. St. Rep. 70, 39 Pac. 1114.

Editorial Notes.

County boards, liability of to private individuals: 95 Am. St. Rep. 80.

(D) OFFICERS AND AGENTS.

Accountants to ascertain indebtedness on division of counties. See ante, I.

Breach of duty of commissioner in approving official bond. See ante, II, (C), 2.

See, also, Clerk of Court; Auditor and Recorder; Coroners; District and Prosecuting Attorneys; Judges; Justices of the Peace; Sheriffs and Constables.

Appointment of deputy for clerk of court. See Clerk of Court.

— For sheriff. See Sheriffs and Constables.

Probate judge. See Judges.

1. Acquisition, Tenure, Relinquishment and Removal.

On creation of county. See ante, I, (C).

Removal of county officers in general. See Officers, I, (G).

Where a person elected to a county office is not qualified to hold and enter into the same, at the time fixed by law therefor, the office is vacant and may be filled by appointment.—*People v. Curtis*, 1 Idaho, 753.

The appointment of an attorney to act as the legal adviser of the board of county commissioners for a period of two years, and a contract by the board with such appointee defining his duties and fixing his compensation, is the creation of a county office, prohibited by Const., article 3, section 19.—*Meller v. Board Commrs. Logan County*, 4 Idaho, 44, 35 Pac. 712.

2. Compensation and Fees.

Fees of public administrator. See *Executors and Administrators*, II.

Of member of county board. See ante, II, (C), 3.

Officers applying to the board of commissioners for an allowance to make up the minimum compensation provided by Const., article 18, section 7, should accompany such application with a detailed statement under oath of all the fees and commissions earned by them during the year.—*Campbell v. Commissioners Logan County*, 4 Idaho, 181, 37 Pac. 329.

Where the fees and commissions received in any one year by the sheriff and other officers named in Const., article 18, section 7, do not amount to the minimum compensation therein provided, they are entitled to receive from the county a sum sufficient to make their annual compensation equal to such minimum, and the board of commissioners must order a warrant drawn for such amount.—*Campbell v. Commissioners Logan County*, 4 Idaho, 181, 37 Pac. 329.

If the necessity for the appointment of a deputy is occasioned by the sickness or absence of the clerk, on business not connected with his office, the county is not liable for the compensation of the deputy.—*Woodward v. Board of Commrs. of Idaho County*, 5 Idaho, 524, 51 Pac. 143.

A county officer must account to the county for all fees earned whether he collects them or not; and, where his earnings exceed the maximum compensation allowed him by law, he must pay such excess into the county treasury in cash, whether he collects it or not.—*Naylor v. Vermont Loan etc. Co.*, 6 Idaho, 251, 55 Pac. 297.

Const., article 18, section 8, provides that the fees and commissions received by county officers in excess of the maximum compensation per annum provided for each in the preceding section shall be paid to the county treasurer for the use and benefit of the county. Held, that there is no necessity for the payment into the county treasury of fees earned by public officers, except those fees earned in excess of the maximum salary prescribed by the constitution.—*Naylor v. Vermont Loan & Trust Co.*, 6 Idaho, 251, 55 Pac. 297.

R. S. 2120, providing for the payment of all compensation of county officers out of the county treasury, upon warrants, is repugnant, to some extent, to Const., article 18, section 8, providing that the compensation provided in section 7 for the officers therein mentioned

shall be paid by fees or commissions or both as prescribed by law.—*Naylor v. Vermont Loan etc. Co.*, 6 Idaho, 251, 55 Pac. 297.

In an action by a county to recover illegal compensation allowed and paid to one of its officers, the complaint need not allege the specific acts of fraud and deception through which such money was obtained.—*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264.

An order allowing a county officer compensation to which he is not entitled by law, made by a board of county commissioners, is void for want of jurisdiction, and may be attacked collaterally.—*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264.

Act of March 7, 1899, fixing the maximum and minimum salary of county officers and vesting in the boards of county commissioners the authority to determine the salary of county officers within the limit of such maximum and minimum salary, is not invalid as a delegation of legislative functions, except in so far as it authorizes the county commissioners to fix their own salaries.—*Stokey v. Board of Commrs. of Nez Perce County*, 6 Idaho, 542, 57 Pac. 312.

Under R. S. 1776, as amended by Laws 1899, page 248, providing when an appeal may be taken from any act of the board of commissioners, an appeal lies from an order of the board fixing the salaries of county officials.—*Reynolds v. Board of Commrs.*, 6 Idaho, 787, 59 Pac. 730.

An order of the board of county commissioners fixing the salaries of county officers under Laws 1899, page 405, will not be disturbed in the absence of a clear abuse of discretion.—*Reynolds v. Board of Commrs.*, 6 Idaho, 787, 59 Pac. 730.

Living expenses, such as charges for bed and board of county officials, are not legal charges against the county.—*Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76.

Under Laws 1899, pages 405, 406, requiring every county officer to file with the clerk of the board of commissioners a quarterly itemized statement of his fees and expenses, verified by oath and accompanied with vouchers showing each item expended for necessary expenses, items of expenses in an officer's statement must be so set forth as to show how, in what manner and for what reason such expenses were incurred and that they were necessary, and proper vouchers proving the disbursements must accompany the statement. *Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76.

Laws 1899, pages 405, 406, make it the duty of every county officer to file with the clerk of the board of commissioners a quarterly itemized statement of his expenses and fees, verified by oath and accompanied with vouchers showing each item expended for necessary expenses. R. S. 1773, provides that the board of commissioners must not hear or consider any claim in favor of an individual against the county unless an itemized, verified account is filed. Held, that items of expense incurred by a county officer can only be considered or allowed by the board of county

commissioners as part of the officer's quarterly statement, and cannot be considered as an independent claim or account.—*Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76.

Const., article 18, section 6, providing that the sheriff, auditor, recorder and clerk may be empowered to employ deputies, who shall receive such compensation as the board of commissioners may fix, does not repeal R. S. 1815 any further than to relieve the county from the payment of salaries of deputies other than those mentioned in Const., article 18, section 6.—*Taylor v. Canyon Co.*, 7 Idaho, 171, 61 Pac. 521.

Const., article 18, section 6, authorizes the sheriff, auditor, etc., to employ such deputies and assistants as the business of their offices may require, when empowered to do so by the county commissioners, and provides that said deputies and assistants shall receive such compensation as may be fixed by the board of county commissioners. Section 7 fixes the maximum and minimum compensation which such county officers may receive per annum, and section 8 provides that such compensation shall be paid by fees or commissions or both, the excess over the maximum going into the county treasury. Held, that where the board authorizes a county officer to employ a deputy and fix his salary, the salary so fixed becomes a charge against the county.—*Taylor v. Canyon County*, 7 Idaho, 171, 61 Pac. 521.

3. Powers and Duties.

Of county board. See ante, II, (C), 4.

A county treasurer is agent of the county, and, where he deposits money in a bank which thereafter becomes insolvent and his checks thereon are not paid, the county is liable for his wrongful acts.—*Green v. Custer County*, 8 Idaho, 721, 71 Pac. 115.

4. Accounting and Settlement.

Accounting for fees. See ante, II, (D), 2.

Liability of sheriff's surety to pay over liquor license tax. See *Sheriffs and Constables*, IV.

Limitation of action by county to recover money from agent or officer. See *Limitation of Actions*, I.

5. Personal Liabilities and Disabilities.

(No paragraphs.)

6. Official Bonds.

An action will not lie against the sureties on the official bond of a county collector for a failure to account for money paid to him by order of the commissioners after his term of office had expired, and he had made settlement and turned the office over to his successor.—*Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1071.

In an action on a county treasurer's bond, the complaint alleged that the tax collector "had and sought to pay" to said county treasurer several sums of money, aggregating a stated amount of moneys belonging to the county; that said treasurer did not receive said moneys, and did not demand the same in money, as in law he should have done, but in

lieu thereof, and as payment of said moneys, he received from the tax collector checks and credits on an insolvent bank; that such checks and credits were worthless, and that the said moneys were thus lost to plaintiff county on account of the treasurer's negligence. Held, demurrable, in failing to show that any money was paid to the treasurer by the tax collector and that receipts were given by the treasurer for such checks and credits as required by R. S. 1842, requiring the treasurer to give receipts for any money paid to him.—*Bingham County v. Woodin*, 6 Idaho, 284, 55 Pac. 662.

The county tax collector paid into a bank a sum of money collected by him as such official and subsequently gave the outgoing county treasurer a check for such money, which check was deposited and credited to the account of the outgoing treasurer. The cashier of the bank, without the knowledge or consent of the incoming treasurer, placed a portion of such amount to the latter's credit. Held, that this did not constitute "a deposit on general deposit" by the incoming treasurer, making the treasurer or his sureties responsible on the loss thereof owing to the bank's insolvency.—*Bingham County v. Woodin*, 6 Idaho, 284, 55 Pac. 662.

In an action on a county treasurer's bond, the complaint alleged that defendant treasurer received from the tax collector a specified sum, belonging to the county; that, as such treasurer, he did not safely keep said moneys, nor any part thereof, but deposited the same on a general deposit in an insolvent bank; that the said money was never returned to the plaintiff county or to said treasurer, but was wholly lost to plaintiff, to its damage, etc. Held, demurrable; first, in failing to allege the treasurer's failure to "apply and pay out or to render account" of the moneys received by him, as provided by R. S. 1840; second, in not alleging that any demand has been legally made on him which has not been promptly met; third, because the allegation that the treasurer "did deposit the same on a general deposit," etc., is not of itself sufficient in an action against the treasurer's sureties; but must be supplemented by a further allegation that by reason of such act, the county has suffered loss.—*Bingham Co. v. Woodin*, 6 Idaho, 284, 55 Pac. 662.

7. Criminal Responsibility.

(No paragraphs.)

III. PROPERTY, CONTRACTS, AND LIABILITIES.

Adjustment of rights and liabilities on division or annexation. See ante, I, (D).

Right to recover payments made illegally by county commissioner. See *Payments*.

(A) PUBLIC BUILDINGS AND OTHER PROPERTY.

Property purchased by county at delinquent tax sale not assessable. See *Taxation*, III, (A).

Liability of county for negligence in maintaining or constructing bridge. See *Bridges*.

Nature of ownership of public bridges. See *Bridges*.

"Public property," as used in Laws 1911, page 8, section 7, creating Bonneville County, does not apply to roads, highways, or bridges, but to such public property as the county owns by reason of acquiring the same out of the general funds of the county or by special assessment authorized by law, and does not mean bridges and highways.—*Bonneville Co. v. Bingham Co.*, 24 Idaho, 1, 132 Pac. 431.

Editorial Notes.

Right of county to exercise power of eminent domain: *Ann. Cas.* 1913E, 1079.

(B) CONTRACTS.

Building and contracting for bridges. See *Bridges*.
Law requiring printing, etc., within county and state. See *Constitutional Law*, V, X.

Counsel may be employed to assist the district attorney in the trial of criminal causes.—*People v. Biles*, 2 Idaho, 114, 6 Pac. 120.

The board of county commissioners may, when the necessity therefor exists, employ counsel, but that necessity must be apparent, and the action of the board in each case is subject to review by the courts.—*Meller v. Board of Commrs. Logan County*, 4 Idaho, 44, 35 Pac. 712.

The charge or claim for publishing the delinquent tax list under a contract with the assessor and tax collector is not within R. S. 2005, which provides that the auditor must draw his warrant "for all debts and demands against the county where the amount is fixed by law."—*Jolly v. Woodward*, 4 Idaho, 496, 42 Pac. 512.

Under R. S. 2160, 2161, only the board of county commissioners can audit and allow claims for publication of the delinquent tax list.—*Jolly v. Woodward*, 4 Idaho, 496, 42 Pac. 512.

R. S. 1530, 1531 and 1532 (as amended by Laws 1890-91, p. 237), authorize the publication of the delinquent tax list. R. S. 2005, provides that the auditor must draw warrants on the county treasurer in favor of all persons entitled thereto in payment of all claims, etc., examined, allowed and ordered paid by the board of commissioners; also, for all debts and demands against the county when the amounts are fixed by law, and which are not directed to be audited by some other person or tribunal. Held, that the assessor and tax collector has no authority to audit and allow a claim for publishing the delinquent tax list.—*Jolly v. Woodward*, 4 Idaho, 496, 42 Pac. 512.

Services rendered under a void contract with a board of county commissioners cannot be recovered for in an action upon a quantum meruit.—*Hampton v. Logan County Commrs.*, 4 Idaho, 646, 43 Pac. 324.

Where the validity of an act creating a county is to be litigated, the board of county commissioners have discretion to employ private counsel to assist the attorney general to protect the interests of the county in such litigation.—*Ravenscraft v. Board of Commrs.*, 5 Idaho, 178, 47 Pac. 942.

Plaintiffs presented their claim for printing the delinquent tax list to the board of county commissioners, based on a contract made with the tax collector, who had no authority to make such contract. The board equitably allowed them a reasonable compensation therefor, which they refused to accept. Plaintiffs refused to appeal from the order of the board and sued the county on their contract. No quantum meruit was pleaded. Held, that the court properly refused to give judgment in favor of plaintiffs.—*Jolly v. Latah County*, 5 Idaho, 301, 48 Pac. 1063.

R. S. 1530 requires the tax collector to have the delinquent tax list published. R. S. 1532, amended by Laws 1891, page 237, prescribes the time and place for such publication. R. S. 1759, subsections 10, 18, make it the duty of the board of commissioners to settle and allow all accounts legally chargeable against the county and to contract for the county printing. Held, that the assessor and collector of a county cannot contract for the printing of the delinquent tax list, that being a matter for the determination of the county board.—*Jolly v. Latah County*, 5 Idaho, 301, 48 Pac. 1063.

R. S. 1759, subsection 13, gives the board of county commissioners power to direct and control the prosecution and defense of all suits to which the county is a party in interest and employ counsel to conduct the same with or without the district attorney as they may direct. Const., article 18, section 6, provides, inter alia, that "the county commissioners may employ counsel when necessary." R. S. 2051, 2052, as amended by Laws 1890-91, page 47, prescribe the duties of the district attorneys, and authorize the appointment of a district attorney pro tem. by the court in case of the absence, disability, etc., of the district attorney. Held, that county commissioners are not authorized to employ counsel in criminal cases.—*Conger v. Commrs. Latah Co.* (on rehearing), 5 Idaho, 347, 48 Pac. 1064.

Under R. S. 1759, subdivision 13, giving the board of commissioners power "to direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the district attorney, as they may direct," the action of the board in employing counsel to attend to certain legal matters of the county will not be disturbed in the absence of a showing of abuse of discretion on the part of the board.—*Anderson v. Shoshone Co.*, 6 Idaho, 76, 53 Pac. 105.

In an action on a note executed by defendants to settle an action brought by a county against a sheriff to recover money due from such officer, defendants are estopped to plead that the acceptance of such compromise by the county was ultra vires.—*Fremont County v. Warner*, 7 Idaho, 367, 63 Pac. 106.

Where the board of commissioners makes a contract for the care and repair of bridges, roads, etc., under R. S. 875 et seq., as amended by Laws 1899, pages 127-132, it has no express or implied power thereafter to accept the resignation of the contractor and relieve

him from the obligations of the contract.—*Corker v. Commissioners Elmore County*, 10 Idaho, 255, 77 Pac. 633.

A county as a municipal corporation cannot ratify an indebtedness incurred in direct violation of the constitution.—*McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

R. C. 1475, 1476, refer only to the work to be done in printing and binding, and such work as is necessary to prepare paper, books, and stationery for public use in the respective state and county offices, and has no reference to the purchase of material itself upon which the work is done, and makes no attempt to deprive any person of the right to sell to the state or county any material which may be needed for such public use.—*In re Gemmill*, 20 Idaho, 732, Ann. Cas. 1913A, 76, 119 Pac. 298.

Editorial Notes.

- Power of members of board of county commissioners to make contract extending beyond their term of office: 12 Ann. Cas. 988; 29 L. R. A., N. S., 652.

Power of county or other municipal corporation to employ expert accountants to examine public accounts and records: Ann. Cas. 1913B, 1087.

(C) COUNTY EXPENSES AND CHARGES AND STATUTORY LIABILITIES.

Expenses of extradition. See Extradition.

R. S. 8539 requires the sheriff to receive, keep and provide for all persons committed to jail by competent authority, "for which he shall be allowed a reasonable compensation to be determined by the board of commissioners, and except as provided in the next section, to be paid out of the county treasury." Laws 1899, pages 117, 118, provide that the sheriff may demand and receive the sum of not more than one dollar per day for each prisoner confined in the county jail as remuneration in full for the board, clothing and lights of such prisoner. Laws 1899, pages 405, 406, provide that, in addition to his salary, the sheriff shall be allowed the actual and necessary expenses for care of each prisoner confined in the county jail; and that the salaries of county officers must be paid quarterly but all actual and necessary expenses incurred by any officer in the performance of his duty may be retained by him out of his fees, the balance to be turned in to the county treasurer at the end of each quarter. Held, that the county is liable only to the sheriff for the board of prisoners, and therefore, a person furnishing such board at the request of the sheriff must look to him directly for his pay and cannot maintain his action against the county.—*Mombert v. Banrock County*, 9 Idaho, 470, 75 Pac. 239.

R. C. 7900, 7901, requires the county commissioners to provide a room with suitable furniture, fuel, lights and stationery for the use of the jury upon their retirement for deliberation, and also to provide suitable food and lodging when the jury are kept together. Held, not to authorize the payment by the

county of a bill for shaving and hair-cutting for jurors while kept together.—*Schmelzel v. Board of County Commrs.*, 16 Idaho, 32, 133 Am. St. Rep. 89, 17 Ann. Cas. 1226, 21 L. R. A., N. S., 199, 100 Pac. 106.

An expense incurred by order of the court for shaving jurors and hair-cutting while the jury was kept together in the progress of the trial is not such a necessary expense incident to and necessary in the administration of justice as to become a county charge.—*Schmelzel v. Board of County Commrs.*, 16 Idaho, 32, 123 Am. St. Rep. 89, 17 Ann. Cas. 1226, 21 L. R. A., N. S., 199, 100 Pac. 106.

Editorial Notes.

Liability for support of unsettled or transient pauper: Ann. Cas. 1913C, 82.

Liability of municipality, or proper officers thereof, to pauper for failure to furnish relief: Ann. Cas. 1913D, 1074.

Liability for injuries to travelers and vehicles: 39 L. R. A. 33.

(D) TORTS.

Liability of county for negligence in construction for maintenance of bridge. See Bridges.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES AND TAXATION.

Adjustment of rights and liabilities on division or annexation. See ante, I, (D).

County funds deposited in violation of law as trust funds. See Depositaries.

Issuance of bonds for erection of bridges. See Bridges.

Rights between city and county or taxing district. See Taxation, XIV.

Where a warrant is drawn on a fund which does not exist, the court will not compel the county treasurer to pay it from any other fund of the county; but if the plaintiff is entitled to a warrant out of another fund for the sum due on such warrant, the auditor may receive and cancel the warrant in controversy and issue to plaintiff a warrant on the proper fund, and if he refuses to do so, the law gives him his remedy.—*Chandler v. Lee*, 1 Idaho, 349.

A levy of taxes by the county commissioners to provide for the payment of interest or principal of county bonds before such bonds have been issued or negotiated is premature, and cannot be upheld.—*Shoup v. Willis*, 2 Idaho, 120, 6 Pac. 124.

Allegations of fraud and illegality in the allowance of claims upon which county warrants were issued, without the statement of any facts constituting the fraud or illegality, are insufficient, and a demurrer to such allegations in an action to restrain the payment of such warrants is proper.—*Picotte v. Watt*, 3 Idaho, 447, 31 Pac. 805.

A warrant for \$435 to pay for a temporary jail is an ordinary and necessary expense and does not require the assent of two-thirds of the voters as required by Const., article 8, section 3, relating to the incurring of indebtedness in excess of the revenue provided

for the current year.—*Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277.

Under Const., article 8, section 3, the submission of the question to a vote of the people is an indisputable prerequisite to the incurring of any indebtedness or liability whatever, exceeding in that year the incomes and revenue provided for it for such year, except for the ordinary and necessary expenses of the county.—*Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277. Overruled in part by *Veatch v. City of Moscow*, 18 Idaho, 313, 21 Ann. Cas. 1332, 109 Pac. 722.

A warrant issued for the purchase of a courthouse site, incurring an indebtedness above the county revenue for the current year, is not an ordinary and necessary expense and is therefore in violation of Const., article 8, section 3, which provides that no county shall incur any indebtedness, etc., exceeding in that year the revenue provided for it for said year without the assent of two-thirds of the qualified voters, etc.—*Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277.

Under Laws 1893, page 78, providing that "all obligations of debt, etc., stated in terms of dollars and to be paid in money, if not dischargeable in legal tender notes, shall be payable in either the standard silver or gold coin authorized by the Congress of the United States, all stipulations in the contract to the contrary notwithstanding," county bonds payable "in gold coin of the United States of America, of the present standard weight and fineness" are in conflict with the statute and would be payable in either gold or silver coin of the United States. (Laws 1893, p. 78, repealed by Laws 1895, p. 6).—*Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277.

Under R. S. 3602, as amended by Laws 1890-91, page 200, authorizing the issuance of negotiable bonds by counties, the county commissioners may issue bonds to take up both warrant and bonded indebtedness, when authorized so to do by a vote of two-thirds of the electors of the county voting at an election to be held for that purpose.—*Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277.

Where an order for the issuance and sale of bonds has been made and entered of record by the board of county commissioners of any county, proceedings in equity to restrain the issuance and sale of such bonds in pursuance of such order will not lie, since R. S. 1776 provides a plain, speedy and adequate remedy at law by appeal from the order of the board.—*Morgan v. Commrs. Kootenai County*, 4 Idaho, 418, 39 Pac. 1118.

A taxpayer residing in a county may sue to enjoin the issuance of funding bonds, which are about to be issued by the county commissioners for debts contracted in violation of constitutional provisions.—*Dunbar v. Board Commrs. Canyon Co.*, 5 Idaho, 407, 49 Pac. 409.

Where a board of county commissioners, in violation of the constitution, incurs a large debt in excess of the revenues for the fiscal

year, in which they assume to incur such debt, without submitting the question of incurring such debt to the voters and providing for the payment of the interest and payment thereof, the board is not acting within its jurisdiction; and the action of the board in making such order is void and may be attacked, directly, indirectly or collaterally at any time.—*Dunbar v. Board Commrs. Canyon Co.*, 5 Idaho, 407, 49 Pac. 409.

The building of a bridge and the payment of scalp bounties are not ordinary, but extraordinary, expenses, and, being such, cannot be created in excess of the revenues for the fiscal year in which they may be incurred without the assent of two-thirds of the electors of the county voting at an election duly called and held under Const., article 8, section 3.—*Dunbar v. Board Commrs. Canyon Co.*, 5 Idaho, 407, 49 Pac. 409.

Const., article 8, section 3, provides that no county, etc., shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, etc., provided that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. Held, that a board of county commissioners can purchase a courthouse site, where the revenue of the county is sufficient to pay all the necessary and ordinary expenses of the county for the year in which the purchase is made, together with the cost of the site to be purchased.—*Ball v. Bannock County*, 5 Idaho, 602, 51 Pac. 454.

In the absence of allegation and proof to the contrary, the presumption is that county bonds and coupons are payable where made, and therefore compound interest cannot be allowed thereon under R. S. 1265 prohibiting compound interest.—*Blaine Co. v. Lincoln Co.*, 6 Idaho, 57, 52 Pac. 165.

Laws 1899, page 443, amending R. S. 3604, entitled "an act for the issuance of negotiable coupon bonds for the funding and refunding of the county indebtedness, amending chapter 6, etc., by adding thereto authority to issue bonds to assist any city or village in constructing a free bridge over any navigable stream, within or partly within or adjoining the limits of any such city or village," sufficiently states the substance of the act in the title thereof so as to comply with Const., article 16, section 3.—*Andrews v. Board of Commrs. Ada Co.*, 7 Idaho, 453, 63 Pac. 592.

Where the holder of a check issued in payment of county warrants has not delayed presenting it to the bank for payment to the prejudice of the county, and the bank afterward fails, the holder may recover from the county the money due on the warrants, with interest.—*Green v. Custer County*, 8 Idaho, 721, 71 Pac. 115; *Chambers v. Custer Co.*, 8 Idaho, 724, 71 Pac. 113.

Laws 1905, page 278, authorizing county commissioners of any county indebted to the state for state taxes to make a sufficient levy not exceeding a maximum rate therein

specified for the purpose of paying such indebtedness is constitutional.—*Gooding v. Proffitt*, 11 Idaho, 380, 83 Pac. 230; *Gooding v. Anderson*, 11 Idaho, 392, 83 Pac. 234; *Gooding v. Cowen*, 11 Idaho, 392, 83 Pac. 234.

Where county warrants in the sum of \$6,350 were issued for the construction of a wagon road, and the question of incurring such indebtedness was not submitted to a vote of the people and the whole thereof was in excess of the income and revenue of the county for the year in which such indebtedness was incurred, and no provision was made for the payment thereof, such indebtedness is void under Const., article 8, section 3.—*McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

R. S. 2006, providing that "all warrants must distinctly specify the liability for which they are drawn and when it accrued," is mandatory.—*McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

Where county warrants are issued in contravention of Const., article 8, section 3, and the people of the county subsequently vote to issue bonds covering all the indebtedness of the county including such warrants, such action does not amount to a ratification or take the place of an election as required by Const., article 8, section 3.—*McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

A county cannot ratify an act done in direct violation of the constitution.—*McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

A county through its board of commissioners may resist the payment of a warrant which has been wrongfully and unlawfully issued, though no appeal was ever taken by anyone from the order directing its issuance. *McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

The emergency contemplated by R. C. 937, which authorizes the board of county commissioners to transfer funds from the current expense fund to the road fund, was such emergency as might arise out of the actions of the elements in destroying or injuring roads or bridges, and not emergencies arising by the failure of the legislature to authorize the levying of an adequate tax to keep the roads in such condition as the board of commissioners deem they should be kept in, or emergencies arising because of inoperative and void acts of the legislature in creating such road fund. *Cunningham v. Thompson*, 18 Idaho, 149, 108 Pac. 898.

Sess. Laws 1909, page 238, providing for the formation of railroad districts and the voting of bonds and purchase or construction of railroads by such districts and providing for operating or leasing the same, is in violation of the provisions of Const., article 8, section 4, and contrary to the spirit of article 8, sections 2, 3, and article 12, section 4.—*Atkinson v. Board of Commrs. of Ada County*, 18 Idaho, 282, 108 Pac. 1046.

Under R. C. 1950, an appeal may be taken from any act, order or proceeding of the board of county commissioners by any person

aggrieved thereby, or by a taxpayer of the county. Held, that an appeal may be taken from the order of the board making a levy of taxes under Laws 1911, page 483, section 65, requiring the board to levy a tax of not less than five nor more than ten mills for school purposes.—*Fenton v. Board of Commrs.*, 20 Idaho, 392, 119 Pac. 41; *Dart v. Board of Commrs.*, 20 Idaho, 445, 119 Pac. 52; *Independent School Dist. v. Board of Commrs.*, 20 Idaho, 448, 119 Pac. 52.

R. C. 1962 authorizes the board of commissioners to bond the county for roads and bridges. R. C. 1963 provides, among other things, that the board must cause to be levied annually upon all of the taxable property of the county, in addition to other authorized taxes, a sufficient sum to pay the interest on all such bonds. Held, that the provisions of said sections construed together show that the legislature intended such bonds should be binding obligations upon all of the property in the county.—*Reinhart v. Canyon County*, 22 Idaho, 348, 125 Pac. 791.

Laws 1911, page 121, and R. C. 887a, as amended by Laws 1911, page 168, provide that in case the construction, maintenance, repair or improvement of any highway or portion thereof within a county and not included within a highway district would also be a benefit to such district, the highway board of the district and the board of county commissioners have power to contract each with the other for a division and apportionment of the cost of such construction, etc., and in case they fail to agree the proper action may be brought therefor in the district court. Held, that in such a case the board of county commissioners has the power and authority to levy the tax upon all of the property within the county for the payment of such bonds and the interest thereon.—*Reinhart v. Canyon County*, 22 Idaho, 348, 125 Pac. 791.

Where the law authorizes the issuance of bonds for the purpose of constructing and repairing roads and bridges, the statute does not mean merely the building of new roads, but it means the betterment of roads already in existence, as well as the constructing of new roads and bridges, and for that purpose the bonds of the county may be issued, if duly authorized by the vote of the taxpayers of the county.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

The issuance of the bonds authorized by an election held in Ada county for the improvement and repair of roads and bridges therein is not prohibited by the provisions of Const., article 7, section 15, and article 8, section 3, or R. C. 869, 900, and even though the board of county commissioners may intend to illegally expend some of the proceeds of said bond issue, that does not make void the issuance of such bonds.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

Where a systematic improvement of a road system of a county is undertaken, as in this case, and in the prosecution of that work roads and bridges are repaired and put in good condition, the expense thereof may be

paid out of the proceeds of a bond issue.—Independent Highway etc. v. Ada Co., 24 Idaho, 416, 134 Pac. 542.

Where a notice of an election for a proposed bond issue under R. C. 1962, 1968, specified that the proceeds thereof were to be used "in the construction, building and repair of roads and bridges," the notice does not state a double purpose rendering the election void.—Independent Highway etc. v. Ada Co., 24 Idaho, 416, 134 Pac. 542.

Where a board of county commissioners declares by resolution that, in the opinion of the board, it is for the best interests of the county and the public good to bond the county for \$200,000 for the construction and repair of roads and bridges, and the notice calling the election recites such facts and proceeds as follows: "Notice is hereby given that on Wednesday the 25th day of June, 1913, an election shall be held according to law for the purpose of determining whether or not the said Ada county, state of Idaho, shall issue bonds in the sum of two hundred thousand dollars, the proceeds thereof to be used in the construction, building and repair of roads and bridges within said Ada county, state of Idaho," such notice is sufficient under R. C. 1968, and it was not necessary to specify particularly the roads or bridges that were to be constructed or repaired or the amount to be used for bridges and the amount to be used for roads.—Independent Highway etc. v. Ada Co., 24 Idaho, 416, 134 Pac. 542.

Editorial Notes.

Interest on county warrants: 3 Ann. Cas. 459; 17 L. R. A., N. S., 552.

When limitations commence to run against action on county warrant: 10 L. R. A., N. S., 200.

V. CLAIMS AGAINST COUNTY.

Adjustment on annexation or division. See ante, I, (D).

Claims of county commissioners for services or on contracts. See ante, II, (C), 3.

Claim of physician for making post-mortem examination. See Coroners.

Liability for expenses of extradition proceedings. See Extradition.

Presentation by municipality of claim for proportion of road taxes. See Taxation.

Right of justice of the peace to bind county for keeping of person who is an indigent sick person. See Paupers.

Under act of January 15, 1869, section 19, providing that on appeal from an order of the board of county commissioners, "the case shall be heard anew, and the court may affirm, reverse, annul or modify the order or decision appealed from," a money judgment cannot be rendered either against the board or the county on an appeal from an order rejecting a claim against the county.—Gorman v. Commissioners Boise County, 1 Idaho, 627.

Under R. S. 1775, providing that the board of county commissioners may allow claims against the county in part and draw a warrant for the portion allowed, on the claimant filing a receipt in full for his account, the

claimant must either forego the part of his claim rejected or sue for the whole amount claimed to be due.—Eakin v. Nez Perce County, 4 Idaho, 131, 36 Pac. 702.

Where bills against the county are presented and ordered paid by the county commissioners, the county can appeal from such order or bring suit to recover back the money paid under such order.—Ada County v. Gess, 4 Idaho, 611, 43 Pac. 71.

Under R. S. 1775, providing that when the board of commissioners finds that a claim presented is a proper county charge, but greater in amount than is justly due, the board may allow the claim in part and draw a warrant for the portion allowed, on the claimant filing a receipt in full for his account, the claimant must accept or reject the action of the board on the entire claim and he cannot appeal from that part of their action disallowing a portion of his claim.—Ellis v. Bingham Co., 7 Idaho, 86, 60 Pac. 79; Clyne v. Bingham Co., 7 Idaho, 75, 60 Pac. 76.

Items in a claim or account filed by an officer against a county must be specially set forth with such certainty that each item can be identified, and it can be ascertained from the statement thereof that it was necessary.—Clyne v. Bingham Co., 7 Idaho, 75, 60 Pac. 76.

Under R. S. 1775, providing that when the board of commissioners finds that the claim presented is a proper charge against the county, but greater in amount than is due, the board may allow the claim in part and draw a warrant for the portion allowed, on the claimant filing a receipt in full for his claim, acceptance of a warrant for part of the claim allowed estops the claimant from appealing from the order or from asserting a claim to that part of the claim disallowed.—Ellis v. Bingham Co., 7 Idaho, 86, 60 Pac. 79.

Where a claim against a county is rejected on the sole ground that it is not a proper charge against the county and the form of the claim and its proper presentation are not questioned, the complainant need not cover all matter required by the statutes in relation to the form and presentation of such claim.—Taylor v. Canyon County, 7 Idaho, 171, 61 Pac. 521.

Where the holder of warrants against a county presents the same for payment and receives in lieu thereof checks on an insolvent bank, which checks are not paid, he can recover from the county the amount of the original debt with accrued interest.—Chambers v. Custer County, 8 Idaho, 724, 71 Pac. 113.

R. S. 1776, as amended by Laws 1899, page 248, provides the right of appeal only for persons and taxpayers from decisions of the county commissioners and does not contemplate that the county itself as a municipal corporation should appeal from the action or order of its own board of county commissioners.—McNutt v. Lemhi County, 12 Idaho, 63, 84 Pac. 1054.

Corrupt or willful allowance of illegal claims by the county commissioners may be reached by proceedings under R. S. 7445 or

by appeal, but not by proceedings under R. S. 7459.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

Under R. C. 1953, an appeal from an order of the board of county commissioners must be tried anew in the district court, and the board of county commissioners or the person in whose favor a claim is allowed has the affirmative in said trial, and must produce evidence sufficient to make a prima facie case.—*Prothero v. Board of Comms.*, 22 Idaho, 598, 127 Pac. 175.

Editorial Notes.

Counties, claims against, effect of allowance or rejection of: 55 Am. St. Rep. 203.

Estoppel to contest illegal claims or expenditures: 137 Am. St. Rep. 354.

VI. ACTIONS.

See, also, ante, IV.

Actions relating to the apportionment of county indebtedness. See ante, I.

Right of county attorney to take appeal. See District and Prosecuting Attorneys.

Necessity of undertaking on appeal from district court from order of commissioners. See Appeal and Error, VII, (C), 2.

Stipulation of county attorney limiting issues on appeal from board. See District and Prosecuting Attorneys.

On a writ of error from a judgment of the district court modifying an order of the board of county commissioners fixing the assessment of plaintiff in error, the record need not show that plaintiff in error has paid or tendered the tax on its property upon the valuation thereof as fixed by the commissioners.—*Van Camp v. Commissioners Custer County*, 2 Idaho, 29, 2 Pac. 721.

R. S. 4090 provides that all actions must be brought in the name of the party in interest. R. S. 1732 provides that all acts respecting the property and rights of the counties shall be in the names of the respective counties. R. S. 1733 provides that counties may sue and be sued. Held, that an action by a county must be in its corporate name.—*United States v. Shoup*, 2 Idaho, 493, 21 Pac. 656.

In an action against a county, the complaint alleged that the board of county commissioners determined that it was essential to purchase real estate upon which to erect a courthouse and jail; that appraisers were duly appointed and qualified and appraised plaintiff's property at \$4,500; that said appraisers reported and were duly discharged; that the plaintiff then offered to sell said property for \$4,000, which offer was duly accepted by the county commissioners; that the plaintiff, by deed, conveyed said property to the county; that a warrant was issued to plaintiff for \$4,000 in payment for said property; that at the time the said warrant was issued the constitutional limit of indebtedness had not been reached, and that the county treasurer refused to pay the amount of the warrant. The second count of the complaint alleged a quantum valebat. Held, that the complaint was not

demurrable for misjoinder of causes of action, since the plaintiff's ground of recovery must rest on his contract, the second count being immaterial.—*Ball v. Bannock County*, 5 Idaho, 602, 51 Pac. 454.

In an action against a county and the treasurer thereof, in which the complaint alleges that the board of county commissioners ordered a warrant drawn for the purchase price of land sold to the county by plaintiff, that the warrant was issued and that the treasurer refused to pay the same, the complaint is not demurrable for misjoinder of parties defendant.—*Ball v. Bannock County*, 5 Idaho, 602, 51 Pac. 454.

On appeal in an action in which the county is a party, the transcript and the briefs of the appellant must be served on the attorney general under supreme court rules 6, paragraph 3, and 27, paragraph 9.—*Corker v. Elmore County*, 11 Idaho, 787, 84 Pac. 509.

The payment of the costs in a case which has been decided against the county is not a bar to the prosecution of an appeal by the county.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

COUNTY ATTORNEYS.

See District and Prosecuting Attorneys.

COURT REPORTER.

Court reporter. See Courts, II, (A).

COURTS.

- I. NATURE, EXTENT AND EXERCISE OF JURISDICTION IN GENERAL.
- II. ESTABLISHMENT, ORGANIZATION AND PROCEDURE IN GENERAL.
 - (A) Creation and Constitution and Court Officers.
 - (B) Terms, Vacations, Place and Time of Holding Court, Courthouses and Accommodations.
 - (C) Rules of Court and Conduct of Business.
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- III. COURTS OF GENERAL ORIGINAL JURISDICTION.
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- VI. COURTS OF APPELLATE JURISDICTION.
- VII. UNITED STATES COURTS.
- VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

Court officers, and jurisdiction thereof. See Attorney and Client; Clerks of Courts; District and Prosecuting Attorneys; Judges; Sheriffs and Constables.

Contempt of court. See Contempt.

Courts of special jurisdiction and procedure therein.

See Equity; Criminal Law; Justices of the Peace. Jurisdiction of district court over Indian reservations. See Indians.

Jurisdiction over and proceedings relating to particular classes of persons, species of property, etc.

See Infants; Indians; Corporations; Partnership, etc.

Probate courts exercising civil and criminal jurisdiction. See Justices of the Peace.

I. NATURE, EXTENT AND EXERCISE OF JURISDICTION IN GENERAL.

Agreement ousting jurisdiction. See Contracts, I, (F).

Appellate jurisdiction. See Appeal and Error.

Criminal jurisdiction. See Criminal Law.

Jurisdiction of justices of the peace. See Justices of the Peace.

Effect of absence of defendant from state on right to injunctive relief. See Injunctions, VI.

Proceeding without or in excess of jurisdiction as ground for writ of prohibition. See Prohibition.

A mere grant of jurisdiction to a particular court without words of exclusion as to other courts, previously possessing like powers, will only have the effect of constituting the former court a court of concurrent jurisdiction with the latter.—*Greathouse v. Heed*, 1 Idaho, 494.

Act of Congress of December 13, 1870, gave jurisdiction to the probate courts in civil cases where the damages or debts claimed did not exceed \$500, etc., and in such criminal cases as do not require the intervention of a grand jury. The legislature, by act of January 11, 1871, provided that the jurisdiction of district and probate courts, in certain cases, should be concurrent. Held, that it was competent for the territorial legislature to thus limit and define the character of the probate court's jurisdiction except as to the amount involved.—*Greathouse v. Heed*, 1 Idaho, 494.

The district courts of the territory are not United States courts, but territorial courts with the jurisdiction of the circuit and district courts of the United States conferred upon them by law.—*Pickett v. United States*, 1 Idaho, 523.

A suit brought in the name of the people of the territory, on the territorial side of the court, for the removal of a county officer, is properly brought.—*People v. Curtis*, 1 Idaho, 753.

The territorial district courts are not district courts of the United States, but are in some respects *sui generis*, having a broader and more extensive jurisdiction than state courts or the district and circuit courts of the United States.—*United States v. Mays*, 1 Idaho, 763.

In matters relating to guardianship, probate courts are courts of general jurisdiction, whose records import verity and are not open to collateral attack.—*In re Brady*, 10 Idaho, 366, 79 Pac. 75.

When a court is satisfied that it is without jurisdiction to hear and decide questions presented by the pleadings, it may of its own motion refuse to try the case.—*Abrams v. White*, 11 Idaho, 497, 83 Pac. 602.

Under Const., article 5, section 21, and R. S. 3842, probate courts are courts of record only in all matters of probate, settlement

of estates of deceased persons and appointment of guardians, and are not courts of record in the trial of civil or criminal actions.—*Dewey v. Schreiber Imp. Co.*, 12 Idaho, 280, 85 Pac. 921.

Under Const., article 5, section 20, giving probate courts sole and exclusive original jurisdiction in all probate matters, probate courts are courts of record as to all probate matters, and to the judgment, records and proceedings thereof in such matters absolute verity is attached as fully as in other courts of record.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Probate courts are courts of record in the matter of appointment of guardians and all other matters within the probate department or jurisdiction of such courts, and their duty to keep and maintain such records as are commonly kept by courts of record is imposed by the constitution, and therefore exists independently of any legislation to that effect.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

Whether the particular facts of the case authorize the trial court to enter a decree for the partition of real property does not involve the jurisdiction of the court to act in such matter, but relates solely to the inquiry: Did the court act erroneously upon the facts presented?—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

There is a clear distinction between jurisdiction to act and action which is merely erroneous; the former involving the power to act at all, and the latter involving the authority to act in the particular way in which the court did act.—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

Jurisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases, not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending, and not whether the particular case is one that presents the cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

The phrase "subject matter," as used in an inquiry as to jurisdiction, means the thing in issue, or the authority of the court to exercise judicial power over the class of cases or proceedings to which the one under consideration belongs.—*Wayne v. Alspach*, 20 Idaho, 144, 116 Pac. 1033.

The court having jurisdiction of the "subject matter," and having acquired jurisdiction of the "person," has complete jurisdiction.—*Wayne v. Alspach*, 20 Idaho, 144, 116 Pac. 1033.

Editorial Notes.

Jurisdiction of equity over land and property in a foreign jurisdiction: 67 Am Dec. 95; 69 L. R. A. 673; 23 L. R. A., N. S., 924; 27 L. R. A., N. S., 420.

Jurisdiction of courts to enforce causes of action created by the statutes of another state: 14 Am. St. Rep. 350.

Jurisdiction of courts to review proceedings of bodies having jurisdiction to judge of the election and qualification of their members: 16 Am. St. Rep. 220.

Jurisdiction of courts to enforce contracts made beyond the limits of the state: 55 Am. St. Rep. 774.

Jurisdiction of action at law or for damages for breach of contract, or for tort, concerning real property in another state or county: 26 L. R. A., N. S., 928.

II. ESTABLISHMENT, ORGANIZATION AND PROCEDURE IN GENERAL.

(A) CREATION AND CONSTITUTION, AND COURT OFFICERS.

References. See *Reference*.

Fees of stenographer as costs. See *Costs*, V.

Preparation and certification of transcript of evidence by court reporter. See *Appeal and Error*, X, (O).

Idaho Gen. Laws, 1888-89, page 25, authorizing the judge of each district court to appoint an official reporter, defining his duties, fixing his compensation, the time of payment and authorizing the controller to draw his warrant to pay the same when due, sufficiently makes an appropriation for the payment of the claims of such officers and hence is not in conflict with Const., article 7, section 13.—*Gilbert v. Moody*, 3 Idaho, 3, 25 Pac. 1092.

Stenographic reporters appointed by district judges under Laws 1888-89, page 25, are entitled to the compensation fixed by said act.—*Gilbert v. Moody*, 3 Idaho, 3, 25 Pac. 1092.

Under Idaho Gen. Laws, 1888-89, page 25, authorizing the judge of each district court to appoint an official reporter, defining his duties, fixing his compensation, etc., mandamus will issue to compel the state auditor to issue a warrant for the payment of the court reporter's salary as required by said act.—*Gilbert v. Moody*, 3 Idaho, 3, 25 Pac. 1092.

The fact that there are no funds in the hands of the treasurer of the state with which to pay a claim for the salary of a court reporter will not excuse the auditor from issuing his warrant.—*Gilbert v. Moody*, 3 Idaho, 3, 25 Pac. 1092.

All fees earned by the reporter or his deputy under the provisions of the reporter statutes, which include R. C. 3980 and the following seven sections, must be turned into the state treasury, and the reporter cannot evade that requirement by reducing the stenographic record to narrative form.—*Keane v. Pittsburgh Lead Min. Co.*, 18 Idaho, 711, 112 Pac. 214.

(B) TERMS, VACATIONS, PLACE AND TIME OF HOLDING COURT, COURT-HOUSES AND ACCOMMODATIONS.

The judges of the territorial supreme court have power when assembled at the capitol to

fix the time and places for holding court for the trial of cases in which the United States is a party at such places and times in the respective districts as may seem proper.—*United States v. Mays*, 1 Idaho, 763; *United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407; *United States v. Cozzens*, 2 Idaho, 486, 21 Pac. 409.

Under the organic law of Idaho and the general territorial laws, in all causes where the United States is a party, trials can be had in but one place in each district.—*People v. Heed*, 1 Idaho, 402.

Under the organic law of Idaho and the general territorial laws, in all causes where the territory is a party, trials can be had in such counties or subdivisions in each judicial district as shall seem proper and convenient to judges.—*People v. Heed*, 1 Idaho, 402.

Courts of justice have the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the discharge of the duties thereof in the administration of justice.—*Schmelzel v. Board of County Commrs.*, 16 Idaho, 32, 133 Am. St. Rep. 89, 17 Ann. Cas. 1226, 21 L. R. A., N. S., 199, 100 Pac. 106.

(C) RULES OF COURT AND CONDUCT OF BUSINESS.

Where the legislature has failed to prescribe the practice in the district courts of the territory in cases arising under the constitution and laws of the United States, as well as in those arising under the laws of the territory, the territorial courts are at liberty to make orders and adopt regulations of their own concerning the practice in the United States cases.—*United States v. Mays*, 1 Idaho, 763.

The trial court has authority to amend its minutes to conform to the fact at any time during the term.—*State v. Griffin*, 4 Idaho, 459, 40 Pac. 60.

A trial judge may announce an order ruling on a demurrer from the bench and have it entered on the court minutes and the same will be as much an order of the court and have the same force and effect as a formal written order signed and filed with the clerk.—*Perkins v. Loux* (on rehearing), 14 Idaho, 607, 95 Pac. 696.

Editorial Notes.

Rules of courts, authority of to enact: 41 Am. St. Rep. 639.

(D) RULES OF DECISIONS, ADJUDICATIONS, OPINIONS AND RECORDS.

Concurrent and conflicting jurisdiction. See post, VIII.

Construction of statutes adopted from other states. See *Statutes*.

Decision of appellate court as law of the case in lower court or on subsequent appeal. See *Appeal and Error*, XVI, (K); *Criminal Law*, XV, (G), 7. Following land office decision. See *Public Lands*, II, (I).

An entry on the records of the supreme court cannot be attacked on the ground of fraud on an objection to its introduction as

evidence. Its validity can only be questioned upon allegations of fraud fully and fairly made, and issue positively tendered.—*In re Havird*, 2 Idaho, 687, 24 Pac. 542.

The doctrine of *stare decisis* applies when a decision has been recognized as a law of property and forms a definite basis for contracts and business transactions.—*Parke v. Boulware*, 9 Idaho, 225, 73 Pac. 19.

Editorial Notes.

Stare decisis, rule of, when applicable: 27 Am. Dec. 628; 73 Am. St. Rep. 98.

When the beneficial results to be obtained by a departure from the construction placed by the court on a constitutional or statutory provision will not greatly exceed the disastrous effects likely to flow therefrom, the court will decline to reopen those questions, where rights have become settled, and have been acquiesced in by the legislature and the people for any reasonable period.—*Walling v. Bown*, 9 Idaho, 740, 2 Ann. Cas. 720, 76 Pac. 318; affirmed, *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503, 27 Sup. Ct. Rep. 292.

The decision of the land department of the United States on the question of the mineral or nonmineral character of a part of the public domain is conclusive on the state courts.—*Le Fevre v. Amonson*, 11 Idaho, 45, 81 Pac. 71.

The decisions of the federal courts are binding on state courts as to the construction of the United States constitution and statutes.—*In re Case*, 20 Idaho, 128, 116 Pac. 1087.

Where a court of record discovers that the minute entry of an order of court is false and does not correctly state the order, the court has the power and jurisdiction to correct the same so as to make the record speak the truth.—*State v. Winter*, 24 Idaho, 749, 135 Pac. 739.

Editorial Notes.

When decision of United States supreme court is not binding on state court: Ann. Cas. 1913E, 281.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

Jurisdiction over infants. See *Infants*.

Original jurisdiction of supreme court. See post, VI.

Criminal jurisdiction of district courts. See *Criminal Law*, IV.

The district court has equitable jurisdiction under the constitution and statutes and is authorized to exercise it in all cases where the remedy at law is not adequate, complete and certain, so as to meet all the requirements of justice.—*Coleman v. Jagers*, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894.

Under Const., article 5, section 20, the district court has original jurisdiction in all cases both at law and in equity as well as certain appellate jurisdiction.—*Coleman v. Jagers*, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894.

Under Const., article 5, section 20, providing that "the district court shall have original jurisdiction in all cases both at law and in equity, and such appellate jurisdiction as may be conferred by law," the legislature is the sole and exclusive judge as to the extent and scope of the "appellate jurisdiction" they will confer on the district courts and they may limit such jurisdiction or not grant it at all; but they cannot grant to the district court, under the guise of appellate jurisdiction, original jurisdiction in probate matters.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Under Const., article 5, section 20, providing that the district court has jurisdiction in all cases both in law and equity, probate and guardianship matters are not cases at law and equity.—*Idaho Trust Co. v. Miller*, 16 Idaho, 308, 102 Pac. 360.

Under Const., article 5, section 20, the district court has original jurisdiction in all cases both in law and equity, but it does not have original jurisdiction in probate and guardianship matters, original jurisdiction thereof being vested in the probate court under Const., article 5, section 20.—*Idaho Trust Co. v. Miller*, 16 Idaho, 308, 102 Pac. 360.

A judgment rendered in the district court against the board of trustees of the Albion State Normal School is in fact a judgment against the state, and is not sufficient as a claim to be filed against the state with the state board of examiners.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761.

An action in the supreme court against the state based upon a judgment rendered in a district court of the state fails to state a cause of action, and a demurrer thereto will be sustained.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761.

The district court has no jurisdiction of an action against the state which involves a claim against the state, such jurisdiction being vested in the supreme court under Const., article 5, section 10.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761.

Under R. C. 5468, providing that when a claim has been presented to an administrator and rejected by him, the holder must bring action within a specified time in the proper court, the action to be brought on a money demand is an action at law, and if the amount claimed is within the jurisdiction of a justice court or probate court action may be brought therein, but if it is not, the action must be brought in the district court.—*Idaho Trust Co. v. Miller*, 16 Idaho, 308, 102 Pac. 360.

Under Const., article 5, section 20, and R. C. 3830, the district court has original jurisdiction in all cases both in law and in equity.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

Criminal jurisdiction of justices' courts. See *Criminal Law*, IV.

Where a claim for over \$1,000 was rejected by an administrator, the district court had

jurisdiction to try an action brought thereon, and owing to the amount involved the probate court had no jurisdiction to hear or determine such action.—*Idaho Trust Co. v. Miller*, 16 Idaho, 308, 102 Pac. 360.

V. COURTS OF PROBATE JURISDICTION.

Probate courts as courts of record. See ante, I. Concurrent, conflicting or exclusive jurisdiction. See post, VIII.

Jurisdiction over infants and delinquent children. See Infants.

Jurisdiction of proceedings for appointment of guardian. See Guardian and Ward.

Conclusiveness of judgment of probate court. See Judgment.

Process, pleadings, proceedings and exercise of civil jurisdiction in general. See Justices of the Peace. Amendment of pleading on appeal from probate court in probate matter. See Pleadings, VI.

Legislative discretion to regulate appeals from probate court. See Appeal and Error, III, (A).

Appeals from orders of probate court relating to sales of property. See Executors and Administrators, VIII.

Appeals in probate proceedings. See Wills, V.

Acts of March 2, 1853, and March 3, 1863, vesting the judicial power of the state in the supreme court, district court, probate courts and justices of the peace, did not confer appellate jurisdiction on probate courts by mere failure to prohibit the exercise of such jurisdiction.—*Moore v. Koubly*, 1 Idaho, 55.

Probate courts are courts of special and limited statutory jurisdiction, and where an order for the sale of real estate is attacked, it is necessary to show that there was a petition therefor sufficient to show legal grounds for the order.—*Ethell v. Nichols*, 1 Idaho, 741, reversed by *Clark v. Rossier*, 10 Idaho, 348, 3 Ann. Cas. 231, 78 Pac. 358.

Under R. S. 3862, subdivision 8, providing that every court has power to amend and control its process and orders so as to make them conformable to law and justice, an order confirming a sale of real estate by an administrator is not res adjudicata but may be set aside by the probate court for fraud.—*State ex rel. Chemung Min. Co. v. Cunningham*, 6 Idaho, 113, 53 Pac. 451.

Probate courts of this state, as far as their jurisdiction in regard to probate and guardianship matters is concerned, are courts of general jurisdiction.—*In re Brady*, 10 Idaho, 366, 79 Pac. 75; *Clark v. Rossier*, 10 Idaho, 348, 3 Ann. Cas. 231, 78 Pac. 358.

Under the organic act the probate courts of Idaho had no jurisdiction of civil actions but had original jurisdiction in probate matters until Act Cong. Dec. 13, 1870, c. 1, 16 Stat. 395, which gave such courts jurisdiction of all civil cases where the matter in controversy did not exceed \$500 and jurisdiction in criminal cases that did not require the intervention of a grand jury.—*Dewey v. Schreiber Implement Co.*, 12 Idaho, 280, 85 Pac. 921.

Under Const., article 5, section 21, probate courts have original jurisdiction in probate matters and jurisdiction in civil cases

where the amount involved does not exceed \$500, and concurrent jurisdiction with justices of the peace in criminal cases.—*Dewey v. Schreiber Implement Co.*, 12 Idaho, 280, 85 Pac. 921.

Laws 1903, page 94, amending R. S. 3841, paragraph 9, granting to the probate court jurisdiction to hear and determine actions to enforce mechanics' and laborers' liens, mortgages and other liens upon real and personal property, is void under Const., article 5, section 21, which provides that probate courts shall be courts of record, having original jurisdiction in all matters of probate, settlement of estates of deceased persons, and appointment of guardians; also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed \$500.—*Dewey v. Schreiber Imp. Co.*, 12 Idaho, 280, 85 Pac. 921.

Const., article 5, section 21, giving probate courts original jurisdiction in certain civil cases includes only cases to be settled in actions at law, and does not include suits in equity.—*Dewey v. Schreiber Implement Co.*, 12 Idaho, 280, 85 Pac. 921.

Where an appeal is taken to the district court from the probate court, and the probate court fails to transmit the undertaking on appeal or deposit made in lieu thereof, the district court may, on proper showing, direct the probate court to certify the fact to the district court.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

A judgment of the probate court recited: "The court is of the opinion that the petition to set apart homestead and exempt personal property should be denied, and it is so ordered." The notice of appeal therefrom specified two orders: one the order relating to the homestead, the other, the order as to exempt property. Held, that only one undertaking on appeal or one deposit of \$100 was required under Laws 1903, page 372, section 1.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Under Laws 1903, page 372, providing for appeals in probate matters to the district court, the judgment of the district court on appeal should be certified back to the probate court for execution in accordance therewith.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Under Laws 1903, page 372, providing for a trial de novo in the district court, on appeal from the probate court in probate matters, trial de novo means a trial on the same papers and the same issues had below.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Under Laws 1903, page 372, section 3, providing for appeals in probate matters if the appeal is taken on questions of law alone, the district court will review only the questions of law raised in the probate court and will either reverse the judgment and direct the probate court to proceed accordingly or affirm the judgment and certify it back to the probate court with its decision.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Where an appeal is taken from the probate court on questions both of law and fact in a probate matter, and the cause is not reversed on questions of law the same questions of fact as were tried in the probate court will be retried in the district court.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31; *Estate of Christensen*, 15 Idaho, 692, 99 Pac. 829; *Kent v. Dalrymple*, 23 Idaho, 694, 132 Pac. 301.

Where an appeal is taken from the probate court on questions both of law and fact in a probate matter, the district court will first try the questions of law, and if the case is reversed on questions of law the questions of fact will not be tried.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31; *Estate of Christensen*, 15 Idaho, 692, 99 Pac. 829; *Kent v. Dalrymple*, 23 Idaho, 694, 132 Pac. 301.

Where an appeal is taken from an order confirming the sale of real estate, the fact that either party failed to present evidence in support of the issues made in the probate court is not ground for dismissing the appeal, and the proof offered or a showing that no proof was offered in the probate court cannot be presented to the district court by affidavit in support of a motion to dismiss the appeal as the cause is to be tried de novo upon the issues made in the probate court.—*Estate of Christensen*, 15 Idaho, 692, 99 Pac. 829.

The right of appeal in probate matters, from the probate to the district court, is of purely statutory regulation, and where the right of appeal is challenged, the authority for such appeal must be found in the statute.—*Estate of Coryell*, 16 Idaho, 201, 101 Pac. 723.

The probate court has no jurisdiction to determine adverse claims to title to real estate as between the estate or heirs thereof and third parties.—*Miller v. Mitcham*, 21 Idaho, 741, 123 Pac. 941.

Where issues of law and issues of fact are presented by proper motions and pleadings filed in a cause pending in the probate court in probate matters, it is the duty of the probate judge to pass upon such issues in the order presented, and it is error for the court to refuse to determine such issues and when an appeal is taken to the district court upon issues of law and fact, it is the duty of the district judge to pass upon the same issues tried in the probate court, and the refusal to pass upon such questions is reversible error.—*Kent v. Dalrymple*, 23 Idaho, 694, 132 Pac. 301.

Editorial Notes.

Probate courts, conclusiveness of decrees of, and power of chancery to correct: 48 Am. Dec. 744.

Jurisdiction of probate courts, collateral attack on letters of administration granted by: 81 Am. St. Rep. 535.

Of probate courts, grant by of letters of administration on the estate of a living person: 30 Am. Rep. 748; 47 Am. Rep. 465.

Power of probate court to determine questions involving incidentally title to real estate: 5 Ann. Cas. 192.

Jurisdiction of probate court to determine questions of title to property between estate and stranger: 6 Ann. Cas. 878.

VI. COURTS OF APPELLATE JURISDICTION.

Original jurisdiction of supreme court in habeas corpus proceedings. See *Habeas Corpus*, I.

Under Laws 1899, page 6, section 3, providing that, unless by agreement of parties, causes in which writs of error or appeals are taken to the supreme court for certain counties shall be heard at Lewiston, and for certain other counties shall be heard at Boise City, the place of hearing of an appeal to the supreme court from a judgment in a proceeding to remove a county officer is determined the same as other causes, as the term "causes" is sufficiently broad to include special proceedings.—*Mahoney v. Elliott*, 8 Idaho, 190, 67 Pac. 317.

Under R. S. 4994, giving the supreme court jurisdiction to issue writs of prohibition, the word "jurisdiction" means the right to hear and determine a matter, and carries with it the idea of exercising judicial or quasi-judicial functions.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

Under Const., article 5, section 9, the supreme court has power to appoint a receiver pending the litigation.—*Chemung Min. Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619.

Under R. C. 517, creating the Albion State Normal School, consent is given that the board of trustees may sue and be sued; and this, taken in connection with Const., article 5, section 10, gives jurisdiction only to the supreme court in actions involving claims against the state.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761.

VII. UNITED STATES COURTS.

Removal of causes. See *Removal of Causes*.

Territorial district courts. See *ante*, I.

VIII. CONCURRENT AND CONFLICTING JURISDICTION AND COMITY.

Binding effect of order remanding case after removal to federal court. See *Removal of Causes*.

Jurisdiction of state courts to try Indians for criminal offenses; and of actions by or against Indians or persons living on Indian lands. See *Indians*.

Conclusiveness of decision of federal court and of land department. See *ante*, II, (D).

Foreign divorces. See *Divorces*.

Transfer laws of another state as affecting property in this state. See *Sales*, II.

Act of Congress of December 13, 1870, giving jurisdiction to the probate courts in certain cases and providing "that this act shall not affect any suit pending in the district courts of said territory at the time of its passage," does not confer exclusive jurisdiction upon those courts in such cases, but the power of the district courts and the probate courts is by said act made concurrent in the

cases therein specified.—*Greathouse v. Heed*, 1 Idaho, 494.

A citizen of another state, who has submitted himself to the jurisdiction of a court of Idaho, which has in its possession assets of an insolvent, will not be given or permitted an advantage over resident citizens and those of other states in recovering debts due from such insolvent estate, since comity between states does not require giving to foreign creditors an advantage over resident creditors of an insolvent.—*Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157.

The rule that full faith and credit shall be given in each state to the judicial proceeding of every other state does not require the court of a state that first obtained possession of the assets of an insolvent to give up such assets to a creditor of such insolvent who acquired title to shares of stock representing such assets subsequent to the time of the appointment of a receiver for the estate of such insolvent and taking possession of such assets by the receiver.—*Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157.

Where a corporation of Utah has submitted itself to the jurisdiction of a court of this state in certain insolvency proceedings, and thereafter by proceedings in the courts of another state, claims to have secured title to shares of stock which are evidence of assets in the custody of an Idaho court, such corporation will not be assisted by the courts of this state in obtaining such assets, to the detriment of citizens of this and other states who have filed and proved their claims in the court of this state having possession of such assets.—*Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157.

State courts have no jurisdiction to determine the mineral or nonmineral character of public lands while the claims of the respective parties on such question are pending before the land department of the general government.—*Le Fevre v. Amonson*, 11 Idaho, 45, 81 Pac. 71.

Probate courts have exclusive jurisdiction of the settlement of the estates of deceased persons and errors or mistakes may be corrected by proper proceedings in that court, and if not corrected, an appeal lies to the district court.—*Abrams v. White*, 11 Idaho, 497, 83 Pac. 602.

Where a water company has constructed a dam across a stream for the purpose of impounding water, and the dam or structure results in the flooding of the lands of another, and an action for condemnation of such land is thereafter prosecuted in the federal court, and a judgment is entered in favor of the land owner for the value of the land taken and the company thereupon appeals to the United States circuit court of appeals, the state court has the jurisdiction to issue an injunction to restrain such company from flooding and submerging the land sought to be condemned until such time as the value thereof has been paid to the land owner or into court for his use and benefit, as provided by law. In such case, there is no conflict of jurisdiction between the state and the federal courts, and no rule of law or

comity requires the state court to desist or refrain from taking jurisdiction for the purpose of protecting the land owner in his ownership and right of possession.—*Ryan v. Weiser Valley L. & W. Co.*, 20 Idaho, 288, 118 Pac. 769.

Unless the jurisdiction conferred by the constitution and laws of the United States upon the federal courts is made exclusive of the state courts, state courts retain jurisdiction of all actions, wherein they are competent to take jurisdiction under the state laws.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

The state courts have concurrent jurisdiction in all matter wherein the jurisdiction of federal courts is not made exclusive by the constitution or acts of Congress.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

State courts have jurisdiction of actions to enforce liabilities of stockholders of national banks on stock assessments.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

Section 256 of the U. S. Judiciary Act (Act March 3, 1911, c. 231, 36 Stat. 1160 [U. S. Comp. Stats. Supp. 1911, p. 234]) declares the jurisdiction of the federal district courts to be exclusive of the state courts in the particular cases set forth in said section, but this section does not include such actions as the one at bar.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

Editorial Notes.

Federal courts, state courts cannot lawfully interfere with execution of final process of: 76 Am. Dec. 223.

Courts, concurrent and conflicting jurisdiction, authority of state courts on habeas corpus: 37 Am. Dec. 200.

Courts of concurrent jurisdiction, conflicts between: 29 Am. St. Rep. 310.

Right to control action as between two courts of concurrent jurisdiction: Ann. Cas. 1912A, 150.

COVENANTS.

I. REQUISITES AND VALIDITY.

II. CONSTRUCTION AND OPERATION.

III. PERFORMANCE OR BREACH.

IV. ACTIONS FOR BREACH.

Requisites, validity and effect of instruments containing covenants, and covenants incident to particular classes of instruments. See *Deeds*; *Mortgages*; *Landlord and Tenant*; *Contracts*, and other specific heads.

Restrainng breach of covenant. See *Injunction*.

Compelling performance of covenants. See *Specific Performance*.

I. REQUISITES AND VALIDITY.

(No paragraphs.)

II. CONSTRUCTION AND OPERATION.

Under R. S. 2935, providing the effect of the word "grant" in conveyances, a deed whereby the grantor "grants, bargains, sells and conveys" certain water rights impliedly

covenants that the property so conveyed is free from encumbrances, but is not a covenant of warranty of title or of quiet enjoyment against encumbrances.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

The mere fact that the purchaser of real property has knowledge of the existence of a private roadway across the land which he contracts to purchase will not defeat his right to insist upon a clear title from the seller who agrees to convey said lands free from encumbrances.—*Newmyer v. Roush*, 21 Idaho, 106, Ann. Cas. 1913D, 433, 120 Pac. 464.

Where the word "grant" is used in a conveyance, certain covenants are implied "unless restrained by express terms contained in such conveyance," and where there follows in the conveyance an express covenant of "quiet and peaceable possession," and where the implied covenants and the express covenants are entirely independent of each other and of a different character, they must be construed together and both permitted to stand, unless it clearly appears from such instrument that the express covenant was intended to restrict or limit the implied covenant.—*Polak v. Mattson*, 22 Idaho, 727, 128 Pac. 89.

Where taxes are legally levied on real estate, the lien attaches on the second Monday of January of that year, and where the grantor in a conveyance procures title to such real estate on the 23d day of May, 1906, the taxes levied for that year and the two years previous thereto were encumbrances on said real estate before the defendant acquired title thereto, and are not encumbrances "done, made, or suffered" by the grantor or any person claiming under him, unless it appears that he had agreed with his grantor to pay them.—*Polak v. Mattson*, 22 Idaho, 727, 128 Pac. 89.

Taxes which were a lien upon land at the time of its conveyance, although not payable until afterward, are not an encumbrance "suffered" by the grantor, where it is not shown that he was under any personal obligation to discharge the tax lien.—*Polak v. Mattson*, 22 Idaho, 727, 128 Pac. 89.

Under the implied covenants provided by R. C. 3120 from the use of the word "grant" in any conveyance, an encumbrance upon property at the time the grantor acquired title to it is not within the covenant against encumbrances "done, made or suffered" by the grantor, unless he has agreed to pay it.—*Polak v. Mattson*, 22 Idaho, 727, 128 Pac. 89.

Editorial Notes.

Construction of covenant in deed restricting building on premises to use as dwelling-house: Ann. Cas. 1912D, 477.

III. PERFORMANCE OR BREACH.

In case of breach of covenant against encumbrances, the breach thereof occurs when the deed is given and no eviction is necessary. *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

An easement and right of way across a tract of land for the purposes of maintaining

and operating an irrigation canal for the reclamation of arid land is not a breach of a covenant in a deed or contract of sale against encumbrances.—*Schurger v. Moorman*, 20 Idaho, 97, Ann. Cas. 1912D, 1114, 117 Pac. 122.

Under Act Cong. March 3, 1891, chapter 561, section 18, 26 Stat. 1101 (6 Fed. Stat. Ann., p. 508 [U. S. Comp. Stats. 1901, p. 1570]), Congress has specifically granted an easement and right of way over the public domain for ditches and canals to companies formed for the purposes of irrigation, and under R. C. 1630, the legislature has provided that maps of Carey act (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [U. S. Comp. Stats. 1901, p. 1554]) lands segregated for purposes of reclamation under the act of Congress shall show the locations of all ditches and canals, and that all lands filed upon under the Carey act shall be subject to easements and rights of way for irrigation canals necessary for the carrying of water to reclaim such lands. Held, that one who deals with lands taken and reclaimed under such acts is chargeable with notice of the provisions of the law in reference thereto.—*Schurger v. Moorman*, 20 Idaho, 97, Ann. Cas. 1912D, 1114, 117 Pac. 122.

Where a public highway has been constructed and opened and used by the public, and is of such general character as to give notice of its use, across a tract of land, it is not such an encumbrance as will constitute a breach of a covenant of warranty, and the purchaser of such land is presumed to have had in mind the existence of such easement, and that the parties in making such contract did not intend to include the same in the contract or conveyance.—*Newmyer v. Roush*, 21 Idaho, 106, Ann. Cas. 1913D, 433, 120 Pac. 464.

Where an easement is granted for a private roadway or passage over a tract of land and the use is limited to the person to whom the easement is granted, and his successors or assigns, and there is no indication of any intention to dedicate the same to a public use, and such private road or passageway is inclosed, such easement is a claim or right that interferes with the possession of the owner, and affects the estate and falls within the spirit and intent of a covenant of warranty, and is an encumbrance upon the estate.—*Newmyer v. Roush*, 21 Idaho, 106, Ann. Cas. 1913D, 433, 120 Pac. 464.

Where an easement and right of way have been granted by Congress or are provided for by the state legislature, over public lands belonging to the government or the state, as the case may be, the existence of such easements do not constitute a breach of covenant against encumbrances in subsequent conveyances of said land.—*Newmyer v. Roush*, 21 Idaho, 106, Ann. Cas. 1913D, 433, 120 Pac. 464.

Editorial Notes.

Covenants of warranty, when broken: 14 Am. Dec. 53.

Covenants not to sue, effect of: 36 Am. St. Rep. 145.

Acceptance of rent as waiver of breach of covenant against assignment or subletting: *Ann. Cas.* 1913A, 1202.

Breach of covenant of warranty or for quiet enjoyment by showing of undivided interest in tenant in common: *Ann. Cas.* 1913B, 847.

Existence of restriction on use of land as breach of covenant against encumbrances: *Ann. Cas.* 1913B, 1065; 4 L. R. A., N. S., 312; 32 L. R. A., N. S., 738.

IV. ACTIONS FOR BREACH.

In case of the breach of a covenant against encumbrances, the vendee may pay off the encumbrance and recoup the sum so paid against the amount due on the purchase price or he may assign the breach of such covenant as a defense to an action against him for the purchase price.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

From the fact that a vendee of real property has failed to record his deed, and thereby lost the title and right of possession as against a subsequent vendee of the same property, his vendor cannot be heard to complain of his failure to record the conveyance as a protection against the vendor's subsequent wrongful acts committed in violation of the covenants of his deed.—*Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A., N. S., 332, 100 Pac. 358.

In an action by an evicted vendee for breach of covenants of warranty and peaceable and quiet possession, the value of improvements placed on the land by such vendee is an element of the damages recoverable. *Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A., N. S., 332, 100 Pac. 358.

Where an evicted vendee sues his vendor for breach of his covenants of warranty and peaceable and quiet possession, the evicted vendee is entitled to fix the amount of damages sustained as of the date of the judgment of eviction.—*Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A., N. S., 332, 100 Pac. 358.

A vendee whose title has been defeated by the wrongful acts of his vendor in conveying the same property to a third person is entitled to recover such reasonable attorneys' fees as were necessarily expended by him in an endeavor to sustain his title and right of possession.—*Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A., N. S., 332, 100 Pac. 358.

Where a vendor having a good and perfect title conveys the property with covenants of warranty and for peaceable and quiet possession, and thereafter deeds the same property to another purchaser, and the latter places his deed of record prior to the recording of the first conveyance, and thereby takes the paramount title and right of possession, and the first vendee is evicted and sues his vendor for damages for breach of the covenants, the measure of damages to be adopted is the same as in cases where the vendor has contracted

and agreed to convey, and thereafter, having good title and right to convey, declines and refuses so to do. In other words, the measure of damages is adequate compensation for the actual injury sustained, or, as it is sometimes expressed "damages for loss of the bargain." *Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A., N. S., 332, 100 Pac. 358.

Editorial Notes.

Warranty of title, eviction necessary to recovery: 1 Am. Dec. 9.

Mutual and independent covenants, suit on, when may be maintained: 26 Am. Dec. 624.

Warrantor, when may be brought in to defend: 43 Am. Dec. 569.

Real and personal covenants and distinctions between: 47 Am. Dec. 569.

Covenants, actions for breach of covenant of seisin or of good right to convey, what damages recoverable in: 99 Am. Dec. 73.

Damages, measure of in actions for breach of covenant of quiet enjoyment: 58 Am. Rep. 606.

Actions for breach of warranty of title, damages recoverable for breach of: 24 Am. St. Rep. 266.

Building restrictions: 95 Am. St. Rep. 219.

Who is real party in interest by whom action must be brought on covenant, 64 L. R. A. 621.

Who may enforce restrictive covenant as to use of property: 37 L. R. A., N. S., 12.

Right to enforcement as affected by change in neighborhood: 28 L. R. A., N. S., 707.

CREDITOR'S SUIT.

Actions to set aside conveyances fraudulent as to creditors. See *Fraudulent Conveyances*.

Where the goods of a judgment debtor are claimed by a third person under an alleged bill of sale, and proceedings supplementary to execution under R. S. 4504 et seq. would not result in the application of the judgment debtor's property to the payment of the judgment without the separate action provided for in R. S. 4510, the plaintiffs have no adequate remedy at law by such proceedings, and therefore a creditor's bill will lie in favor of the judgment creditor.—*Gordon v. Lemp*, 7 Idaho, 677, 65 Pac. 444.

In an action in the nature of a creditor's bill, whereby creditors of defendant C. sought to subject certain merchandise in the possession of defendant L. to the payment of their judgments against C., the complaint alleged that C. executed a promissory note to L. and at the same time and for the same consideration executed a written contract purporting to sell to L. a certain stock of merchandise; that the contract was duly acknowledged as in case of a chattel mortgage, but was not recorded or disclosed to plaintiffs until after the delivery of the merchandise to L. some

months later; that said possession was demanded and received under said contract; that by the terms of the contract C. was appointed L.'s agent to hold and dispose of the property in the regular course of trade and keep up the stock, and to account for the same to L. at the end of six months; that C. conducted the business and added goods thereto by purchase, a part of such purchase price being included in plaintiff's judgments; that execution issued against C. and was returned unsatisfied; that C. remained in possession of the goods until being hard pressed by creditors he turned them over to L.; that L. had never foreclosed the chattel mortgage; that L. sold the goods and refused to account to C. or to plaintiffs for the proceeds thereof; that the contract between C. and L. was made for the purpose of enabling C. to continue business while insolvent and to replenish his stock, and that the transfer from C. to L. was without consideration and in trust for C. The complaint prayed that the contract be adjudged a chattel mortgage and void as against plaintiff's claims, for an accounting and for judgment against L. for the amount for which he should be found chargeable. Held, that the complaint stated a cause of action.—*Gordon v. Lemp*, 7 Idaho, 677, 65 Pac. 444.

Where in an action commenced by creditor's bill a judgment debtor's property in the hands of a defendant claiming title thereto is found to belong to such judgment debtor and to be amply sufficient to pay the costs and judgments against such debtor, there is no error in rendering judgment against such defendant for the full amount of such judgments and costs.—*Gordon v. Lemp*, 7 Idaho, 677, 65 Pac. 444.

Editorial Notes.

Claims in favor of which voluntary conveyances may be avoided: 52 Am. Dec. 113.

Demands which will support creditors' suits: 66 Am. St. Rep. 271.

Conditions precedent to equitable remedies of creditors: 23 L. R. A., N. S., 1.

CRIMINAL LAW.

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- IV. JURISDICTION.
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 — By officer of bank. See Banks and Banking, II.
 Purchase of chow in action by attorney. See Attorney and Client.
 Receiving deposits while bank insolvent. See Banks and Banking, II.
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 Witnesses and their examination. See Witnesses.
 Unlawful selling of grain by warehouseman. See Warehousemen.
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Prosecution under either of two statutes. See False Pretenses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

Particular crimes and attempts to commit. See titles of particular crimes, e. g., Arson; Embezzlement; Homicide; Rape, etc.
 Statements of defendant insufficient to prove corpus delicti. See post, X, (K).
 Motive or intent not element in crime of unlawful selling of grain by warehouseman. See Warehousemen.
 Self-defense. See Assault and Battery.
 Intent as element in offense of resisting officer. See Obstructing Justice.

The general rule in the criminal law is that every person is supposed to contemplate the result and know the nature of his acts, so that when the acts which constitute the crime are established, the guilt is presumed. Guilty purpose is presumed from the establishment of the facts of an unlawful or forbidden act.—*People v. Page*, 1 Idaho, 189.

An injunction against the enforcement of a penal statute issued out of a court having no jurisdiction of the subject matter will not protect the person obtaining such injunction from the penalty for violation of such statute. *State v. Simpson*, 8 Idaho, 698, 70 Pac. 1030; *State v. Keller*, 8 Idaho, 699, 70 Pac. 1051.

The fact that a wrong has been committed against a prisoner in the manner or method pursued in subjecting his person to the jurisdiction of the state, whose laws he is alleged to have transgressed, is no just or legal reason why he should not answer the charge against him, when brought before the proper tribunal, since the commission of an offense in his arrest does not expiate the offense with which he is charged.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 897; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

Editorial Notes.

Several offenses growing out of same facts: 31 L. R. A., N. S., 695.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

Evidence as to insanity. See post, X.

Editorial Notes.

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III. PARTIES TO OFFENSES.

Admissibility of acts and declarations of conspirators and codefendants. See post, X, (G).
 Bank officer receiving deposits for insolvent bank, principal and not accessory. See Banks and Banking, II.
 Indictment against principal and accessory. See Indictment and Information.

Under R. S. 7697, abolishing all distinction between an accessory before the fact and a principal, the fact that one who is in fact an accessory before the fact is indicated as such is not a defense of which the accused will be heard to complain.—*Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39.

R. S. 7697 abrogates the distinction between an accessory before the fact and a principal and provides that all persons concerned in the commission of a felony whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, shall be prosecuted as principals. Held, that instructions, erroneous because of the use of the disjunctive in the words "aid, abet, counsel and advise" were cured by the other instructions to the effect that before the jury could convict the defendant, they must find from the evidence, beyond a reasonable doubt, that the defendant acted knowingly and with guilty purpose and intent in the commission of the offense charged.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034:

Editorial Notes.

Accessories after the fact: 80 Am. Dec. 95.

Aiding and abetting the commission of a crime: 51 Am. Rep. 373; 13 Am. Rep. 177.

Interference with evidence of crime as rendering one accessory after fact: Ann. Cas. 1912B, 503.

Accessories before the fact: 33 L. R. A., N. S., 334.

IV. JURISDICTION.

Jurisdiction of crimes committed on Indian lands.
See *Indians*.

Necessity of preliminary examination. See post, VIII, (A), (C).

In cases of prosecution for misdemeanors, where the fine or penalty does not exceed \$100, the territorial district courts and justice courts have concurrent jurisdiction.—*People v. Maxon*, 1 Idaho, 330.

The legislature has no power, under the organic act, to authorize a justice of the peace to try a criminal case in which the fine or penalty exceeds, or may exceed, \$100.—*People v. Maxon*, 1 Idaho, 330.

The jurisdiction of justices of the peace in preliminary examinations in criminal cases is not limited to the precincts for which they are elected.—*State v. Griffin*, 4 Idaho, 462, 40 Pac. 58; *State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

Justices of the peace have jurisdiction of offenses arising under act of February 6, 1899, prohibiting gambling.—*In re Rowland*, 8 Idaho, 595, 70 Pac. 610.

The jurisdiction of a court in which an indictment is found or an accusation is lodged is not impaired by the manner in which the accused is brought before the court.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 897; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

Under Const., article 5, section 21, probate courts have original jurisdiction in probate matters and jurisdiction in civil cases where the amount involved does not exceed \$500, and concurrent jurisdiction with justices of the peace in criminal cases.—*Dewey v. Schreiber Implement Co.*, 12 Idaho, 280, 85 Pac. 921.

Under R. S. 3854 the criminal jurisdiction of justice's courts is coextensive with the boundaries of the county.—*State v. Noyes*, 15 Idaho, 241, 96 Pac. 435.

Where a court of co-ordinate jurisdiction acquires jurisdiction of a given case, it retains such jurisdiction until the case is finally determined in the mode prescribed by law.—*State v. Raaf*, 16 Idaho, 411, 101 Pac. 747.

District courts cannot acquire jurisdiction of a misdemeanor within the justice's jurisdiction through the medium and process of a preliminary examination and information of the prosecuting attorney.—*State v. Raaf*, 16 Idaho, 411, 101 Pac. 747.

The jurisdiction of the district court and justice's courts in misdemeanor cases of which a justice's court has original jurisdiction is a co-ordinate and concurrent jurisdiction.—*State v. Raaf*, 16 Idaho, 411, 101 Pac. 747.

Under the constitution and statutes of this state, it is the duty of a justice's court to take jurisdiction of and try a misdemeanor of which it has original jurisdiction whenever a case is properly commenced before such court.—*State v. Raaf*, 16 Idaho, 411, 101 Pac. 747.

Where a criminal prosecution for practicing medicine without a license in violation of R. C. 1350 was begun in a justice's court, the justice of the peace had no authority to hold a preliminary examination of defendant and bind him over to the district court for trial but should have proceeded with a jury trial demanded by defendant.—*State v. Raaf*, 16 Idaho, 411, 101 Pac. 747.

Under Const., article 1, section 8, and the statutes, "magistrates" are given jurisdiction to hold preliminary examinations of such criminal cases as are not cognizable in justice and probate courts, and their jurisdiction to hold preliminary examinations is limited to crimes only that are beyond the original jurisdiction of justice and probate courts.—*State v. Raaf*, 16 Idaho, 411, 101 Pac. 747.

Under Const., article 5, section 20, the district court has original jurisdiction in all criminal cases, whether they be misdemeanors or felonies.—*State v. Raaf*, 16 Idaho, 411, 101 Pac. 747.

The penalty prescribed by R. C. 360 for illegal voting by inmates of houses of ill-fame is in excess of the jurisdiction of justices' and probate courts, and the only jurisdiction such courts have of the offense defined by this section of the statute is to hold a preliminary examination and commit the accused for trial in the district court.—*State v. West*, 20 Idaho, 387, 118 Pac. 773.

V. VENUE.

Place of preliminary examination. See post, VIII, (A).

A motion for change of venue in a criminal case must be predicated on facts existing at the time the motion is made; and where such a motion, once overruled, is re-

newed at a subsequent term, several months after that at which such motion was overruled, it will not be presumed in the absence of any showing to that effect, that the same condition still existed.—*State v. Reed*, 3 Idaho, 754, 35 Pac. 706.

On motion for a change of venue in a criminal case, counter-affidavits on the part of the state should be admitted.—*State v. Reed*, 3 Idaho, 754, 35 Pac. 706.

Under R. S. 7769, 7770, providing that if the court is satisfied that the representation of defendant on motion for change of venue is true, an order must be made for the removal of the action, there is no abuse of discretion in refusing an application for change of venue based on the affidavit of defendant, unsupported and uncorroborated by other evidence.—*State v. St. Clair*, 6 Idaho, 109, 53 Pac. 1.

R. S. 7491 provides that the jurisdiction of a criminal action for murder or manslaughter when the injury which caused the death was inflicted in one county and the party injured dies in another county or out of the territory is in the county where the injury was inflicted. Held, that where deceased was shot in Shoshone county and carried to a hospital in another state where he died, the venue of the prosecution was properly laid in Shoshone county.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

In a prosecution for larceny of livestock, affidavits for a change of venue showed that there existed in the county an organization whose purpose was to protect their stock from larceny, that such organization offered a reward for the arrest and conviction of anyone charged with such crime, that it had hired an attorney to assist the prosecuting attorney in this action, that a fair trial could not be had on account of the prejudice and bias of the people of the county. An equal number of affidavits showed that a fair and impartial trial could be had in the county. Held, that it was not error to deny the motion for change of venue.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Where in a criminal prosecution one witness for the state testifies that the scene of the trouble was in Blaine county, and no one denies or disputes that evidence, the venue is sufficiently shown.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

Editorial Notes.

Venue, place where crime is deemed to have been committed: 44 Am. St. Rep. 79.

Quantum of proof necessary to establish venue in criminal prosecution: Ann. Cas. 1912B, 939.

VI. LIMITATION OF PROSECUTIONS.

(No paragraphs.)

VII. FORMER JEOPARDY.

R. S. 7905 authorizes the court to discharge the jury when, "at the expiration of such time as the court may deem proper, it

satisfactorily appears that there is no reasonable probability that the jury can agree." Held, that the discharge, without defendant's consent, of a jury which had been out fifteen and one-half hours, was not error, so as to sustain a plea of former jeopardy.—*State v. Crump*, 5 Idaho, 166, 47 Pac. 814.

A conviction for violation of a city ordinance, although covering the same state of facts, is not a defense to a prosecution under a state statute.—In *re Henry*, 15 Idaho, 755, 21 L. R. A., N. S., 207, 99 Pac. 1054.

R. C. 6452, prescribing the punishment of state prisoners for escape from prison, does not provide for placing in jeopardy the second time the persons charged thereunder.—In *re Mallon*, 16 Idaho, 737, 22 L. R. A., N. S., 1123, 102 Pac. 374.

Editorial Notes.

Autrefois acquit, plea of, when sustainable: 17 Am. Dec. 791; 58 Am. Dec. 536.

Former jeopardy, granting of a new trial after conviction for manslaughter does not permit subsequent conviction for a greater crime: 12 Am. Rep. 473; 21 L. R. A., N. S., 20.

Former jeopardy, identity of offenses in plea of: 92 Am. St. Rep. 89.

Former jeopardy, new trial, granting of, whether may subject defendant to conviction for higher offense: 4 Am. St. Rep. 117; 5 L. R. A., N. S., 571; 22 L. R. A., N. S., 959.

Mistrial and discharge of jury because of sickness of accused as constituting former jeopardy: Ann. Cas. 1912B, 1147.

Prosecution under statute as bar to prosecution under ordinance, and vice versa: Ann. Cas. 1912C, 37; 17 L. R. A., N. S., 69.

Conviction of minor offense as bar to prosecution for same act charged as higher crime: Ann. Cas. 1912C, 668.

VIII. PRELIMINARY COMPLAINT, WARRANT, EXAMINATION, COMMITMENT, SUMMARY TRIAL AND APPEAL.

Right to bail. See Bail and Recognizance.

(A) PRELIMINARY COMPLAINT, WARRANT AND EXAMINATION.

Failure to examine all witnesses at preliminary examination not ground for discharge of defendant. See Habeas Corpus.

Admissibility of evidence taken at preliminary examination. See post, X, (L).

Const., article 1, section 8, provides that no person shall be held to answer for any felony or criminal offense of any grade unless on the presentment or indictment or on information of the public prosecutor after a commitment by a magistrate. Laws 1891, page 184, section 8, provides that "no information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as

provided by law." Held, that the district court has no jurisdiction to try any person for an offense by information until the statute regarding preliminary examinations has been complied with.—*State v. Brathwaite*, 3 Idaho, 119, 27 Pac. 731.

No preliminary examination is necessary to the finding of an indictment.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

Under R. S. 7525, the prosecuting officer may designate the precinct where, and the magistrate before whom, a preliminary examination upon a criminal charge shall be held, within the county where the offense is alleged to have been committed and most convenient to a majority of the witnesses for the prosecution; and it is not necessary that such precinct be the precinct in which the offense was committed.—*State v. Griffin*, 4 Idaho, 462, 40 Pac. 58.

The defendant in a criminal case may waive a preliminary examination and, having done so, he cannot complain that he was permitted to do so.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

Where defendant files an affidavit stating that he has never had a preliminary examination on the charge preferred in the information, it is the duty of the prosecution to refute such affidavit by the production of the depositions taken upon the preliminary examination, or other competent proof, and failing to do so, the motion to quash the information should be granted.—*State v. Faris*, 5 Idaho, 666, 51 Pac. 772.

The certificate of a committing magistrate to the depositions taken before him at the preliminary examination may be amended by leave of court at the county seat, though the county seat is outside the precinct of the committing magistrate and outside of the precinct where preliminary examination was had.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

Under R. S. 7511, which defines magistrates to be the justices of the supreme court, probate judges, justices of the peace and police magistrates in towns and cities, the coroner is not a magistrate and his inquisition is not a sufficient basis for an information by the public prosecutor.—*In re Sly*, 9 Idaho, 779, 76 Pac. 766.

A preliminary examination is in no sense a trial, the only purpose being to ascertain whether the accused should be tried for the alleged crime in the manner prescribed by law.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

The object of a preliminary examination is to ascertain whether a crime has been committed, and if so, whether there is probable cause for believing that the accused is guilty and when these facts have been determined in the affirmative, it is the duty of the examining magistrate to hold the defendant for his appearance at the next term of the district court.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

In a preliminary examination, the state need not produce all its evidence, but simply

such evidence as would induce a reasonable man to believe that the accused probably or likely committed the offense charged.—*In re Squires*, 13 Idaho, 624, 92 Pac. 754.

In a preliminary examination on the charge of manslaughter evidence held sufficient to warrant the committing magistrate in binding the accused over to the district court for trial.—*In re Squires*, 13 Idaho, 624, 92 Pac. 754.

The provisions of R. C. 7576, as to the holding of an examination and the taking of testimony and certifying the same by the magistrate should be substantially complied with, and the certificate of the magistrate should show that the evidence taken by the stenographer in shorthand is certified by the stenographer, as required by section 4, and that the same is true and correct; if taken in writing, it must be subscribed and sworn to by the witness; and where a witness has given testimony, under the statute, upon preliminary examination, the testimony of such witness should be subscribed by the witness and sworn to before the magistrate, and, after all the evidence has been taken, then the magistrate, under the statute, is required to make a final certificate, certifying that the requirements of this section of the statute have been complied with.—*State v. Yturaspe*, 22 Idaho, 360, 125 Pac. 802.

Under R. C. 7509, a complaint upon which a defendant is arrested and brought before a magistrate upon arraignment is not required to state the true name of the defendant, and neither is the defendant required to disclose his correct name; but such defendant may be prosecuted, either under a fictitious name, or his true name, as appears by the evidence, and if the defendant is charged by a fictitious name, and his true name is disclosed, then his true name should be inserted instead of the fictitious name; but if the true name is not disclosed, and the fictitious name is used as the name of the defendant, such fact does not render such examination void.—*State v. Yturaspe*, 22 Idaho, 360, 125 Pac. 802.

It is not necessary for the committing magistrate to be convinced beyond a reasonable doubt that one accused of crime is guilty thereof; but if from all of the evidence he has reasonable or probable cause to believe, and does believe, that the accused is guilty it is his duty to hold him for trial. *State v. Layman*, 22 Idaho, 387, 125 Pac. 1042.

R. C. 7576, as amended by Laws 1909, page 146, is mandatory in requiring that the evidence taken at a preliminary examination shall be in writing and subscribed by the witness, or taken by a stenographer appointed as provided in said section, and certified to by the stenographer.—*State v. Carlson*, 23 Idaho, 545, 130 Pac. 463.

Under R. C. 7576, as amended by Laws 1909, page 146, the evidence of witnesses at a preliminary examination, if taken in writing, must be certified by the magistrate, but, where such evidence is taken by a stenographer and transcribed and certified by such

stenographer, the certificate of the magistrate to the testimony becomes unnecessary; the certificate of the stenographer takes the place of the certificate of the magistrate as to the correctness of the evidence.—*State v. Carlson*, 23 Idaho, 545, 130 Pac. 463.

(B) COMMITMENT.

Where an order of commitment was reduced to writing and entered in the official docket of the committing magistrate, the fact that the order of commitment was not indorsed on the depositions taken on the preliminary examination does not deprive the order of its validity or affect any substantial right of the defendant.—*State v. Clark*, 4 Idaho, 7, 35 Pac. 710.

An application for a writ of habeas corpus should be denied where it is not shown that the committing magistrate has abused the discretion which the law vests in him.—*In re Levy*, 8 Idaho, 53, 66 Pac. 806; *In re Squires*, 13 Idaho, 624, 92 Pac. 754.

(C) SUMMARY TRIAL AND CONVICTION.

Under Const., article 1, section 8, the district court has no jurisdiction to try a person charged with the commission of a misdemeanor for the punishment of which a penalty is prescribed in excess of that which justices and probate courts have jurisdiction to impose, unless the accused has been first accorded a preliminary examination, or has been indicted by a grand jury.—*State v. West*, 20 Idaho, 387, 118 Pac. 773.

Where a complaint was filed in a justice's court and defendant was arrested under a warrant issued by the justice of the peace, and thereafter it was stipulated between defendant and the county attorney that the justice might hold his court and try the case in another justice's precinct within the county, the fact that defendant was tried in such other precinct was an irregularity affecting only the procedure and jurisdiction was not lost over the person of defendant.—*State v. Noyes*, 15 Idaho, 241, 96 Pac. 435.

(D) APPEAL AND TRIAL DE NOVO.

The record on appeal from a justice's court in a criminal case is not required to show that the defendant ever gave notice of his intention to appeal.—*State v. Barnard*, 13 Idaho, 439, 90 Pac. 1.

Where the only order made on motion to dismiss an appeal from a justice's judgment of conviction is a minute entry stating that "the motion filed herein by the county attorney to dismiss the action sustained and granted," such entry does not amount to an order or judgment from which an appeal will lie, and an appeal taken therefrom will be dismissed.—*State v. Barnard*, 13 Idaho, 439, 90 Pac. 1.

Failure to give notice of intention to appeal from a judgment of conviction in a justice's court as required by R. S. 8321, is not sufficient ground for dismissal of the appeal. *State v. Barnard*, 13 Idaho, 439, 90 Pac. 1.

Where a notice of appeal from a judgment of conviction of a justice's court under R. S. 8321 gives the title of the court and cause and date of the judgment, and recites that the judgment was in favor of plaintiff and against defendant, and that he appeals from the judgment and the whole thereof, such notice sufficiently states the character of the judgment as required by statute.—*State v. Barnard*, 13 Idaho, 439, 90 Pac. 1.

Where a defendant is convicted in a police or justice's court, and thereafter prosecutes an appeal to the district court, and gives an undertaking for a stay of proceedings in conformity with R. C. 8324, and is thereafter convicted in the district court, it is the duty of the latter court, under R. C. 8327, to enter a judgment for a fine imposed or costs, or both fine and costs, against the defendant and his sureties in the same manner as a judgment is entered in a civil action, and execution should thereupon issue on such judgment. In such case the district court has no jurisdiction or authority to impose an alternative judgment of imprisonment against the defendant in case he fail to pay the fine or costs, or both fine and costs.—*In re Lucas*, 17 Idaho, 164, 104 Pac. 657.

R. C. 8327 does not prohibit the district court entering an unqualified and independent sentence of imprisonment against the defendant, convicted on appeal, in addition to any fine and costs, where such additional sentence is allowed as a part of the penalty for the specific offense of which the defendant was convicted.—*In re Lucas*, 17 Idaho, 164, 104 Pac. 657.

The civil judgment authorized by R. C. 8327 may be entered against a defendant and his sureties in the district court, whether they be present in court or fail to appear.—*In re Lucas*, 17 Idaho, 164, 104 Pac. 657.

R. C. 7232 and 7994 authorizing the trial court to impose an alternative sentence of imprisonment against the defendant in case of failure to pay the fine or costs, or both fine and costs, as the case may be, have reference to the judgment upon the original trial of a criminal case.—*In re Lucas*, 17 Idaho, 164, 104 Pac. 657.

Upon an appeal to the district court from the probate or justice's court, upon a conviction for selling intoxicating liquors without a license, where the supersedeas bond is given as provided for in B. C. 8324, the district court has no power or jurisdiction to imprison the defendant.—*In re Walton*, 17 Idaho, 171, 104 Pac. 659.

IX. ARRAIGNMENT AND PLEAS AND NOLLE PROSEQUI OR DISCONTINUANCE.

Where defendant was arrested after the finding of an indictment, she could not avail herself of R. S. 7730, subdivision 4, providing that the indictment must be set aside on defendant's motion "when defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror," with-

out supporting such motion by proof, at least to the extent of the oath of defendant that the grounds set forth in the motion are true. *State v. Hardy*, 4 Idaho, 478, 42 Pac. 507.

Where a judgment of conviction had been reversed for insufficiency of the evidence to support the verdict and the county attorney moved to dismiss on the ground that the state had no further reputable evidence than was given on the former trial, and the evidence introduced on the second trial fully bore out his statement, the court should have dismissed the case or directed the jury to bring in a verdict of acquittal.—*State v. Seymour*, 7 Idaho, 548, 63 Pac. 1036.

Under R. S. 7855, providing that if the indictment or information is for a felony, the clerk must read it and state the plea of the defendant to the jury, failure to read the indictment or information and state the plea of defendant in a felony case is reversible error.—*State v. Chambers*, 9 Idaho, 673, 75 Pac. 274.

Editorial Notes.

Right to withdraw plea of guilty in criminal action: *Ann. Cas.* 1912D, 243; 8 *Ann. Cas.* 237; 16 *Ann. Cas.* 973.

Statute allowing plea of guilty in capital case: 16 L. R. A. 358.

Plea after commencement of trial: 27 L. R. A., N. S., 1181.

Right upon plea of guilty to sentence accused without intervention of jury: 35 L. R. A., N. S., 1146.

X. EVIDENCE.

In prosecutions for particular crimes. See, also, Homicide; Rape, etc.

Denial of application to take depositions. See Depositions.

Credibility and impeachment of witnesses. See Witnesses, IV.

Nature, scope and limits of cross-examination. See Witnesses, III, (B).

Privilege of witness not to testify. See Witnesses, III, (C).

(A) JUDICIAL NOTICE, PRESUMPTIONS AND BURDEN OF PROOF.

Presumption from possession of counterfeiting instruments. See Counterfeiting.

Burden of proving insanity in prosecution for murder. See Homicide, VII, (A).

Where a defendant relies upon an alibi for his defense, the burden of establishing such alibi is on him; and if he succeeds, by competent evidence, in raising a reasonable doubt in the minds of the jury as to the fact of his presence, at the place and time the offense was committed, he is entitled to acquittal.—*State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

Before a legal conviction can be had, the state must have established the accused person's guilt of the crime charged by legal evidence beyond a reasonable doubt.—*State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033.

It is a well recognized principle in criminal jurisprudence that proof of certain facts may lead irresistibly to the presumption that

another act, of which there is no direct proof, was committed or done.—*State v. Adams*, 10 Idaho, 591, 79 Pac. 398.

Where the defense is insanity, until defendant furnishes evidence thereof sufficient to raise a reasonable doubt, the prosecution may rest on the legal proposition that men are supposed to be sane.—*State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.

Under R. C. 5950, subdivision 2, courts of this state will take judicial notice as to whether or not the local option statute is in force in any particular county, and will advise the jury accordingly in the case of a prosecution for a violation of such statute.—*State v. Schmitz*, 19 Idaho, 566, 114 Pac. 1.

A statute providing that the proof of a certain fact shall constitute prima facie evidence of the existence of a certain other fact merely shifts the burden of proof to the adverse party, and in the absence of proof to the contrary leaves the presumption both of fact and law against such party.—*State v. Adams*, 22 Idaho, 485, 126 Pac. 402.

Editorial Notes.

Insanity, burden of proving: 44 *Am. Rep.* 435; 3 *Ann. Cas.* 926; 15 *Ann. Cas.* 95; 36 L. R. A. 727; 34 L. R. A., N. S., 1115.

Presumptions of guilt, creating by statute: 36 *Am. St. Rep.* 684.

Burden of proof of duress as defense to charge of crime: *Ann. Cas.* 1912B, 1111.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES AND RES GESTAE.

Dying declarations. See Homicide, VII, (C).

In prosecution for rape. See Rape.

Declarations of deceased made half or three-quarters of an hour after an affray in which deceased was fatally shot, and after the occurrence had wholly ceased, when all danger was over, the defendant under arrest and not in the presence of deceased and when deceased had been for that length of time among his friends, are inadmissible as part of the res gestae.—*People v. Dewey*, 2 Idaho, 83, 6 Pac. 103.

What is or is not res gestae is a matter that must be decided upon the facts of each case, there being no limits of time within which the res gestae can be arbitrarily confirmed.—*State v. Ellington*, 4 Idaho, 529, 43 Pac. 60.

Where, in a prosecution for murder, a witness testified that after the shooting and while defendant was going from the house where the shooting occurred and down the alley "he took a shot at" the witness, the admission of such testimony was prejudicial error, since it was not part of the res gestae and inadmissible on any other ground.—*State v. Taylor*, 7 Idaho, 134, 61 Pac. 288.

In a prosecution for murder, resulting from a criminal operation for abortion, the declaration of deceased made to a witness at the time such witness introduced deceased to defendant, touching her condition as to pregnancy, is admissible as a part of the res gestae.—*State v. Alcorn*, 7 Idaho, 599, 97 *Am. St. Rep.* 252, 64 Pac. 1014.

Evidence showing that within half an hour after the homicide defendant tore down and burned a house upon the land over which the controversy between defendant and deceased arose was admissible, to show the motive and intent of the defendant and to show the existence of malice and guilty knowledge.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

The declaration of deceased made immediately after the affray, that he was "stabbed to the heart that he was dying and that he was done for," was admissible in a prosecution for murder as part of the *res gestae*.—*State v. Gilbert*, 8 Idaho, 346, 1 Ann. Cas. 280, 69 Pac. 62.

Statements of deceased that defendant shot him, made within a few moments after the shot was fired, are admissible as part of the *res gestae*.—*State v. Wilmbusse*, 8 Idaho, 608, 70 Pac. 849.

Where it is shown that a witness has been acquainted for some six years with the accused, and has observed peculiarities in his conduct, it is error to reject such evidence, where the defense of insanity is set up.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

Where the prosecution shows that a murder was committed with a certain gun, the defense may show on cross-examination any facts tending to explain why defendant had the gun at the time.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

Evidence which tends to prove the defendant's guilt of the offense charged is admissible, although it may also have reference to a distinct offense.—*State v. Lancaster*, 10 Idaho, 410, 78 Pac. 1081.

Where a defendant has been indicted and arraigned and the time fixed for him to plead, and prior to entering his plea he flees from the state and is thereafter apprehended and brought to trial, evidence of his flight is admissible.—*State v. Baird*, 13 Idaho, 29, 88 Pac. 233.

Evidence which tends to show that the accused has attempted to fabricate or procure false evidence is admissible as tending to show a consciousness of guilt; and it is not necessary, in order to render such evidence admissible, that the falsity or fabrication be proven by direct evidence, but such falsity or fabrication may be proven by circumstantial evidence.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

Evidence which tends to show preparation and plan for the commission of the crime charged is admissible as tending to show intent and purpose to commit the act and the animus of the person and its weight and credit are entirely for the jury.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

"Circumstantial evidence" in a criminal case is the proof of such facts or circumstances connected with or surrounding the commission of the offense charged as tends to show the guilt or innocence of accused.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

A defendant in a criminal trial is not permitted by way of defense to show by conjectu-

ral inferences that some other person might have committed the offense for which he is on trial, or that some person other than himself is more probably guilty.—*State v. Moon*, 20 Idaho, 202, Ann. Cas. 1913A, 724, 117 Pac. 757.

In a prosecution for murder, a witness was permitted to testify as to the conduct and remarks of defendant some two or three hours before the murder, defendant at that time having flourished his knife in a threatening manner. Held, admissible as part of the *res gestae*.—*State v. Willis*, 24 Idaho, 252, 132 Pac. 962.

Editorial Notes.

Admissibility, in criminal prosecution, of evidence of threats by third person to commit crime charged against defendant: Ann. Cas. 1913A, 731.

Evidence of threats of accused or of person injured or killed: 17 L. R. A. 654.

(C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

Character of complaining witness. See *Assault and Battery; Rape*, II, (B).

Evidence of general reputation in prosecution for maintaining bawdy-house. See *Disorderly House*.

Reputation of deceased. See *Homicide*, VII, (B).

General repute in prosecution for bigamy. See *Bigamy*.

Admissibility of judgment-roll in similar action. See *Embezzlement*.

R. S. 6082 provides, *inter alia*, that a witness cannot be impeached by evidence of particular wrongful acts except that it may be shown that the witness was convicted of a felony. In a prosecution for rape, the state undertook to show by cross-examination of defendant that he had attempted to debauch a child about a year previous to his conviction in this action. Defendant denied such crime, and another witness was introduced who testified that he had found defendant in a compromising position with such child. Held that testimony as to such alleged attempt and testimony tending to contradict defendant's denial thereof was inadmissible because such alleged act had no connection with the issue.—*State v. Anthony*, 6 Idaho, 383, 55 Pac. 884.

The state was permitted to show that within less than a half hour after the homicide the accused tore down and burned a house upon the land over which the controversy between the accused and the deceased arose. Held, that such evidence was admissible for the purpose of showing the intent of the accused.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

The general rule that a crime distinct from that laid in the information cannot be given against the defendant is subject to the exception that in crimes involving illicit sexual intercourse of any sort evidence of previous acts of defendant is admissible, not for the purpose of proving a different offense, but for the purpose of corroboration and to show the relation and familiarity of the parties.—*State v. Lancaster*, 10 Idaho, 410, 78 Pac. 1081.

Evidence in a prosecution for rape of the common purpose to commit like crimes on other girls, and the commission of such of-

fenses by the defendant, held admissible under the circumstances of this case, as incidents in the commission of the common criminal design included in the conspiracy.—*State v. Hammock*, 18 Idaho, 424, 110 Pac. 169.

Where a defendant is prosecuted for the crime of statutory rape, the existence of the sexual passion in the defendant for the prosecutrix may be shown by acts of intercourse with the prosecutrix subsequent to the date of the act for which the defendant is prosecuted as corroborative evidence of the principal facts sought to be established.—*State v. Henderson*, 19 Idaho, 524, 114 Pac. 30.

Where one is prosecuted for aiding and abetting an unlawful sale of intoxicating liquor in a prohibition district by prescribing a quart of whisky and directing on the prescription that the purchaser thereof shall "drink all at once," and the defendant claims that the direction as to the amount to take at a time was a mere pleasantry or humorous addition made to the prescription, it is not improper for the state to prove that at or about the same time the defendant gave other prescriptions for like quantities and wrote on the prescription the same direction, "drink all at once."—*State v. Schmitz*, 19 Idaho, 566, 114 Pac. 1.

A defendant who is charged with homicide should, as a rule, be allowed to show, if he can, that he has a good reputation in his community and among those who have known him both for peace and quiet and truth and veracity in all cases where the evidence is circumstantial, or the plea is one of self-defense, and the defendant's truthfulness or honesty is brought in question.—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

Where the crime is committed in a systematic manner, it is competent to prove other similar transactions occurring at different times and places to show the intent or motive of the accused.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

Where a defendant denies knowledge or intent, evidence of other acts of the same character or kind on his part may be admitted so that the jury may determine whether the defendant intended to make a false report.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

In a prosecution of a bank officer for making a false report, other false statements and reports made by the defendant in regard to said bank were properly admitted in evidence.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

Editorial Notes.

Other offenses evidence of, when admissible: 44 Am. Rep. 299; 105 Am. St. Rep. 976; 62 L. R. A. 194.

Proof of other offenses in prosecution for violation of liquor law: 18 Ann. Cas. 846.

Admissibility, to prove motive for crime, of evidence tending to prove other crimes against defendant: 7 Ann. Cas. 66.

Evidence of good character for the purpose of creating a doubt of defendant's guilt: 103 Am. St. Rep. 888.

Weight of evidence of good character of defendant in criminal case: Ann. Cas. 1913E, 16.

Evidence of specific instances to prove character: 14 L. R. A., N. S., 690; 20 L. R. A. 614.

(D) MATERIALITY AND COMPETENCY IN GENERAL.

Admissibility of advice of counsel. See *Embezzlement*.

In prosecutions for particular crimes. See *titles of particular crimes*.

Where a witness is asked a question that is immaterial and no foundation is laid to show its materiality, an objection thereto is properly sustained.—*State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.

In a prosecution for murder, a letter purporting to have been written by defendant, whose handwriting was identified, was introduced to show motive on the part of the defendant. Held, that the fact that the state did not show how it came in possession of the letter or in whose custody it had been did not render it inadmissible.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

Where it is shown that defendant fled from the state prior to trial, evidence is admissible in behalf of defendant tending to explain the flight or his reasons therefor.—*State v. Baird*, 13 Idaho, 29, 88 Pac. 233.

Testimony of a witness for the state that one of defendant's witnesses had attempted to persuade him not to testify in the case was admissible to show the bias or interest of such witness for the defendant.—*State v. Cook*, 13 Idaho, 45, 88 Pac. 240.

A witness who was a bartender on duty behind the bar at the time of the homicide was asked on cross-examination, "What were your duties there that night at the time this affray took place?" Held, immaterial and irrelevant.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

The defendant in a criminal action has the right to show the feeling of any witness against him either by cross-examination as to the feeling or by anything the witness may have said with reference to defendant.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

(E) BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE.

The admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of handwriting, should not be allowed except when no collateral issue can be raised concerning them, which is only where the papers are either conceded to be genuine or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting and who exhibits them in confirmation and explanation of his own testimony.—*State v. Seymour*, 10 Idaho, 699, 79 Pac. 825.

It was not error on the part of the trial court to admit a revolver holster in evidence in a prosecution for murder, where the wit-

ness identifying the holster was shown the holster in the presence of the jury, and was asked if that was the revolver holster the defendant had, and the witness replied: "I think it is, I am not sure; it appears to be."—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

In a prosecution of a bank president for making a false report, the court did not err in admitting in evidence certain comparative statements, made by experts; such statements having been taken from numerous and voluminous records which were already in evidence and which were made for the purpose of assisting the jury in arriving at their verdict.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

(F) ADMISSIONS, DECLARATIONS AND HEARSAY.

Declarations of defendant prior to homicide. See *Homicide*, V.

Confessions. See post, X, (K).

Dying declarations. See *Homicide*, VII, (C).

Voluntary statements made by a defendant at the time of and while under arrest, not shown to have been made or induced by any promise or hope of benefit to accrue to him therefrom, may be proved on the trial.—*State v. Ellington*, 4 Idaho, 529, 43 Pac. 60.

A statement made by a defendant while under arrest and in jail in charge of his accuser and not connecting the defendant with the alleged crimes is not admissible.—*State v. Crump*, 5 Idaho, 166, 47 Pac. 814.

Statements of defendant, charged with murder, contradictory of other statements made by him concerning the crime, are admissible.—*State v. Davis*, 6 Idaho, 159, 53 Pac. 678.

Where defendant, charged with murder, stated to a witness that he was first told about the killing on February 6th, 7th, or 8th, and it is shown that the crime was not discovered until February 16th, such statement is admissible as tending to show guilty knowledge on the part of defendant.—*State v. Davis*, 6 Idaho, 159, 53 Pac. 678.

In a prosecution for murder, evidence of a conversation between witnesses not shown to have been in the presence of defendant or deceased and sought to be introduced for the purpose of contradicting one of such witnesses held irrelevant.—*State v. Lyons*, 7 Idaho, 530, 64 Pac. 236.

It is error to instruct that statements by counsel for accused in presence of the jury, in so far as they are admissions against the defendant, may be considered by the jury.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

Admission of a written document, purporting to be a confession made by one of the defendants, and which was not properly identified, and where the circumstances under which the statement was made are not shown, and where the defendant is an Indian, and denies making the statement, and claims that he was intoxicated at the time the statement purports to have been made, and the witnesses present at the time of the making of the statement are not sworn or examined, and no one

who was present at the making of the statement, or who claims to know anything of the circumstances under which it was made, is sworn or testifies, held erroneous.—*State v. Lott*, 21 Idaho, 646, 123 Pac. 491.

Editorial Notes.

Admissibility in evidence of undenied accusation of crime: Ann. Cas. 1913C, 240; 4 Ann. Cas. 1042; 12 Ann. Cas. 875; 25 L. R. A., N. S., 543; 42 L. R. A., N. S., 890.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

Testimony of accomplices. See post, X, (J).

The declaration of a conspiracy during the pendency of a criminal enterprise, with reference to the common object thereof, is competent evidence against the co-conspirators.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

The declaration of one conspirator while he is acting in furtherance of the common design is competent evidence against his co-conspirators, where the conspiracy has been shown to have existed.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Where a conspiracy existed between defendant and his wife for the purpose generally of procuring girls to have sexual intercourse with defendant, a statement or declaration made by the wife subsequent to the commission of a specific act, and during the existence of the common design, is admissible against the defendant as a declaration from a co-conspirator.—*State v. Hammock*, 18 Idaho, 424, 110 Pac. 169.

(H) DOCUMENTARY EVIDENCE AND EXCLUSION OF PAROL EVIDENCE THEREBY.

Where a record book is in evidence, it is not error to permit a witness familiar with the record to testify as to the absence of certain items therefrom.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

(I) OPINION EVIDENCE.

General repute. See *Bigamy*; *Burglary*.

In a prosecution for robbery, a witness for the state testified that he saw defendant scuffling with the party alleged to have been robbed; that defendant handed something to his codefendant, an alleged accomplice; that "he thought" he took what he thus handed to his accomplice from the person of the prosecuting witness; didn't see him take it, but "I thought he got it from him, because I thought so." Held, error to deny a motion to strike out the testimony as to what the witness "thought."—*Territory v. McKern*, 3 Idaho, 15, 26 Pac. 123.

Where it is apparent that no injustice has been done by admitting expert testimony in a criminal case and that the exigencies of the case seem to warrant or require the admission of such testimony for a proper and satisfactory presentation of the facts to the jury, such admission is not error.—*State v. Hendel*, 4 Idaho, 88, 35 Pac. 836.

Where the plea of insanity is interposed as a defense in a prosecution for murder, witnesses for the state in rebuttal are shown to be sufficiently qualified to give an opinion as to the sanity of defendant on testifying that they had an intimate acquaintance with the defendant for years and up to the time of the homicide.—*State v. Hurst*, 4 Idaho, 345, 39 Pac. 554.

A nonexpert witness, to be competent to give his opinion as to the sanity or insanity of the defendant in a criminal action, should show, before being permitted to testify on such questions, that he has such intimate acquaintance with the defendant, as well as the necessary opportunity to observe the actions and demeanor of the defendant, and has made such observations as would enable him to form an intelligent opinion as to the state of mind of defendant.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

In a prosecution for murder, witnesses not shown to be expert judges of blood or chemists may nevertheless testify as to the existence of blood stains on the wrist and clothing of defendant.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where the plea of insanity is interposed in a prosecution for murder, nonexpert witnesses may give their opinion as to the sanity or insanity of accused, after stating the facts on which they base their opinion.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

In the prosecution for murder where the defense is insanity, a witness for defendant who had been acquainted with him for six years and had worked with him more or less every week during three of these years and for part of the time had seen him almost daily, should have been permitted to give his opinion as to the defendant's sanity.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

In a prosecution for murder defendant was asked, "Did you go into the saloon that night for the purpose of bringing on a fight between yourself and Charlie?" Held, objectionable, as it was for the jury to determine his motives from all the facts.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Certain evidence as to the identification of the watch claimed to have been taken from the body of the deceased, and the evidence of a witness in identifying handwriting, examined, and held that it was properly admitted.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

(J) TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.

Where, in a criminal prosecution, the letter of an accomplice of defendant is admitted on the express ground that the jury were to be satisfied from the evidence aliunde that the defendant was an accomplice of the writer, there is no error.—*People v. Page*, 1 Idaho, 102.

The testimony of accomplices must be corroborated by some fact or circumstance before a conviction can be had.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

One who has been jointly indicted with a defendant on trial, and has entered a plea of guilty, is a competent witness for the state on the trial of his codefendants.—*State v. Knudtson*, 11 Idaho, 524, 83 Pac. 226.

Under R. S. 7871, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated, the corroboration must be upon some material fact or circumstance, and, standing alone and independent of the evidence of the accomplice, it must tend to connect the defendant with the commission of the offense.—*State v. Knudtson*, 11 Idaho, 524, 83 Pac. 226.

An instruction that "the jury ought not to convict upon the testimony of an accomplice alone, unless after a careful examination of such testimony they are satisfied beyond all reasonable doubt of its truth," is erroneous, being in conflict with R. S. 7871.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

Editorial Notes.

Accomplice, convicting on the testimony of: 71 Am. Dec. 671; 34 Am. Rep. 408; 98 Am. St. Rep. 158.

Declarations of one upon whom an abortion is committed: 35 L. R. A., N. S., 1084.

(K) CONFESSIONS.

In a prosecution for robbery, a witness for the state testified that when he called on defendant in jail, that defendant denied taking the money of the prosecuting witness; that after witness had made defendant believe that he was going on his bond and told him that it was no use to deny it, for that he knew he was the man, defendant admitted the crime and said he didn't know why he had done it. Held, that such confession was admissible.—*Territory v. McKern*, 3 Idaho, 15, 26 Pac. 123.

The fact that defendant was under arrest at the time of making a confession is not of itself sufficient to exclude the confession.—*State v. Elbington*, 4 Idaho, 529, 43 Pac. 60.

A confession which the record shows was extorted from the defendant by threats and menaces, and which does not connect the defendant with the alleged crime, is inadmissible.—*State v. Mason*, 4 Idaho, 543, 43 Pac. 63.

The confession of defendant in a criminal case, made to a witness in the presence of a mob and while defendant was evidently in fear of being lynched, said confession being advised by said witness, should not be admitted in evidence.—*State v. Smith*, 5 Idaho, 291, 48 Pac. 1060.

Where a confession, taken under such circumstances as to render it inadmissible in evidence, is nevertheless admitted, and the record shows that defendant made another confession, which was voluntary and without fear or hope of favor, and there is other evidence sufficient to support the verdict of the jury, the admission of such incompetent confession will not be reversible error.—*State v. Smith*, 5 Idaho, 291, 48 Pac. 1060.

A confession or declaration tending to show guilt, made by an accused to an officer having

him in custody, is admissible, if such confession or declaration was made freely and voluntarily, and without any inducement having been held out by the officer, or other person present, to the accused, by reason of which he is induced to make it.—*State v. Davis*, 6 Idaho, 159, 53 Pac. 678.

Statements of defendant or extrajudicial confessions alone, without any corroborating evidence, are insufficient to prove the corpus delicti in criminal prosecutions.—*State v. Simpson, Hill & Reed* (3 cases), 8 Idaho, 698, 70 Pac. 1030; *State v. Keller*, 8 Idaho, 699, 70 Pac. 1051.

An extrajudicial confession by the accused is not sufficient to warrant a conviction unless there are some corroborating circumstances, and as to whether the corroborating circumstances are sufficient is a question for the jury.—*State v. Downing*, 23 Idaho, 540, 130 Pac. 461.

Editorial Notes.

Confessions, when sufficient to convict: 65 Am. Dec. 676.

Confessions, when admissible: 46 Am. Rep. 253.

Admissibility of confession as affected by fact that accused was tied, chained, shackled, incarcerated in dark cell, etc.: Ann. Cas. 1912B, 1056.

Sufficiency of extrajudicial confession to sustain conviction without corroborative evidence: Ann. Cas. 1912B, 1249; 10 Ann. Cas. 913.

Admissibility in evidence of confession induced by exhortation to tell truth or by appeal to religious, moral or superstitious sentiment: Ann. Cas. 1913B, 303.

Sufficiency of extrajudicial confession to sustain conviction without corroborative evidence: Ann. Cas. 1912B, 1249.

When confession is involuntary: 18 L. R. A., N. S., 772.

(L) EVIDENCE TAKEN CONDITIONALLY OR AT PRELIMINARY EXAMINATION OR AT FORMER TRIAL.

Depositions taken in the presence of the accused may be used on trial, when on account of death or other good cause, the presence of the witness cannot be had.—*Territory v. Nelson*, 2 Idaho, 651, 23 Pac. 116; *Territory v. Evans*, 2 Idaho, 651, 23 Pac. 232.

The use of depositions taken in the presence of accused, when on account of death or other good cause the witness cannot be present, is not in contravention of article 6 of the amendments to the United States constitution, providing that the accused must be "confronted with the witnesses against him."—*Territory v. Nelson*, 2 Idaho, 651, 23 Pac. 116; *Territory v. Evans*, 2 Idaho, 651, 23 Pac. 232.

Depositions, taken upon the preliminary examination of a person charged with a criminal offense, are not admissible on the trial of such person for the offense.—*State v. Por-*

ter, 6 Idaho, 584, 57 Pac. 431; overruling *Territory v. Evans*, 2 Idaho, 651, 23 Pac. 232.

A deposition, taken under R. S. 7588, providing that when it appears that a witness in a criminal case is unable to procure sureties, he may forthwith be conditionally examined on behalf of the people in the presence of defendant, is admissible in evidence on the trial of such defendant.—*State v. White*, 7 Idaho, 150, 61 Pac. 517; *State v. Ireland*, 9 Idaho, 686, 75 Pac. 257; *State v. Zarlenga*, 14 Idaho, 305, 94 Pac. 55.

Before a deposition, taken conditionally as provided in R. S. 7588, can be admitted in evidence, the state must show that the deposition was taken before the magistrate who conducted the preliminary examination or the judge of the court to which such party has been held for trial; that it was shown to such magistrate or judge, on oath, that there was reason to believe that such witness whose deposition was sought would not appear and testify unless security was given; that an order was made requiring such witness to enter into a written undertaking, with sureties, under R. S. 7585; that thereupon it was shown that the witness was unable to procure sureties; that the defendant had been advised of his right to counsel and to be represented by such; that the defendant was present in person and by counsel, if he desired counsel, or that he had notice of such examination, if on bail; that the examination was conducted in the same manner as the examination before a committing magistrate, and certified as required by R. S. 7576; that the witness is unable to attend by reason of his death, infirmity, sickness, or insanity, or of absence from the state, and that due diligence has been exercised to procure the presence of such witness at the trial.—*State v. Zarlenga*, 14 Idaho, 305, 94 Pac. 55.

Editorial Notes.

Absent witnesses, testimony of, when admissible: 61 Am. St. Rep. 886.

Competency in criminal cases of former testimony of absent witness: Ann. Cas. 1913C, 464; 1 Ann. Cas. 471; 13 Ann. Cas. 973.

Testimony on preliminary examination of witnesses not available at time of trial: 25 L. R. A., N. S., 868.

Testimony of accused at coroner's inquest: 70 L. R. A. 33; 33 L. R. A., N. S., 465.

(M) WEIGHT* AND SUFFICIENCY.

It is not necessary for the prosecution to exclude every possible defense in order to secure a conviction.—*People v. Nash*, 1 Idaho, 206.

A preponderance of the evidence is sufficient to establish insanity as a defense to crime.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

The gist of the defense of alibi consists of showing that, at the time of the commission of the alleged crime, defendant was at a place different from that where the crime was committed, and not in showing that at

said time it was improbable that he was at the scene of the crime.—*State v. Davis*, 6 Idaho, 159, 53 Pac. 678.

A reasonable doubt must be a doubt arising from the evidence in the case, and not derivable from or dependent upon any extraneous fact or substance.—*State v. Kruger*, 7 Idaho, 178, 61 Pac. 463.

The flight of defendant after he has been arrested and held to answer is not conclusive evidence of guilt, but is open to explanation. *State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033.

Though circumstantial evidence is often the most satisfactory and convincing that can be produced, the convincing effect that follows from positive evidence is not necessarily expected.—*State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

To establish the defense of insanity in a criminal case, it is not incumbent on the defendant to "clearly prove" that he was insane; if he establishes in the minds of the jurors a reasonable doubt as to his sanity, he is entitled to acquittal.—*State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.

Editorial Notes.

Necessity that circumstantial evidence, to convict of crime, must exclude every reasonable hypothesis except guilt of defendant: *Ann. Cas.* 1913E, 428; 41 L. R. A., N. S., 750.

XI. TIME OF TRIAL AND CONTINUANCE.

Review on appeal. See post, XV, (G), 3.

Where, in a criminal case, an application for a continuance is based on the absence of witnesses, and the state offers to admit that if present the witnesses would testify as set forth in the affidavits for continuance, it is not error in the trial court to refuse the continuance.—*Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39; *State v. St. Clair*, 6 Idaho, 109, 53 Pac. 1; *State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

Where, in a criminal case, the defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that the witnesses, if present, would testify to the facts as stated in the affidavit, and that such evidence, if proper, be considered as actually given, the affidavit thereby becomes evidence, but not conclusive of its contents, and it is not error for the court after such admission to deny the continuance.—*Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39.

It is error to hold a party to bail, to answer a charge of felony, which has been investigated by a grand jury, which ignored the charge, in the absence of a showing of improper conduct on the part of the grand jury, and when it is not made to appear that other evidence than that considered by the first grand jury, which tends to prove the guilt of the accused, can, with reasonable diligence, be presented to another grand jury, to be impaneled at the next term of the district court.—*In re Moragne*, 6 Idaho, 82, 53 Pac. 3.

To entitle the defendant to a postponement of the trial of a criminal prosecution on the ground of the absence of a witness, he must show what he expects to and will prove by such witness; that such evidence is material and true; that the witness is not absent by his procurement or consent; that he has used due diligence to procure the presence of such witness and failed, and that there is a reasonable probability that he can and will procure the attendance of such witness at the next term of court.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Affidavits showing the existence of martial law to a limited extent and an excited condition of the public mind growing out of the presence of the military authorities in the county, are irrelevant on a motion for postponement of the trial of a criminal prosecution.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

In a prosecution for murder, an affidavit for a continuance on the ground of the absence of a material witness stated that such witness would testify that on the date of the murder he saw deceased and a stranger enter the business place of deceased, where the homicide occurred, that shortly afterward the stranger came out, locked the door, threw something in the street and walked away. The affidavit failed to state that the testimony of such witness is or would be true. Held, that the evidence of such witness would not have changed the result and hence that there was no abuse of discretion in refusing the continuance.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where the record shows that defendant had about two weeks from the time of his arrest in which to prepare for trial, there was no error in refusing to grant a continuance on the ground that defendant did not have sufficient time in which to prepare for trial.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

The existence of intense popular excitement and prejudice against the defendant in a criminal case is not ground for a continuance. *State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where an application for a continuance in a criminal case does not sufficiently show that it would be in the power of defendant to procure the attendance of absent witnesses at any future time and does not disclose what defendant expected to prove by such absent witnesses, there is no error in refusing a continuance.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Under R. S. 8212, providing that, when a person has been held to answer for a public offense, if an indictment is not found against him at the next term of court, the prosecution must be dismissed, the court, unless good cause to the contrary is shown, must dismiss a prosecution where the indictment is not found at the next term of said court, at which term he is held to answer.—*In re Jay*, 10 Idaho, 540, 79 Pac. 202.

That the complaint filed with the committing magistrate has been lost, and the information of the loss not communicated to the prosecuting attorney until about two weeks

before the beginning of the term of court, and press of business on the part of the prosecuting attorney is not good cause to the contrary within R. S. 8212, ordering dismissal of a prosecution where an indictment is not found against accused at the next term of court at which he is held to answer.—*Id. re Jay*, 10 Idaho, 540, 79 Pac. 202.

On defendant's application a case was removed to another county for trial and all the papers were transmitted in accordance with R. S. 7773. Defendant did not know that the papers so transmitted were received by the clerk until May 2d, on the evening of which day the case was set for trial for May 4th at 10 A. M. R. S. 7790 provides: "After his plea, defendant is entitled to at least two days to prepare for trial." Prior to removal a plea of not guilty had been made and the case set for trial for April 21st. Held, that there was no abuse of discretion in overruling the motion of defendant for a postponement of the trial, or a continuance for the case.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

A defendant charged with a criminal offense, under the laws of this state, is required to exercise due diligence in preparing his case for trial, and where it appears that he has not been deprived of any legal right in the preparation or trial, and full opportunity has been given to prepare his defense, it is not an abuse of discretion to deny the application for postponement.—*State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

No distinction is drawn by the statute of this state as to the showing required on an application for a continuance in a criminal case, whether the application be made at the first or a later term after the indictment is returned; but such fact may be taken into consideration by the trial court in determining the question of diligence.—*State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

An application for a continuance in a criminal case is addressed to the sound discretion of the trial court, and there is no abuse of discretion in denying such application, where the party applying fails to show that if the continuance should be granted he could procure material evidence tending to establish his defense, which he could not reasonably expect to produce, unless such continuance should be granted.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

It is not error for the trial court to overrule a motion for a continuance in a criminal case upon the ground of absence of witnesses, where the showing fails to state the names of such witnesses, what the defendant believes such witnesses will testify to, or show the materiality of the evidence of such witnesses.—*State v. Allen*, 20 Idaho, 263, 117 Pac. 849.

XII. TRIAL.

Waiver of statutory right to have two counsel argue.
See *Homicide*, VIII, (A).

(A) PRELIMINARY PROCEEDINGS.

Denial of request to coroner to produce testimony of witnesses taken at inquest. See *Homicide*, VII, (D).

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R. S. 8151, as amended by Laws 1891, page 20, provides that before witnesses in a criminal case shall be subpoenaed at the county expense on behalf of defendant, he shall make an affidavit that they are witnesses whose evidence is material to his defense and that he cannot safely go to trial without them, and that in such case the court shall order a subpoena to issue for such of said witnesses as the court may deem material for the defendant, and the costs and fees and mileage shall be paid in the same manner that costs and fees of other witnesses are paid. Held, that such affidavit must state the facts to which such witnesses will testify in order that the court may judge of the materiality thereof.—*Delano v. Board Commrs.*, Logan Co., 4 Idaho, 83, 35 Pac. 841.

To entitle a defendant to the benefit of R. S. 8151, as amended by Laws 1893, page 20, allowing defendant in criminal proceedings to subpoena witnesses in his behalf, the necessity and materiality of such witnesses must be shown by affidavit before the court will issue such subpoena or charge the county with the expense thereof.—*State v. Godard*, 4 Idaho, 750, 44 Pac. 643.

In the absence of an affirmative showing of prejudice to defendant, it was not error to permit the prosecuting attorney, at the trial to correct an error made in indorsing the name of a witness on an information.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

Though Laws 1899, page 125, section 2, requires that the names of all the witnesses shall be indorsed on the information before trial, it was not error to permit the indorsement of additional names after the jury had been sworn, on the affidavit of the prosecuting attorney that he did not know the names of such witnesses at the time of filing the information.—*State v. Wilmbusse*, 8 Idaho, 608, 70 Pac. 849.

Under Laws 1899, page 125, requiring the district attorney to indorse on the information the names of the witnesses known to him at the time of filing the same, some showing should be made by affidavit or otherwise before the prosecuting attorney is allowed to indorse the names of witnesses on an information after it is filed.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

Names of witnesses may be indorsed on the information at the beginning of the trial when it satisfactorily appears to the court that the prosecuting attorney could not reasonably have asked such permission at an earlier time.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Under R. S. 7668, relating to indictments and Laws 1899, page 125, section 2, relating to informations, it is error to permit a witness to testify unless his name appears on the indictment or information, even though such witness is called on rebuttal.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

A showing supporting a motion for permission to indorse a name upon the information after the information is filed and the trial begun, was that the witness whose name the prosecution asks to have indorsed upon the

information was a witness at the preliminary examination, and that the defendant knew that such witness was an important and material witness for the prosecution, and the only reason why such name was not indorsed was the oversight and neglect of the prosecuting attorney. No showing was made on behalf of the defendant to the effect that such defendant was in any way misled or deceived by the failure to indorse such name on the information, and the court offered to grant a continuance giving the defendant time to secure necessary and material evidence made necessary by such indorsement. Held, that such showing was sufficient to warrant the court in permitting such name to be indorsed upon the information.—*State v. Allen*, 20 Idaho, 263, 117 Pac. 849.

R. C. 7656, requiring that the prosecuting attorney shall indorse upon the information filed in a criminal case the names of witnesses known to him at the time of filing the same, and, at such time before the trial of any case as the court by rule or otherwise may prescribe, the names of such other witnesses as shall be known to him, does not mean that an information will be quashed, or that the prosecution shall in no case be permitted to have names indorsed upon the information after the same is filed, where good cause is shown at the time the application is made why the name or names were not indorsed at the time the information was filed, or why application was not sooner made after such information was filed.—*State v. Allen*, 20 Idaho, 263, 117 Pac. 849.

R. C. 7656, which provides that the prosecuting attorney shall indorse on the information the names of the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the court may rule or otherwise prescribe he shall indorse thereon the names of such other witnesses as shall then be known to him, does not require the indorsement of the names of witnesses on the information that are called for the purpose of rebutting the testimony given on behalf of the defendant.—*State v. Silva*, 21 Idaho, 247, 120 Pac. 835.

R. C. 7680, as amended by Laws 1911, page 368, provides that "when two or more defendants are jointly indicted or informed against for a felony or any criminal offense, the defendants may be tried separately or jointly in the discretion of the court." Held, that, under this statute, it was not an abuse of the discretion of the trial court to refuse to grant separate trials to defendants, where each of the defendants desired to be a witness for the other and also a witness in his own trial on his own behalf.—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

(B) COURSE AND CONDUCT OF TRIAL IN GENERAL.

Experiments and tests in murder case. See *Homicide*, VIII, (A).

Credibility and impeachment of witnesses. See *Witnesses*, IV.

Nature, scope and limits of cross-examination. See *Witnesses*, III, (B).

Remarks of judge in prosecution for murder. See *Homicide*, VIII, (A).

The formalities required by our statute to be observed in the trial of felonies are the same in all grades or classes of felonies.—*People v. Waters*, 1 Idaho, 560.

Defendant in a criminal case has no constitutional right to be present when a view of the premises is ordered under R. S. 7878.—*State v. Reed*, 3 Idaho, 754, 35 Pac. 706.

Where two persons, jointly indicted for homicide, are granted separate trials, it is proper on the trial of one of them to hear counsel for the other in opposition to a request for a chemical and microscopical examination of a bullet which fitted such other's revolver and was found in decedent's clothes.—*State v. Hendel*, 4 Idaho, 88, 35 Pac. 836.

In a prosecution for murder, it is within the discretion of the trial court to permit the wife of deceased to remain in the courtroom during the trial against the objection of defendant.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

Under R. S. 7855, providing that when the evidence is concluded, unless the case is submitted without argument, "the district attorney or other counsel for the people, must open, and the district attorney may conclude the argument," it was error to compel the district attorney to close the argument in person and not to permit the closing argument to be made by assistant counsel for the state.—*State v. Williams*, 4 Idaho, 502, 42 Pac. 511.

Laws 1899, page 25, section 2, provides that where there is no county attorney or where he is absent from the court or where he has acted as counsel or attorney for the party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge, or when he is unable to attend to his duties, the district court may appoint some suitable person to act as county attorney for the time being with all the powers of the county attorney. Held, that where it appeared that the county attorney was disqualified from acting in a criminal case either through fear or complicity with the persons accused, the court properly appointed an attorney to act temporarily as county attorney.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

An attorney appointed to act temporarily in a criminal case is not disqualified from acting as such by reason of the fact that he has acted as attorney in a civil case for the company whose property was destroyed in the perpetration of the murder for which defendant is being prosecuted.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Where remarks of the trial judge are not shown to be prejudicial to defendant, and do not indicate the opinion of the court as to the guilt or innocence of defendant, error cannot be predicated thereon.—*State v. Roland*, 11 Idaho, 490, 83 Pac. 337.

In a criminal case, it is not error to permit the appearance of private counsel as attorneys for the state.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

An attorney appointed to act temporarily as county attorney is not disqualified from acting as such by reason of his residence in another county.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

It is error for the trial judge to make any remark in the presence of the jury which can be construed into a comment or an opinion on the evidence of witnesses.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

Under R. S. 7855, prescribing the order of trial in a criminal case, the omission to read the information and state the plea of the defendant to the jury at the opening of the trial is reversible error.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013; *State v. Chambers*, 9 Idaho, 673, 75 Pac. 275.

It is not error to permit the witnesses in a case to be sworn in a body.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013; *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

R. S. 7782, providing that "if the indictment is for a felony, the defendant must be personally present at the trial," is mandatory.—*State v. McGinnis*, 12 Idaho, 336, 85 Pac. 1089.

Where an inspection of the premises where an offense was committed is ordered, the defendant has a right to be present at such inspection and examination if he requests such privilege.—*State v. McGinnis*, 12 Idaho, 336, 85 Pac. 1089.

Under R. S. 7782, providing that if the indictment is for a felony, the defendant must be personally present at the trial, a brief and voluntary absence of defendant from the courtroom during the argument by counsel and ruling by the court on a motion to have the jury view the place where the offense was committed is not such a violation of the statute and invasion of defendant's rights as will cause a reversal of a judgment of conviction.—*State v. McGinnis*, 12 Idaho, 336, 85 Pac. 1089.

In a prosecution for rape, the suggestion of the court to the prosecuting attorney that he would have to further question the prosecutrix to show if he could that the act of sexual intercourse had been completed; that he did not think the law would take notice of the words witnesses had used to convey the idea that sexual intercourse had taken place, was unnecessary but not prejudicial to defendant.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

Where a trial judge after admonishing a jury before taking a recess in the course of the trial of a criminal case said in the presence of the jury: "The court desires to say to counsel concerned in this case that he is of the opinion that too much time is being consumed in the examinations, as the same questions are being repeatedly asked many times and much needless repetition being indulged in, and that perhaps nine out of ten questions which have been asked are irrelevant and immaterial because of this continued and useless repetition," the remarks of the court were not prejudicial to the rights of the defendant.—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

Editorial Notes.

Trial, presence of accused at, necessity for: 28 Am. Dec. 629; 68 Am. Dec. 219.

Constitutional right of an accused to be confronted by the witnesses, and what is an invasion of that right: 129 Am. St. Rep. 23.

View in criminal case in absence of accused: 11 Ann. Cas. 1159; 42 L. R. A. 378.

Waiver of right by accused to be present at rendition of verdict: 13 Ann. Cas. 1213; 21 L. R. A., N. S., 56.

(C) RECEPTION OF EVIDENCE.

Anything may be given as rebutting evidence which is a direct reply to that produced by the other side.—*People v. Page*, 1 Idaho, 189.

In a criminal action, the court made an order excluding witnesses from the courtroom while not testifying. A witness, not on the list of defendant's witnesses, remained during the trial and on being called as a witness for the defense, the state objected to his testifying. Thereupon defendant's counsel stated to the court that they did not know that said witness would be called or used as a witness until a few minutes prior to his being called. Held, that the witness should have been allowed to testify.—*State v. Smith*, 5 Idaho, 291, 48 Pac. 1060.

Where a witness in a criminal case was not allowed to testify on the ground that he remained in court during the trial after an order excluding all witnesses, it was the duty of defendant to inform the court of the facts expected to be proved by the witness, and without doing this, and saving an exception to the action of the court, and preserving such exception in the bill of exceptions, the error in rejecting the testimony offered cannot be considered as a ground on which to predicate reversal of the judgment.—*State v. Smith*, 5 Idaho, 291, 48 Pac. 1060.

In a prosecution for robbery, it was shown that the defendant, the prosecuting witness and others had been drinking together from 10 o'clock in the evening until 5 o'clock in the morning, when the robbery was alleged to have taken place. The prosecution confined its examination of the prosecuting witness to the first meeting of such witness with defendant and to the occurrences which took place at the time of the robbery. Held, that it was error to refuse to permit the defense to cross-examine the witness as to his acts and whereabouts during such interim.—*State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

In a prosecution for murder, defendant's attention was called to an alleged conversation with one of the witnesses and he denied that he had ever had any conversation with such witness. To impeach defendant's testimony, the witness was called and testified in positive terms that such conversation did occur. Held, that it was not error to refuse to allow defendant's counsel to cross-examine the witness on such answer.—*State v. Lyons*, 7 Idaho, 530, 64 Pac. 236.

Though, on a prosecution for rape alleged to have been committed on a certain day, evidence of other acts of intercourse committed within the period of limitations is admissible, the state must elect on which offense it will rely for a conviction.—*State v. Lancaster*, 10 Idaho, 410, 78 Pac. 1081.

In a prosecution for murder a witness for the prosecution was called on rebuttal and permitted over defendant's objection to testify as to all he heard and saw during the affray. No reason was given why the witness was not used on the trial in chief and no application made to reopen the case for such evidence. Held error.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Under R. S. 7855, providing that the parties to a criminal prosecution may respectively offer rebutting testimony and that the court "for good reason and in furtherance of justice" may permit either side to offer evidence upon its original case, the action of the trial court in that regard will not be disturbed except for a gross abuse of discretion.—*State v. Waln*, 14 Idaho, 1, 80 Pac. 221.

The party offering rebuttal testimony should be confined to the rules governing the introduction of such testimony, and if he desires to introduce testimony on his original case, he should obtain leave of court to reopen the case for that purpose.—*State v. Waln*, 14 Idaho, 1, 80 Pac. 221.

Where, during the course of the prosecutor's statement to the jury before the introduction of evidence, the defendant asks that the witnesses be excluded, it is proper and advisable that the order of exclusion be made and the witnesses be excluded prior to the statement of the case by the prosecutor.—*State v. Lockhart*, 18 Idaho, 730, 111 Pac. 853.

Where a defendant became a witness in his own behalf and testified concerning his early life, and as to his acquaintance with a third party, and concerning a trip taken by him and a party who was afterward murdered, and made no reference to any property owned by the deceased, and no mention of a transaction in which certain property claimed to have belonged to the deceased was pawned, it was error for the court to allow the prosecuting attorney to ask the defendant on cross-examination if he gave a pawn ticket to a third party for certain of the deceased's property.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

Where the attorney for the defendant on cross-examination of a state's witness in the trial of a criminal case has the witness produce an article of personal property and testify concerning it, and tell where he got it, and what he had been doing with it, it is error for the trial court to refuse to have the article marked for identification, and retained in the possession of the court for the purposes of cross-examination and the inspection of the defendant and his counsel, or for any use to which defendant may legally apply the exhibit.—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

(D) OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

Where evidence is admitted under objection, and no exception is taken to the ruling of the court, the objection is waived.—*People v. Kuok Wah Choi*, 2 Idaho, 90, 6 Pac. 112.

In a prosecution for conspiracy to influence a witness in a criminal action to leave the state and remain without the jurisdiction of the court, where it appears that the prosecuting attorney omitted to prove by primary evidence the pendency of such criminal action at and prior to the time the alleged conspiracy was entered into, but witnesses testified from their personal knowledge that such action was pending at that time, and counsel for appellant made no objection to the admissibility of such testimony on the ground of its being secondary evidence, such testimony is competent evidence of the pendency of such action.—*State v. Roe*, 19 Idaho, 416, 113 Pac. 461.

(E) ARGUMENTS AND CONDUCT OF COUNSEL.

It is error for the prosecuting attorney to refer to the fact that the defendant had failed to testify in his own behalf when he had the right to do so, but such error is cured by an instruction that the fact that defendant did not testify in his own behalf should not in any manner be considered by the jury as a circumstance against him.—*United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407; *United States v. Cozzens*, 2 Idaho, 486, 21 Pac. 409.

In a criminal prosecution the county attorney was called by defendant as an impeaching witness but was excused simply on the ground that he did not wish to testify. Held, error.—*State v. Seymour*, 7 Idaho, 548, 63 Pac. 1036.

Where, in a prosecution for rape, the prosecuting attorney persists in asking questions imputing to the defendant other like crimes, over the objection of defendant, such conduct is calculated to prejudice the jury and constitutes reversible error.—*State v. Irwin*, 9 Idaho, 35, 60 L. R. A. 716, 71 Pac. 608.

In a criminal prosecution, it is error to instruct the jury that statements made by defendant's counsel in their presence as to the commission of the offense are statements, in so far as they are admissions against the defendant, to be considered by the jury in regard to the question as to whether or not the defendant is responsible for the commission of the offense alleged in the indictment. *State v. Stuff*, 9 Idaho, 115, 72 Pac. 664.

In overruling objections to the remarks of the county attorney in a criminal case, the court stated, "You should not interrupt the county attorney in his arguments. The court will grant you an exception to all remarks prejudicial to defendant at the close of the trial." Held error, as the time of the remarks was the only time counsel for defend-

ant could protect defendant from the danger of the statements of the prosecuting officer.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

In a prosecution for rape, a statement of the county attorney in his argument to the jury that one charged with or guilty of the crime for which defendant was on trial should be strung up by the neck or have his brains blown out, that he would blow out the brains of the guilty person under similar circumstances, and that, had the husband of the woman assaulted blown out the brains of the assailant, he (the prosecuting attorney) would not prosecute him for such an offense, was prejudicial error.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

Where a witness is asked in regard to a particular event and swears that he never heard of it, it is not error to overrule a question as to what he had heard about it.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

Statements of a prosecuting attorney, apparently imputing improper motives or influence to any of the jurors, but satisfactorily explained; a statement, "I want you to give this defendant justice, and justice is what the defendant does not want"; and a further statement that defendant's attorney "said in his argument that he desired you to consider him as a thirteenth juror" and "I am willing to accept him as a juror, and from the evidence in this case, he would find the defendant guilty"—are not cause for reversal of a judgment of conviction.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Erroneous statements of the prosecuting attorney may be explained by him.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

In his plea to the jury the prosecuting attorney may refer to and quote from the evidence of the prosecutrix for the purpose of convincing the jury that such statements were true.—*State v. Harness*, 11 Idaho, 122, 80 Pac. 1129.

While a party producing a witness may contradict him by other evidence or by showing that he has made statements inconsistent with his present testimony under R. S. 6080, yet the prosecutor in a criminal case should not ask a witness if he has made conflicting statements in order to prejudice the witness before the jury, and then fail to produce evidence of such statements, and if he does so, the court should specifically instruct the jury to disregard such questions.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

The prosecuting attorney and his assistants must keep within reasonable bounds in the trial of a criminal case and must not make any remarks that would tend to prejudice the jury outside of what the evidence shows or warrants.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

Editorial Notes.

Arguments at trials based on facts not in evidence: 48 Am. Rep. 337.

Guilt of defendant, whether refusal of a witness to testify can be referred to in the argument as evidence of: 121 Am. St. Rep. 806.

Argument of counsel, limitations upon the right of: 46 Am. St. Rep. 23.

Argument of counsel, improper, justifying a new trial: 9 Am. St. Rep. 559; 100 Am. St. Rep. 689.

(F) PROVINCE OF COURT AND JURY IN GENERAL.

In a criminal prosecution, an instruction "that defendant's testimony was to be weighed like the testimony of other witnesses in the case provided it was corroborated by other unimpeached testimony" was properly refused as "being an invasion of the province of the jury.—*People v. Pierson*, 2 Idaho, 76, 3 Pac. 688.

In a criminal prosecution, an instruction that "when the defendant is a witness in his own behalf, as in this case, his evidence is entitled to the same credit as that of any disinterested witness, provided his testimony is sustained and corroborated by other credible and unimpeached evidence," is properly refused as being an invasion of the province of the jury.—*People v. Pierson*, 2 Idaho, 76, 3 Pac. 688.

A motion for nonsuit is not proper in criminal cases, the remedy being by motion to instruct the jury to find a verdict of not guilty.—*People v. Barnes*, 2 Idaho, 161, 9 Pac. 532.

Under criminal practice act, section 354, the trial court, in charging the jury, may state the evidence and declare the law.—*People v. Bernard*, 2 Idaho, 193, 10 Pac. 30.

At the close of the testimony for the prosecution, the defendant moved the court to instruct the jury to acquit, which motion the court denied. Held, that such an instruction would have taken the facts from the jury, which the court cannot do.—*Territory v. Neilson*, 2 Idaho, 614, 23 Pac. 537.

The amount or character of the evidence necessary to create a "reasonable doubt" in a criminal case is for the jury to determine.—*State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

In a prosecution for murder, an instruction stated, "The defense of insanity is a defense which may be and sometimes is resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fairly, fully and justly, and when satisfactorily established must recommend itself to the sense of humanity and justice of the jury, you are to examine it with care lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt." Held, erroneous on the ground that it could be construed by the jury as an expression of the court's views on the evidence, and on the further ground that the last paragraph of the instruction was misleading.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

Where a contract for the possession of property was made in one county and the evidence tends to show that it was embezzled in another county, and the court fully

and fairly instructs the jury as to the law of the case, the determination of the jury that the crime was committed in the county wherein the trial was had will not be disturbed on appeal.—*State v. Roland*, 11 Idaho, 490, 83 Pac. 337.

Under R. S. 7877, the court is not authorized to direct the jury to return a verdict of not guilty, but may so advise, which advice the jury may decline to follow.—*State v. Wright*, 12 Idaho, 212, 85 Pac. 493; *State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

An instruction that leaves the question of fact to be found by the jury and only suggests the law applicable in case they find certain facts to exist is not objectionable on the ground that it assumes that certain facts do exist.—*State v. Wright*, 12 Idaho, 212, 85 Pac. 493.

The credibility of a witness is for the jury. *State v. Simes*, 12 Idaho, 310, 9 Ann. Cas. 1216, 85 Pac. 914.

It is improper for the trial court in its instructions to comment on the evidence introduced or to tell the jury what fact is proven or disproven by the evidence.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

An instruction that "flight is an incriminating circumstance, and the lack of flight in the case presented by the state is a material lessening of the proof of guilt placed before you," was properly refused as being an invasion of the province of the jury and an incorrect statement of law.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

It is not error for the trial court to strike out and refuse to give the italicized portion of the following instruction: "The jury are instructed that evidence of confession or admission should be carefully scrutinized by the jury and received with great caution. *It is the most dangerous evidence that can be admitted in a court of justice and the most liable to abuse*; and though a witness is perfectly honest, it is impossible for him in most cases to give the exact words in which an admission was made, and sometimes, by the transposition of the words a party may give a meaning entirely different from that which was intended to be conveyed by the witness." *State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

An instruction which argues to the jury the weight or relative value of circumstantial evidence as compared with direct evidence is not the statement of a legal proposition, and should not be given to the jury as a charge or part of a charge of the law governing any particular case; and, when the court comments upon or argues the relative weight of circumstantial evidence as compared with positive evidence, the instruction is an argument, and also invades the province of the jury, and is erroneous.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

Where M. went to a butcher-shop and told the manager thereof that he wanted to buy "a three-pound pail of lard," and he was given a pail of lard commonly known and designated as a three-pound pail, for which

he paid the price demanded, and, upon weighing the same, it appeared that the bucket and lard together weighed the gross sum of three pounds and three-fourths of an ounce, and that the net weight of the lard contained in the bucket was two pounds and nine and one-half ounces, and the vender of the lard is subsequently prosecuted under R. C. 7109 for selling by short weight, it is a question to be submitted to the jury as to whether or not the purchaser offered to buy and the seller represented that he was selling three pounds of lard net or gross; and it was error for the court to instruct the jury that, when the purchaser asked for a three-pound pail of lard, "he must be taken to have meant, and the defendant must be taken to have understood, that the purchaser was to receive three pounds of lard, irrespective of the weight of the pail."—*State v. Schweitzer*, 18 Idaho, 609, 111 Pac. 130.

Under R. C. 7877, providing that "if at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant; but the jury are not bound by such advice," the court is not required to give such advice unless it deems the evidence, insufficient to convict.—*State v. Downing*, 23 Idaho, 540, 130 Pac. 461.

In a trial upon a charge of murder, where a trial court in instructing the jury repeated the definition of murder and malice in several different instructions, and it appears that such definitions are the same in all the instructions and are only repeated after defining murder generally in connection with other matters upon which the jury are instructed, in addition to the general definition of murder, such instructions of the court are not cumulative and do not in themselves necessarily impress upon the minds of the jury the idea that in the opinion of the trial judge the defendant is guilty.—*State v. Willis*, 24 Idaho, 252, 132 Pac. 962.

Where two instructions are given upon self-defense, and such instructions together state the law upon the subject of self-defense, this court will not reverse the case upon the assumed error that the court assumes and charges upon a theory not raised or indicated by the evidence, but will follow the rule that an instruction that leaves the questions of fact to be found by the jury and only suggests the law applicable in case they find certain facts to exist is not objectionable on the ground that it assumes that certain facts do exist.—*State v. Willis*, 24 Idaho, 252, 132 Pac. 962.

(G) NECESSITY, REQUISITES AND SUFFICIENCY OF INSTRUCTIONS.

In prosecution for homicide. See *Homicide*, VIII, (O).

Erroneous instruction as to accessory cured by subsequent instruction. See ante, III.

Instructions invading province of jury. See ante, XII, (F).

Instruction as to complaining witness' reputation for peace and quietude. See *Assault and Battery*.

Harmless error. See post, XV, (G), 5.

1. In General.

In a criminal case, it is not necessary to give instructions in the exact language of the statute, it being sufficient if the substance thereof is correctly given.—*People v. McDonald*, 2 Idaho, 10, 1 Pac. 345.

The charge to the jury in criminal cases should be brief, explicit and comprehensive, full enough to protect the rights of the parties and not so prolix as to confuse the jury. *United States v. Camp*, 2 Idaho, 231, 10 Pac. 226.

Under R. S. 7855, subdivision 6, providing that in criminal cases the charge of the court must be reduced to writing before it is given, unless by mutual consent of the parties it is given orally, the record must show that such consent was given to an oral charge.—*Territory v. McKern*, 3 Idaho, 15, 26 Pac. 123.

R. S. 7855, subdivision 6, requires the judge to reduce all instructions to writing before giving them to the jury, unless by mutual consent of the parties they are given orally. Held, that 15 Session Laws, 29, requiring the court stenographer to correctly report all proceedings of the court, requires him to take in writing all oral instructions given, and this secures the end sought by R. S. 7855, subdivision 6.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

In the prosecution of an indictment under R. S. 6975, which prescribes the punishment for public officers and other persons charged with the keeping of public moneys who deposit the same other than as a special deposit, it is error to instruct the jury that before they can convict defendant of a violation of the statute, they must be satisfied, beyond a reasonable doubt, that such violation of the statute was made with the intent feloniously and corruptly to wrong, cheat or defraud the county of its money or property, or any part thereof.—*State v. Browne*, 4 Idaho, 723, 44 Pac. 552.

Conflicting instructions in a criminal case are erroneous.—*State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

In a prosecution for rape, an instruction which virtually instructs the jury that they may find corroboration of the testimony of the prosecutrix in her own statements is misleading, and amounts to prejudicial error.—*State v. Anderson*, 6 Idaho, 706, 59 Pac. 180.

There is no error in an instruction stating: "One of the defenses interposed in this case is what is known in law as an 'alibi,' and is a proper and legitimate defense when proven, and consists in showing that at the time the alleged crime was committed the defendant was at a place different from that where the crime was committed. And where the defendant relies on 'an alibi for his defense, the burden of establishing such alibi is on the defendant, and, if he succeeds in raising a reasonable doubt in the minds of the jury as to the fact of his presence at the place and at the time the offense was committed, he is entitled to an acquittal, as it is incumbent on the prosecution to establish his guilt beyond a reasonable doubt."—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

An instruction that the jury should act throughout the consideration of the evidence on the presumption that defendant was innocent, unless such presumption should be overcome by evidence sufficient to convince them of defendant's guilt beyond a reasonable doubt and that "this rule of law is not intended to aid anyone who is in fact guilty to escape, but is a just and humane provision of the law, intended to be construed by the jury in a common-sense manner and to guard against the liberties of a person being wrongfully taken away from him, or against a person being wrongfully punished," is not prejudicial to defendant.—*State v. Gilbert*, 8 Idaho, 346, 1 Ann. Cas. 280, 69 Pac. 62.

It is error to instruct that, to establish insanity as a defense, it must be clearly proved by a preponderance of the evidence. *State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

It is error to instruct that as to all other matters, except insanity, defendant is entitled to every reasonable doubt.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

It is not error to give an instruction in the words of R. S. 8143, "A defendant in a criminal action or proceeding to which he is a party is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding."—*State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

An instruction in the language of R. S. 7697, that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony whether they commit the offense or aid in its commission, though not present, shall be prosecuted as principals, and no facts need be alleged in an indictment against an accessory, other than those required in an indictment against a principal, is not error.—*State v. Bland*, 9 Idaho, 796, 76 Pac. 780.

The trial court did not err in giving the following instruction: "Should you first find that the defendant fired the fatal shot, then the court instructs you, gentlemen, that the true test and standard of accountability is: Had the defendant sufficient mental capacity to appreciate the character and quality of his acts? Did he know and understand that it was in violation of the rights of another and in itself wrong? Did he know that it was prohibited by the laws of the state, and that its commission would entail punishment and penalty upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his acts, he is responsible to the law for the acts thus committed, and is to be adjudged accordingly. A person in the possession of a sound mind who commits a criminal act under the impulse of passion or revenge, which may temporarily dethrone reason or for the time being control his will, cannot be shielded from the consequences of his act."—*State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

The following language: "The court instructs the jury that the policy of our law deems it better that many guilty persons should escape than that one innocent person should be convicted and punished"—in an instruction is argumentative and should not be given, and where such matter is coupled with other matter proper to be given to the jury and the latter is covered by other instructions, it is not error for the trial court to refuse to give such instruction to the jury. *State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

All instructions given to the jury should be instructions by the court, and the court should in no way indicate to the jury whether the instructions given are instructions given upon the court's own motion or at the request of either the plaintiff or the defendant.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

Where the court permitted the prosecutor to ask a question on cross-examination which was not proper cross-examination, and it appears that the question was one that did not prejudice the defendant's rights, and did not prejudice him in any substantial manner, it was not error for the trial court to refuse to instruct the jury that the defendant had properly declined to answer such question, and that his refusal to answer should not be construed against him.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

The following portion of an instruction given to the jury by the court held to be incorrect: "And, if a large majority of your number are on one side or the other of this case, the minority should consider whether their doubts are reasonable, or whether they may not reasonably be mistaken."—*State v. Moon*, 20 Idaho, 202, Ann. Cas. 1913A, 724, 117 Pac. 757.

Where counsel for defendant suggests to the court that the jury be permitted to take to the jury-room the Session Laws containing the sections of the statute under which the prosecution was had, and the court erroneously grants the request and declines to give, in addition thereto, instructions covering the sections of the statute referred to there is no reversible error.—*State v. Layman*, 22 Idaho, 387, 125 Pac. 1042.

That authorities were cited at the foot of an instruction and given to the jury did not make the jury the judges of the law as well as of the facts.—*State v. Sage*, 22 Idaho, 489, 126 Pac. 403.

2. Credibility of Witnesses.

An instruction that the jury may, in estimating the weight of the testimony of accused on trial for crime, consider his interest in the trial, is proper.—*State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

An instruction that if the jury believe from the evidence that any witness has willfully sworn falsely on this trial as to any matter or thing material to the issues, then they are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial, should be given when requested by de-

fendant.—*State v. Waln*, 14 Idaho, 1, 80 Pac. 221.

3. Circumstantial Evidence.

An instruction that "when a person is charged with an offense, his flight or hiding will not of itself warrant a conviction, but it may be proven as a circumstance to be considered with the other evidence in the case," is sufficient and needs no modification. *United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407; *United States v. Cozzens*, 2 Idaho, 486, 21 Pac. 409.

Where the evidence of defendant's guilt of the crime of burglary was entirely circumstantial, there was no error in an instruction that "while it is necessary for the prosecution to prove all these necessary allegations, yet it is not necessary to prove each link in the chain of circumstances relied upon for conviction; it is sufficient if, taking the testimony altogether, you are satisfied beyond a reasonable doubt of defendant's guilt."—*State v. Kruger*, 7 Idaho, 178, 61 Pac. 463.

There is no error in an instruction stating: "To authorize a conviction on circumstantial evidence alone, the circumstances should not only be consistent with defendant's guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt in the minds of the jury of the defendant's guilt."—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

4. Reasonable Doubt.

An instruction that "a reasonable doubt is not a mere possible doubt, nor is it a captious or imaginary doubt, but is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life," is not erroneous.—*People v. Dewey*, 2 Idaho, 83, 6 Pac. 103; *State v. Kruger*, 7 Idaho, 178, 61 Pac. 463.

An instruction that "if the jury are in doubt upon any material fact sought to be proved by the prosecution, or upon the general evidence introduced as to the guilt of defendant, they should give the defendant the benefit of the doubt and acquit," was properly refused.—*People v. Stapleton*, 2 Idaho, 47, 3 Pac. 6.

In a criminal prosecution, the court struck from an instruction asked by defendant the sentence, "And no matter how slight that doubt may be, as long as it is reasonable, and based fairly on the evidence, you should acquit." Held, no error.—*State v. Anthony*, 6 Idaho, 383, 55 Pac. 884.

In a criminal prosecution, it is not error to instruct the jury as follows: "You are not at liberty to disbelieve as jurors if from the evidence you believe as men. Your oath imposes upon you no obligation to doubt when no doubt would exist if no oath had been administered, and, in considering the case, the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural."—*State v. Lyons*, 7 Idaho, 530, 64 Pac. 236.

An instruction in a criminal case stated: "The term 'reasonable doubt' does not mean a vague or shadowy doubt. A reasonable doubt is one which has some reason for its basis. It is a doubt which a jurymen can give a reason for. You should not go beyond the evidence to hunt for doubt. A doubt to justify an acquittal must be reasonable and arise from a candid and impartial consideration of the evidence. It should be such a doubt as would cause a reasonable, prudent and considerate man to hesitate and pause before acting in the graver and more important affairs of life." Held, not erroneous.—*State v. Gilbert*, 8 Idaho, 346, 1 Ann. Cas. 280, 69 Pac. 62.

An instruction that if the jury "have a reasonable and abiding doubt of defendant's guilt," they should acquit him, though improperly including the word "abiding," is not so prejudicial as to warrant reversal of a judgment of conviction.—*State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

The following language contained in an instruction discussing circumstantial evidence, "although the fact may be in a degree surrounded by a doubt," could only have a tendency to confuse the meaning of "reasonable doubt" as given to the jury, and in no way aids the jury in reaching a verdict, and may create a doubt in the minds of the jurors as to the weight of circumstantial evidence and the doubt which would justify an acquittal, and should not be incorporated in an instruction.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

In defining the words "reasonable doubt," as used in the court's instructions, it is not error as a part of such definition to use the following language: "You are not at liberty to disbelieve as jurors, if from the evidence you believe as men. The oath which you have taken imposes upon you no obligation to doubt when no doubt would exist, if no oath had been administered."—*State v. Moon*, 20 Idaho, 202, Ann. Cas. 1913A, 724, 117 Pac. 757.

The court properly refused to give the following instruction on account of the erroneous nature of italicized statement contained therein: "The court instructs the jury that, upon the trial of a criminal cause, if a reasonable doubt of any facts necessary to convict the accused is raised in the minds of the jury by the evidence itself or by the argument of counsel upon any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner, and he should be acquitted."—*State v. Fonden*, 24 Idaho, 663, 135 Pac. 265.

Editorial Notes.

Reasonable doubt, what is and instructions concerning: 48 Am. St. Rep. 566.

Propriety of instruction defining reasonable doubt as doubt for which juror can give reason: 11 Ann. Cas. 1019; 16 L. R. A., N. S., 260.

5. Application of Instructions to Case.

See *Homicide*, VIII, (O).

In criminal prosecutions, as in other actions, instructions to the jury must be based

upon evidence in the case.—*Territory v. Evans*, 2 Idaho, 425, 17 Pac. 139.

The court did not err in refusing an instruction that "it is the policy of the law that it is better that ninety-nine guilty men should go free and unpunished than that one innocent man should suffer for another's crime," as such instruction was not based on the evidence in the case.—*State v. Reel*, 19 Idaho, 463, 113 Pac. 721.

It is not error for the trial court to refuse to give to the jury an instruction to the effect that the law presumes that the defendant sustained a good reputation prior to the commission of the alleged offense, where no evidence has been introduced touching his character or reputation, and no issue has been made touching his reputation with reference to any trait or quality, or in any respect.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

It is not error for the trial court to refuse to give an instruction to the jury as to the law covering the defense of insanity, where there is no evidence introduced on the part of the defendant tending to show that he was insane at the time of the commission of the offense.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

6. Construction and Effect of Charge as a Whole.

The entire charge on a particular point must be considered in determining whether or not it is misleading.—*People v. Bernard*, 2 Idaho, 193, 10 Pac. 30.

In reviewing alleged errors on appeal from a judgment in a criminal case, where objection is made to specific instructions, the entire charge will be considered together, and if it fairly and correctly presents the law bearing upon the issues tried, the appellate court will not disturb the judgment.—*Territory v. Evans*, 2 Idaho, 425, 17 Pac. 139.

Error cannot be predicated on a single clause of an instruction, if when read as a whole the charge states the law applicable to the case correctly.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

7. Cure of Erroneous Instructions.

See ante, III.

Error in instructions when considered harmless.

See post, XV, (G), 5.

Where the trial court has erroneously instructed the jury as to what it was necessary to prove in order to convict defendant, subsequent instructions that it was necessary to prove the defendant guilty beyond a reasonable doubt and that the burden was on the state to prove every material allegation as laid in the information, did not cure the error.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

(H) REQUESTS FOR INSTRUCTIONS.

Where the instructions fully and fairly state the law on all the questions involved, it is not error to refuse further instructions re-

quested by the state or by defendant.—*United States v. Camp*, 2 Idaho, 231, 10 Pac. 226; *State v. Lyons*, 7 Idaho, 530, 64 Pac. 236; *State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186; *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82; *State v. Roland*, 11 Idaho, 490, 83 Pac. 337; *State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527; *State v. Barber*, 13 Idaho, 65, 88 Pac. 418; *State v. Peck*, 14 Idaho, 712, 95 Pac. 515; *State v. Fleming*, 17 Idaho, 471, 106 Pac. 305; *State v. Reel*, 19 Idaho, 463, 113 Pac. 721; *State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

Where defendant in a criminal case desires the court to instruct the jury on any particular point, he must prepare the same for the court, or he cannot urge the omission of the court to charge thereon as error.—*People v. Biles*, 2 Idaho, 114, 6 Pac. 120.

In a trial for assault with intent to murder, the neglect of the trial court to instruct the jury that they may find the defendant guilty of any lower offense included within the main charges cannot be sustained as error, where the record does not show that such a charge was requested by defendant.—*State v. White*, 7 Idaho, 150, 61 Pac. 517.

Where the court fails to instruct the jury in writing on all the material issues of the case, as required by statute in a felony prosecution, the error is unavailable, unless the charge is requested by counsel and refused by the court.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

Where the court on its own motion has fully instructed the jury on all the essential elements constituting the crime, it is not error to refuse requests for instructions by counsel for the accused.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

The trial court did not err in refusing to give the following instruction: "The jury are instructed that the statements of the defendant out of court are very doubtful species of evidence and should be acted upon with great caution; and, unless supported by other evidence tending to show that the prisoner is guilty of the crime charged, are sufficient to warrant a conviction."—*State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

In a prosecution for the embezzlement of checks, the modification of a requested instruction that the mere secreting of the checks would not constitute an embezzlement, by adding, "unless you find present the other necessary elements set forth in the information," was not error.—*State v. Sage*, 22 Idaho, 489, 126 Pac. 403.

Where instructions are requested by defendant at the conclusion of the trial, the trial judge is not justified in refusing the instructions on the ground that they were handed to him in bulk at or about the conclusion of the trial, but he should give such instructions if they state the law, or other instructions embracing the same principles of law, as the defendant is entitled to have the law given to the jury by the judge, applicable to the facts as shown by the evidence introduced upon the trial.—*State v. Willis*, 24 Idaho, 252, 132 Pac. 962.

It is not error of the trial court to refuse instructions tendered by defendant upon the trial of a criminal case, where the charge is murder, even though such instructions embrace the law applicable to the facts of the case, if the law so stated is covered by other instructions given by the court.—*State v. Willis*, 24 Idaho, 252, 132 Pac. 962.

Certain requested instructions examined, and held to be substantially correct statements of the law, and that they were covered by the instructions given by the court on its own motion.—*State v. Fondren*, 24 Idaho, 663, 135 Pac. 265.

(I) OBJECTIONS TO INSTRUCTIONS OR REFUSAL THEREOF AND EXCEPTIONS.

Necessity of exception to entitle review on appeal.

See post, XV, (B).

An objection to an instruction which does not point out or allege the grounds of such objection will not be considered.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

Where instructions are given by the court upon its own motion they must be excepted to before verdict to be considered.—*State v. O'Donald*, 4 Idaho, 343, 39 Pac. 556.

R. S. 7940, providing that defendant may except to the instructions of the court, has reference to the instructions given by the court on its own motion.—*State v. Suttles*, 13 Idaho, 83, 88 Pac. 238.

(J) CUSTODY, CONDUCT AND DELIBERATIONS OF JURY.

Admissibility of jurors' affidavits to impeach verdict.

See post, XIII, (G).

Discharge of jury, former jeopardy. See ante, VII.

The time during which a jury may be kept together for the purpose of enabling them to reach a verdict is within the discretion of the court.—*People v. Stock*, 1 Idaho, 218.

Under R. S. 7905, the discharge of a jury in a criminal prosecution by reason of their inability to agree is within the discretion of the court.—*State v. Jorgenson*, 3 Idaho, 620, 32 Pac. 1129.

Under R. S. 7905, authorizing the court to discharge the jury "at the expiration of such time as the court may deem proper, when it satisfactorily appears that there is no reasonable probability that the jury can agree," no abuse of discretion is shown in the discharge of a jury in a criminal case after they have been out for over fifteen hours.—*State v. Crump*, 5 Idaho, 166, 47 Pac. 814.

Where the jury in a criminal case returned after retiring and one of the jurors asked the court a question pertaining to the case to which the court made some reply not disclosed in the record, the verdict will not be disturbed for failure to comply with R. S. 7855, subsection 6, requiring instructions to be reduced to writing before they are given, since, in the absence of a showing to the contrary, the court will presume that the reply of the court to such question was reduced to

writing by the court reporter.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

During the trial of a murder case, the jurors were permitted to go to a theater. Six of the jurors were placed in one box and six in another, each six in charge of a sworn officer and in sight of each other. No person was permitted to speak to them and there was nothing in the play that could in any manner affect their judgment or opinion in regard to the case. Held, not reversible error. *State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

After the jury in a criminal action had deliberated for about twenty-three hours, they announced to the court that they could not agree. The court reminded them of the great expense of the trial to the county and said, "I recommend you to meet in a proper spirit of inquiry, investigation and discussion and see if you cannot get together, and avoid, in the meantime, too much pride in your own opinions. It does not seem to me that this case involves a great deal of difficulty. If all the jurors, in the consideration of a question of this kind, should get in a condition of mind where they could not agree, we would never get anything done. Courts would be a travesty and no business would be accomplished; rights of the state and of the individual would never be enforced." About nine hours later, the jury were again called into court and announced that they had not agreed. The court then repeated in substance his former remarks, and spoke of the expense of the trial, the inconvenience to business men serving as jurors, the necessity of protecting the public against malefactors and the defendant against prosecution, and admonished them to "accommodate yourselves to the condition of affairs and meet upon a plane where you can dispassionately discuss the question involved and come to some conclusion. The administration of justice in this state demands it." Held, that such instructions and remarks of the court were reversible error.—*State v. Chambers*, 9 Idaho, 673, 75 Pac. 274.

After a criminal case has been submitted to the jury, the delivery to a juror of a sealed letter, the contents of which are not revealed to judge or counsel, is reversible error.—*State v. Bland*, 9 Idaho, 796, 76 Pac. 780.

Under R. S. 7903, providing that in case of a disagreement of the jury, "on being brought into court the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called," a communication between the trial judge and one or more of the jurors in the absence of defendant and his counsel held reversible error.—*State v. Bland*, 9 Idaho, 796, 76 Pac. 780.

Under R. S. 7902, providing that the jury may take all papers in evidence, written instructions, etc., it is error in a prosecution for murder to permit the jury to take into the jury-room exhibits consisting of a hat, coat, blood-stained vest, revolver, etc.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

Where the defendant in a capital case shows that the jury have separated after hav-

ing been sworn to try the case, such fact is sufficient prima facie showing to entitle him to a new trial and unless the state shows clearly and beyond a reasonable doubt that nothing transpired during such separation or on account thereof that did or could prejudice defendant, a new trial should be granted.—*State v. Sly*, 11 Idaho, 110, 80 Pac. 1125.

Where a new trial is sought in a criminal case on the ground that one of the jurors separated himself from his fellow-jurors after the final submission of the case to the jury, the uncorroborated affidavit of such juror should not be accepted as a satisfactory explanation of his whereabouts and conduct during such separation.—*State v. West*, 11 Idaho, 157, 81 Pac. 107.

Where a juror in a criminal case deliberately separates himself from the other jurors after the case has been finally submitted to the jury and remains out of the view of the bailiff and other jurors for a period of from three to five minutes, and his whereabouts and conduct during that time are unexplained except by his own affidavit, and it does not appear that the absence was the result of necessity, accident or mistake, a new trial will be granted.—*State v. West*, 11 Idaho, 157, 81 Pac. 107.

Editorial Notes.

Jury, separation of, when avoids their verdict: 60 Am. Rep. 73; 24 L. R. A., N. S., 776; 31 L. R. A., N. S., 1005.

(K) VERDICT.

In prosecution for murder. See *Homicide*, VIII, (D).

Conviction of offense included in the charge. See *Indictment and Information*, X.

Form of verdict. See *Vagrancy*.

The verdict of the jury may be corrected in a matter of form by the order of the court, in the presence of the jury, before they are discharged, the jury assenting thereto.—*People v. Biles*, 2 Idaho, 114, 6 Pac. 120.

Where two defendants are jointly informed against and tried together for grand larceny, and the jury, under the court's instructions, brings in a separate verdict of guilty against each defendant, naming such defendant in the verdict but not naming the codefendant, such verdicts were not void for uncertainty, and the fact that the names of the two defendants did not appear in the title of each verdict could not prejudice either defendant.—*State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

The fact that the jury finds defendant guilty of a lower degree of offense than that established by the evidence is not ground for reversal on appeal from a judgment of conviction.—*State v. Phinney*, 13 Idaho, 307, 12 Ann. Cas. 1079, 12 L. R. A., N. S., 935, 89 Pac. 634.

In a prosecution for unlawfully selling lard by short weight, a verdict by the jury in the following form: "We, the jury in the above-entitled case, find the defendant, George Schweitzer, guilty of selling by short weights as charged in the complaint"—is sufficiently definite and certain as to the intent of the

more than ten days after the verdict and without extension of the time was properly denied.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87; *State v. Davis*, 8 Idaho, 115, 66 Pac. 932.

Where affidavits on motion for new trial show that one of the jurors had expressed an opinion as to the defendant's guilt previous to the trial, it is not error for the court to consider counter-affidavits.—*State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

The uncorroborated affidavit alone of a juror, who deliberately separates himself from his associates and bailiff, in disregard of the law and the admonitions of the court, should not be accepted as a satisfactory explanation of his whereabouts and conduct during such separation.—*State v. West*, 11 Idaho, 157, 81 Pac. 107.

R. S. 7953 provides that the application for a new trial must be made within ten days after verdict. R. S. 8070 provides that on appeal of criminal cases the court must give judgment without regard to technical errors or to exceptions not affecting substantial rights. R. S. 8056 provides that if the appeal is irregular in any substantial particular, but not otherwise, it may be dismissed. Held, that a notice of intention to move for a new trial, stating the grounds on which the application is based and treated by the trial judge and respective counsel as an application for a new trial, will be so treated on appeal and the appeal will not be dismissed for want of formal application for a new trial.—*State v. Wright*, 12 Idaho, 212, 85 Pac. 493.

Upon a motion for a new trial in a criminal case, it is proper for the court to receive and consider counter-affidavits in relation to any pertinent matter, except the issue of fact to which the newly discovered evidence is addressed, in order to enable the court to properly and intelligently exercise its discretion in passing upon the motion, and to determine whether a new trial would result with reasonable probability in a different judgment.—*State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

Where the qualification of a juror is attacked after verdict, upon the ground that the juror was biased and prejudiced and made false answer with reference thereto upon his voir dire, affidavits may be received in evidence upon such hearing, made by persons who testify as to the good reputation for truth and veracity of the juror, and affidavits may be considered made by other jurors who testify that the juror attacked acted fairly and impartially and without prejudice in his consideration of the case.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

To entitle a person convicted of an offense to a new trial on the ground of disqualification of a juror, not disclosed upon voir dire and discovered after verdict, the showing should be clear and conclusive, and the trial court should be clearly satisfied that the defendant has been denied the impartial trial guaranteed to him by the constitution.—*State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

(D) ORDER GRANTING OR REFUSING NEW TRIAL.

Where an order granting a new trial in a criminal case does not state the grounds on which the new trial is granted, the supreme court will not reverse such order unless error is manifest from the record.—*State v. Driskell*, 12 Idaho, 245, 85 Pac. 499.

The trial court or judge, granting a new trial, should specify in the order the grounds on which the new trial is granted.—*State v. Barber*, 15 Idaho, 96, 96 Pac. 116.

(E) ARREST OF JUDGMENT.

In prosecution for murder for defect in indictment. See *Homicide*, VI.

Where the record in a criminal action shows before whom defendant's preliminary examination was held, the date of such examination, the presence of defendant in person and by counsel, that the complaint was read to defendant, and his plea; that each witness stated his name, age, residence and occupation and signed his deposition; that the magistrate signed the jurat to each deposition; the questions and answers put to each witness and that said depositions were the basis of the information filed by the district attorney, there is a substantial compliance with the law, and a motion in arrest of judgment will not be sustained for failure of the depositions to contain the certificate of the magistrate required by R. S. 7576, subdivision 5.—*State v. Clark*, 4 Idaho, 7, 35 Pac. 710.

Editorial Notes.

Legal effect of order sustaining motion in arrest of judgment: *Ann. Cas.* 1912A, 975.

XIV. JUDGMENT, SENTENCE AND FINAL COMMITMENT.

Judgment on conviction of less offense. See *Assault and Battery*.

Excessive sentences. See post, XVI.

On appeal from justice's, probate or police court. See ante, VIII, (D).

Where the record of the trial of a defendant for a felony shows the presence of the defendant at arraignment, during the trial, and at the pronouncing of sentence, but, through inadvertence of the clerk, fails to show defendant's presence at the receiving of the verdict, the correctness of the record, after judgment and appeal, so as to make the same accord with the fact, by the district court, is not error.—*State v. Watkins*, 7 Idaho, 35, 59 Pac. 1106.

Editorial Notes.

Sentences, power of the court to revise or amend: 79 Am. Dec. 779.

Sentences differing from those allowed by law, validity of: 55 Am. St. Rep. 264.

Source of imprisonment until a fine is paid: 12 Am. St. Rep. 202.

Power to commit after expiration of term of sentence: 19 L. R. A., N. S., 1041.
Effect of excessive sentence: 45 L. R. A. 137.

XV. APPEAL AND ERROR, AND CERTIORARI.

On summary trial in justice's or police court. See ante, VIII.

(A) FORM OF REMEDY, JURISDICTION AND RIGHT OF REVIEW.

Scope and extent of review. See post, XV, (G), 1.

Though defendant has submitted to the jurisdiction of the court below without exception, objection can be made on appeal, as the whole record may be reviewed under Statutes of Idaho, section 471, page 297.—*People v. Du Rell*, 1 Idaho, 44.

Criminal cases must be brought to the supreme court by appeal under the Criminal Practice Act and cannot be certified under Civil Practice Act, section 326, permitting certification of doubtful questions in actions at law or in equity.—*People v. Farrell*, 1 Idaho, 49.

Where the statutes fail to provide for an appeal from a final judgment of the district court to the supreme court, the supreme court will entertain a writ of error or other proper writ to bring such judgment before it for review under Const., article 5, section 9.—*State v. Reed*, 3 Idaho, 554, 32 Pac. 202.

An order overruling an application for a change of venue in a criminal case may be reviewed on appeal from the final judgment, and therefore a writ of error will not lie to review such order.—*State v. Reed*, 3 Idaho, 554, 32 Pac. 202.

An order overruling an application for a change of venue, not being final, can only be reviewed on appeal from the final judgment.—*State v. Reed*, 3 Idaho, 554, 32 Pac. 202.

The right of the state to appeal from any decision in favor of a defendant in a criminal case is statutory and does not exist unless expressly given by statute.—*State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750.

Defendant was convicted of a misdemeanor in the probate court and appealed to the district court. The district court sustained a demurrer to the complaint and rendered judgment in favor of the defendant, dismissing the action. Held, that an appeal by the state from such judgment of dismissal would not lie.—*State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750.

Const., article 5, section 9, providing that the supreme court shall have jurisdiction to review on appeal any decision of the district courts, or the judges thereof, does not give the state the right to appeal from a judgment in favor of the defendant in a criminal action.—*State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750.

District courts having no jurisdiction to grant an application for a new trial made four years after verdict in a criminal action,

the supreme court has no jurisdiction to reverse the order denying the new trial and the appeal from such order will be dismissed. *State v. Davis*, 8 Idaho, 115, 66 Pac. 932.

(B) PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

To entitle defendant in a criminal case to a review of instructions given by the court of its own motion, he must except thereto at the time the instructions are given. *People v. Walter*, 1 Idaho, 386; *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414; *State v. O'Donald*, 4 Idaho, 343, 39 Pac. 556.

Under R. S. 7940, a defendant is required to except to instructions given by the court on its motion, which he deems prejudicial or erroneous, and such exceptions must be saved by bill of exceptions to entitle them to be reviewed on appeal.—*State v. Suttles*, 13 Idaho, 88, 88 Pac. 238; *State v. O'Brien*, 13 Idaho, 112, 88 Pac. 425; *State v. Gallagher*, 14 Idaho, 656, 94 Pac. 581; *State v. Harris*, 18 Idaho, 620, 111 Pac. 406.

No irregularity in drawing, summoning, returning, or impaneling trial jurors is sufficient to set aside a verdict, unless injury results, nor unless the objection is made before verdict.—*People v. Ah Hop*, 1 Idaho, 698.

A defendant cannot be heard to complain for the first time on appeal that the order prescribed by the statute for delivering the closing arguments upon the trial was not followed.—*People v. Ah Hop*, 1 Idaho, 698.

Where evidence is admitted over objection and no exception is taken to the ruling of the court, the objection is waived.—*People v. Kuok Wah Choi*, 2 Idaho, 90, 6 Pac. 112.

Where a defendant introduces testimony after a motion to instruct the jury to return a verdict of not guilty is denied, he waives his right to assign as error the order denying such motion.—*Territory v. Neilson*, 2 Idaho, 614, 23 Pac. 537.

No exception is allowed by statute to an order overruling a challenge to a juror for general cause.—*Territory v. Nelson*, 2 Idaho, 651, 23 Pac. 116; *Territory v. Evans*, 2 Idaho, 651, 23 Pac. 232.

An exception to an erroneous instruction, taken after a verdict of guilty is returned, comes too late.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

To entitle one to a review of the action of the lower court in granting or refusing a new trial in a criminal case, the record must show that an exception was taken to such ruling.—*State v. Smith*, 4 Idaho, 733, 44 Pac. 554.

Where defendant demurred to an information on the ground that it did not state facts sufficient to constitute an offense and subsequently withdrew the demurrer and pleaded guilty, he could not raise the question on appeal that the information did not state facts sufficient to constitute an offense; such

question must be raised at the trial either by demurrer, or at the trial under a plea of not guilty, or after the trial by motion in arrest of judgment.—*State v. Hineckley*, 4 Idaho, 490, 42 Pac. 510, 4 Idaho, 494, 42 Pac. 511.

An order denying a new trial in a criminal action must be excepted to at the time the order is made in order to be reviewed on appeal.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945; *State v. Smith*, 5 Idaho, 291, 48 Pac. 1060; *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.

Failure of the court to instruct the jury that they might find the defendant guilty of any lower offense included in the charge of assault with intent to murder is not error where the record fails to show that such charge was requested.—*State v. White*, 7 Idaho, 150, 61 Pac. 517.

An exception, and assignment of error based thereon, to an instruction in a criminal case, on the ground that it is oral, is not sufficient where it fails to state the substance of the instruction, so that the appellate court may determine whether the so-called instruction is in fact an instruction, or statement by the trial court of the law of the case, or any portion thereof.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

Where it is shown that the trial court was ignorant of the fact that a letter had been given to a juror during the trial or before the verdict was returned and that in the presentation of the motion for a new trial the court's attention was not called to the existence of such fact, there is no error in denying the motion for a new trial.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Under R. S. 7946, instructions requested by either the state or defendant are deemed to have been excepted to and become part of the judgment-roll, and may be presented without incorporating the objections in a bill of exceptions.—*State v. Suttles*, 13 Idaho, 88, 88 Pac. 238; *State v. O'Brien*, 13 Idaho, 112, 88 Pac. 425.

To review the instructions given by the court on its own motion, the defendant must except to the giving of such instructions at the time given and incorporate such exception in a bill of exceptions, which may contain the instructions given with the exception or may omit the instructions and identify them by proper reference.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

By failing to except to an instruction given by the court on its own motion at the time it was given, the defendant waives the right to allege the giving of the same as error.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

Where no exception is taken to the introduction of certain evidence, and the admission thereof is not specified as error in the assignment of errors in appellant's brief, the admissibility of such evidence will not be passed upon on appeal.—*State v. Harris*, 18 Idaho, 620, 111 Pac. 406.

Whether it is necessary to allege in an information charging larceny from the per-

son the value of the property taken is a question of the sufficiency of the information, and does not go to the jurisdiction of the court, and the only manner in which such question can be raised is by demurrer to the information at the trial under the plea of not guilty, or after the trial in arrest of judgment.—*In re Dawson*, 20 Idaho, 178, 117 Pac. 696.

When, upon a view of the locus in quo being taken by the jury, they are not accompanied by the trial judge, the failure of the defendant to object in time to such fact thereby defeats his right to complain.—*State v. Moon*, 20 Idaho, 202, Ann. Cas. 1913A, 724, 117 Pac. 757.

An objection made that a witness making a translation of a foreign language into English is not competent, and that his translation is not proper, is not well taken in the absence of any affirmative showing so indicating.—*State v. Moon*, 20 Idaho, 202, Ann. Cas. 1913A, 724, 117 Pac. 757.

(C) PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF.

See, also, post, XV, (D), 2.

Where the record shows that neither the statute nor rules of court have been complied with, the appeal will be dismissed.—*State v. Steptoe*, 3 Idaho, 754, 35 Pac. 690; *State v. O'Donald*, 4 Idaho, 343, 39 Pac. 556.

Where neither the statutory requirements nor the rules of court are complied with in taking an appeal, the court may dismiss the appeal of its own motion.—*State v. Gibbs*, 4 Idaho, 207, 38 Pac. 651.

Where the record shows that an appeal was not taken within ten days after verdict in a criminal case as required by R. S. 7953, and fails to show that the time for such application was extended, an appeal from the order denying a new trial will be dismissed.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where it appears from the record that the application for a new trial was not made within ten days after verdict and that no extension of time had been granted therefor, an application for a certificate of probable cause for an appeal from an order denying a new trial will be denied.—*State v. Davis*, 7 Idaho, 776, 65 Pac. 429.

In a criminal case in which the defendant appeals, the state is the adverse party, and under R. S. 250, subdivision 1, as amended by Laws 1901, page 163, the attorney general is the attorney for the state in all such appeals, and a copy of the transcript and brief of appellant must be served on him as required by the rules of the supreme court, and failure to so serve the attorney general is ground for dismissal of appeal.—*State v. Miles*, 11 Idaho, 784, 83 Pac. 697.

Under R. S. 8048, providing that an appeal to the supreme court from a judgment of conviction stays the execution in capital cases, and in all other cases on certificate that there is probable cause for the appeal, the words "probable cause for the appeal"

do not mean that there is probable reason to suppose the judgment will be reversed, but rather that the appellant has specified grounds of error, which are open to doubt or honest difference of opinion.—*In re Neil*, 12 Idaho, 749, 87 Pac. 881.

The prosecuting attorney of a county is not the attorney for the state upon an appeal in a criminal case, and has no authority to enter into a stipulation which will bind the state on such appeal.—*State v. Squires*, 15 Idaho, 327, 97 Pac. 411.

(D) RECORD AND PROCEEDINGS NOT IN RECORD.

1. Matters to be Shown by Record and Scope and Contents Thereof.

The statute does not require that the fact of the arraignment of defendant, or that the jury was admonished at each adjournment of the court, or that the officer in charge of the jury was sworn, should be made a part of the record of the action.—*People v. Waters*, 1 Idaho, 560.

It is not necessary for the record on appeal to show an arraignment, since the fact of an arraignment is not necessarily a part of the record.—*People v. Waters*, 1 Idaho, 560; *People v. Ah Hop*, 1 Idaho, 698.

Where an oral instruction is given to the jury and the defendant desires to except thereto on the ground that he has not consented that oral instructions may be given, the record on appeal must show that consent was not given; otherwise the exception will not be considered.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

Where the record fails to show that the instructions given were given on the request of either party, the presumption is that the instructions were given by the court on its own motion, and to entitle exceptions thereto to be heard, the record must show that such exceptions were taken before verdict.—*State v. Hurst*, 4 Idaho, 345, 39 Pac. 554.

Where error is relied on, it must affirmatively appear in the record or it will not be considered.—*State v. Haverly*, 4 Idaho, 484, 42 Pac. 506.

To obtain a reversal in a criminal case on the ground of error committed during the progress of the trial, such error must affirmatively appear in the record.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

An appeal from an order denying a new trial will be dismissed on motion where the record shows that application therefor was not made within ten days, as required by R. C. 7953, and the record fails to show that the time within which the application may be made was extended by the court or judge thereof.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where the conduct of a prosecutor in making certain statements in the course of his argument to the jury is assigned as error, the defendant should set forth in his statement or bill of exceptions the language of the prosecuting attorney with sufficient certainty

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and definiteness, together with the circumstances and conditions under which it was made, and the context thereof, to enable this court to determine whether or not the same was prejudicial to any substantial right of the defendant.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

2. Proceedings for Taking Appeal.

See, also, ante, XV, (C).

The record on appeal must show that the notice thereof was served and filed or the appeal will be dismissed.—*People v. Lynch*, 1 Idaho, 358.

Where respondent moves to dismiss an appeal for the reason that the record contains no evidence of service of notice thereof and on suggestion of diminution of the record appellant is given leave to file a certified copy of the notice from which it appears that due notice of appeal had been given, the motion to dismiss will be denied.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

Where a transcript on appeal in a criminal case fails to comply with the rules of court in the manner of its preparation, the appeal may be dismissed.—*State v. Boise*, 5 Idaho, 519, 51 Pac. 110.

On an appeal by a defendant in a criminal case, the state is an adverse party, and the attorney general of the state is the attorney for the state on said appeal, and the brief of appellant and transcript of the record must be served on him as required by the supreme court, rule 27, paragraphs 9, 10.—*State v. Miles*, 11 Idaho, 784, 83 Pac. 697; *State v. Squires*, 15 Idaho, 327, 97 Pac. 411.

The provisions of R. S. 8051 requiring the clerk to transmit the records to the appellate court and to certify to their correctness may be waived by a stipulation entered into by the respective counsel as to the correctness and completeness of the record.—*State v. Squires*, 15 Idaho, 327, 97 Pac. 411.

When transcript on appeal in a criminal case is not certified as required by law, and such certificate is not waived, the same will be stricken from the files for want of proper certification.—*State v. Squires*, 15 Idaho, 327, 97 Pac. 411.

Under the statutes of the state, the attorney general of the state is the attorney for the state on an appeal in a criminal case, and the state is the adverse party; and the brief and transcript on such appeal must be served upon the attorney general, as required by the statutes and the rules of this court, and upon failure to make such service the appeal will be dismissed.—*State v. Burgoyne*, 22 Idaho, 586, 588, 126 Pac. 779, 780.

3. Bill of Exceptions.

To entitle defendant in a criminal case to a review of instructions given by the court of its own motion, he must except thereto at the time the instructions are given and incorporate the same in a bill of exceptions certified to by the judge.—*People v. Walter*, 1 Idaho, 386; *People v. Biles*, 2 Idaho, 114, 6

Pac. 120; *People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

Where a new trial in a criminal case is asked on the ground of newly discovered evidence, the affidavits showing such newly discovered evidence must, for the purposes of an appeal, be incorporated into a bill of exceptions and settled by the trial judge so as to show that they were used on the hearing of the motion for a new trial.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

An order denying a new trial in a criminal action will not be reviewed on appeal unless an exception was taken at the time the order was made and duly incorporated in the bill of exceptions and settled by the trial judge.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 495; *State v. Smith*, 5 Idaho, 291, 48 Pac. 1060; *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.

Where the record shows that the district attorney was present at the time the bill of exceptions in a criminal case was settled, and made no objection thereto, the court will presume that notice of the time that such bill of exceptions would be settled was given, and will not consider an objection that the record fails to show such notice.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

Under R. S. 7941, requiring a notice of at least two days to be given to the district attorney of the time that the bill of exceptions in a criminal action would be presented to the judge for settlement, such bill of exceptions will not be considered on appeal where the prescribed notice was not given.—*State v. Smith*, 5 Idaho, 291, 48 Pac. 1060; *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.

The time for serving and settling a bill of exceptions prescribed by R. S. 7941 cannot be extended by stipulation of the parties.—*State v. Dupuis*, 7 Idaho, 614, 65 Pac. 65.

Where the record on appeal in a criminal action shows that the draft of the bill of exceptions therein was not served within the time required by R. S. 7941, and that such time was not extended by the judge or court or by a justice of the supreme court, the bill of exceptions will be stricken from the files on motion.—*State v. Dupuis*, 7 Idaho, 614, 65 Pac. 65.

Where the bill of exceptions in a criminal case has been stricken from the record, an appeal from an order denying a new trial will be dismissed.—*State v. Dupuis*, 7 Idaho, 614, 65 Pac. 65.

Where, with the knowledge and acquiescence of the court, the prosecuting attorney enters into a stipulation with the defendant, to the effect that either party might have sixty days after the close of the trial within which to prepare and present a draft of the bill of exceptions for settlement, defendant's bill of exceptions will not be stricken from the files on the ground that the draft thereof was not presented within ten days after judgment and that no extension of time was granted therefor.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

In order to present to the supreme court the evidence in a criminal case, or the rul-

ings and decisions of the court in admitting or rejecting evidence, it is necessary to incorporate in a bill of exceptions so much of the evidence as is necessary to present the questions of law upon which the exception is based.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

4. Questions Presented for Review.

Presumptions on appeal. See post, XV, (G), 2.
Scope and extent of review in general. See post, XV, (G).

Where a transcript on appeal in a criminal case contains no bill of exceptions or statement, and no assignment of errors, the appellate court can consider nothing but the indictment, the minutes and the instructions. *People v. O'Conner*, 1 Idaho, 759.

Where in a criminal case it sufficiently appears from the bill of exceptions that the venue was proved, and it is conceded that the record contains only a part of the evidence, the objection that proof of the venue does not affirmatively appear in the bill of exceptions will not obtain.—*State v. Hendel*, 4 Idaho, 88, 35 Pac. 836.

Where only a part of the charge to the jury is contained in the record, an exception to that part on the ground that it fails to instruct on the question of "reasonable doubt" will not be considered on appeal, unless the record shows that the part of the charge omitted from the record failed to instruct on that question.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

Where the record shows no evidence in the court below upon the question of the insanity of the defendant, the supreme court will not entertain or consider that question.—*State v. St. Clair*, 6 Idaho, 109, 53 Pac. 1.

Where, pending an appeal from a judgment of conviction, the record is amended to accord with the fact and show the presence of defendant when the verdict of the jury was received, the allowance of such amendment is not error.—*State v. Watkins*, 7 Idaho, 35, 59 Pac. 1106.

Where the record shows that the defendant had two weeks after his arrest charged with the crime of which he was convicted in which to prepare for trial, the judgment will not be reversed because the trial court denied his application for continuance on the ground that he had not had sufficient time to prepare for trial, and the record fails to show that he was prejudiced by reason of being hurried into trial.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where the bill of exceptions does not contain the evidence, the supreme court cannot determine the propriety of the remarks of the prosecuting attorney thereon.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

In the absence of the evidence, the supreme court will not review the refusal of an instruction advising the jury to acquit defendant.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

Where a transcript on appeal has been stricken from the files, and no new transcript

is substituted or filed in lieu thereof, there is no case before this court for review or consideration, and upon motion the appeal in such case will be dismissed.—*State v. Squires*, 15 Idaho, 327, 97 Pac. 411.

5. Matters not Apparent of Record.

Presumptions on appeal. See post, XV, (G), 2.

Upon appeal in a criminal case the appellate court cannot consider evidence not introduced at the trial.—*State v. Yee Wee*, 7 Idaho, 188, 61 Pac. 588.

Though the record on appeal and the notes of the stenographic reporter fail to show that defendant's plea was stated to the jury, such fact may be shown by the affidavit of the reporter.—*State v. Lancaster*, 10 Idaho, 410, 78 Pac. 1081.

The supreme court cannot take judicial notice of the adjournments of the terms of the district courts.—*State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

(E) ASSIGNMENT OF ERRORS AND BRIEFS.

On appeal, or writ of error, in criminal cases, no assignment of error is necessary, but the supreme court should render such judgment as the record requires.—*People v. Du Bell*, 1 Idaho, 44.

Defendant may except to any erroneous ruling of the court below, but he must, in his assignment of errors on appeal, specify and point out those upon which he relies, or they will be treated as waived.—*People v. Page*, 1 Idaho, 102.

Specifications of error: (1) The court erred in the admission of testimony to the jury; (2) The court erred in refusing to admit testimony; (3) The court erred in its instructions to the jury; (4) The court erred in refusing to instruct the jury as requested by the defendant,—are too vague and uncertain to be entitled to consideration.—*State v. Beard*, 6 Idaho, 614, 57 Pac. 867.

An assignment of error that "the court erred in instructing the jury orally, without first having reduced the instructions to writing" is too general in its terms to be considered on appeal.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

An assignment of error that the court refused to quash an information on the ground "that the depositions do not state the ground upon which a question put to the witness was overruled" is not sufficiently specific to be reviewed on appeal, the proper method being to point out the particular deposition and question and folio in the transcript where the fact alleged could be ascertained.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

(F) DISMISSAL, HEARING AND RE-HEARING.

Where an appeal from an order denying a new trial in a criminal case has been dismissed, the supreme court cannot examine into the sufficiency of the evidence to support the verdict and judgment appealed from,

nor has it authority to examine the affidavits presented and used on that motion wherein it was claimed that the jury was guilty of misconduct.—*State v. Gallagher*, 14 Idaho, 656, 94 Pac. 58.

(G) REVIEW.

In homicide cases. See *Homicide*, X.

Of determination of challenge of jurors. See *Jury*.

1. Scope and Extent in General.

As depending on contents or form of record. See ante, XV, (D), 1.

Necessity of showing prejudice. See post, XV, (G), 5.

Under Stats., section 471, the party appealing brings his whole case before the appellate tribunal, and the whole record is there for review, and he may challenge any part of it as erroneous.—*People v. Du Bell*, 1 Idaho, 44.

The evidence in a criminal case can only be reviewed upon an appeal from an order denying a new trial and not on an appeal from the judgment alone.—*People v. Pierson*, 2 Idaho, 76, 3 Pac. 688.

On appeal in criminal cases, the court may review errors of law alone, the questions of fact being for the jury.—*People v. Ah Hop*, 1 Idaho, 698; *United States v. Camp*, 2 Idaho, 231, 10 Pac. 226.

Where the defendant in a criminal action attacks certain sections of an act as violative of the constitution, and it does not appear from the record that any of his rights affected by such sections were involved on the trial, or by the judgment, and the portions of the statute not attacked are sufficient to constitute a valid act, supporting the judgment, the court will not pass on the validity of the sections so attacked.—*State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17.

When one is convicted of crime, and sentenced to a term of fourteen years' imprisonment, and the case is reversed on question of law and sent back for a new trial, the supreme court will not examine the evidence to ascertain whether the sentence is excessive.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

The refusal of the trial court to admit a defendant to bail after sentence pending appeal cannot be reviewed on an appeal from the judgment, such refusal being an appealable order under R. S. 8042, subdivision 3.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

When, after a criminal action has been submitted to a jury to consider their verdict, they are returned into open court and request to be permitted to view the premises in which the offense charged is said to have occurred, and the state and defendant consent that the court may at such time make an order as requested, the defendant so consenting cannot be heard to assign the making of such order as error.—*State v. Moon*, 20 Idaho, 202, Ann. Cas. 1913A, 724, 117 Pac. 757.

2. Presumptions.

The presumptions are in favor of the regularity of the proceedings in the district court in criminal as well as in civil cases.—*People*

v. Waters, 1 Idaho, 560; *People v. Ah Hop*, 1 Idaho, 698.

Upon an appeal from a judgment of conviction in a criminal case, in the absence of the evidence or any bill of exceptions, the instructions given will be presumed correct, if, under any possible state of the evidence, the instruction was authorized.—*People v. Mooney*, 2 Idaho, 17, 2 Pac. 876.

On appeal from a judgment in a criminal case, where no part of the evidence is presented by bill of exceptions or otherwise, and the indictment is sufficient to support the judgment, the supreme court will assume that the evidence was sufficient to warrant the verdict and that the trial court's charge to the jury was pertinent to the facts proved on the trial.—*People v. Woods*, 2 Idaho, 364, 16 Pac. 551; *People v. Williams*, 2 Idaho, 366, 16 Pac. 552.

In the absence of the proof or the evidence upon which the trial court decided the question of implied bias of jurors, the appellate court will presume that the decision of the court below was fully sustained by the evidence.—*United States v. Langford*, 2 Idaho, 561, 21 Pac. 409.

Unless the record affirmatively shows that the court reporter failed to take down all oral instructions, the supreme court will presume on appeal that he did so.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

Where, in a criminal case, the evidence is not contained in the record on appeal, the court cannot presume such a condition of the evidence as would make the giving of a certain instruction prejudicial error.—*State v. Watkins*, 7 Idaho, 35, 59 Pac. 1106.

In the absence of the evidence upon which the challenge to the panel of trial jurors was tried and decided and in the face of the record showing that the defendant accepted the jury while he still had peremptory challenges that he might exercise, the appellate court cannot presume that defendant was prejudiced by the action of the trial court in refusing to appoint triers to try the challenge to the panel.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Where the jurisdiction of the court is attacked on the ground that the term of court at which certain defendants were sentenced had elapsed before the sentence was pronounced by reason of the fact that the term in an adjoining county was set to begin on the day that the court adjourned its term, and the record fails to show whether such term in the latter county had been adjourned prior to the adjournment of the term in the county where the defendants were convicted, the supreme court will presume that the actions of the trial court were legal and that it did not violate the provisions of R. S. 3832.—*State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

The fact that the court duly admonished the jury on each adjournment as required by R. S. 7881 need not be shown by the record constituting the judgment-roll under R. S. 7996, 8051, the presumption being that such

statute was complied with.—*State v. Suttles*, 13 Idaho, 88, 88 Pac. 238.

The fact that R. S. 7826, requiring that the defendant be instructed of his right to challenge any individual juror before the jury is sworn, has been complied with need not be shown by the record constituting the judgment-roll under R. S. 7996, 8051, the presumption being that the statute was complied with.—*State v. Suttles*, 13 Idaho, 88, 88 Pac. 238; *State v. O'Brien*, 13 Idaho, 112, 88 Pac. 425.

Where defendant was convicted of burglary in the first degree and the evidence is not before the appellate court, the court cannot presume that it was error on the part of the trial court to refuse to give an instruction defining larceny.—*State v. O'Brien*, 13 Idaho, 112, 88 Pac. 425.

Where the record made by the committing magistrate upon a preliminary examination and transmitted to the clerk of the district court, upon which the information was filed, is not in the record on appeal, it will be presumed that the record was properly certified.—*State v. Yturaspe*, 22 Idaho, 360, 125 Pac. 802.

3. Discretion of Lower Court.

In granting or refusing application for new trial.
See ante, XIII, (A).

An application for a continuance in a criminal case is addressed to the sound discretion of the court, and the court's action thereon will not be disturbed in the absence of a showing that such discretion has been abused.—*People v. Walter*, 1 Idaho, 386; *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87; *State v. Wetter*, 11 Idaho, 433, 83 Pac. 341; *State v. Steers*, 12 Idaho, 174, 85 Pac. 104; *State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

The competency of a juror is a question for the court, and in the absence of any abuse of his discretion is not reviewable.—*Territory v. Evans*, 2 Idaho, 425, 17 Pac. 139.

The supreme court will not reverse the judgment of the trial court in a criminal case for an abuse of discretion in discharging the jury unless it is affirmatively shown by the record that there has been such abuse of discretion.—*State v. Jorgenson*, 3 Idaho, 620, 32 Pac. 1129.

Under R. S. 7877, providing that "if, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant, but the jury are not bound by the advice," the giving of such instruction is a matter of discretion with the trial court, and its action will not be reviewed on appeal.—*State v. Haverly*, 4 Idaho, 484, 42 Pac. 506.

Where an application for change of venue in a criminal case is based solely upon the affidavit of the defendant, the refusal of a change of venue will not be interfered with.—*State v. St. Clair*, 6 Idaho, 109, 53 Pac. 1.

Where the trial court, in imposing a sentence, fixes the punishment within the limits

prescribed by statute, the exercise of its discretion in the matter is not reviewable on appeal.—*State v. Kruger*, 7 Idaho, 178, 61 Pac. 463.

Granting a change of venue in a criminal case, being largely within the discretion of the trial court, the denial of a motion for change of venue on the ground of prejudice and bias, will not cause reversal of a judgment of conviction, where the record shows that the defendant had a fair and impartial trial, and no trouble was experienced in obtaining a jury.—*State v. Gilbert*, 8 Idaho, 346, 1 Ann. Cas. 280, 69 Pac. 62.

There being no statutory right to a bill of particulars in a criminal case, an order overruling defendant's motion for such a bill will not be disturbed on appeal in the absence of a showing of abuse of discretion by the court.—*State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186.

Where an application is made to take testimony outside of this state under R. S. 8181, the granting or refusing of such application is within the discretion of the trial judge.—*State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.

Under R. S. 3961, it is discretionary with the court to order a jury drawn from the jury-box prepared by the county commissioners or to order an open venire.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

4. Questions of Fact, Verdicts and Findings.

The verdict of the jury on substantially conflicting evidence will not be disturbed.—*State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186; *State v. Collett*, 9 Idaho, 608, 75 Pac. 271; *State v. Cook*, 13 Idaho, 45, 88 Pac. 240; *State v. Downing*, 23 Idaho, 540, 130 Pac. 461.

The supreme court will not disturb the finding of the trial judge upon the question of implied bias of a juror, unless it is so clear a case as would warrant a judge in setting aside the verdict of the jury as against the evidence.—*United States v. Langford*, 2 Idaho, 561, 21 Pac. 409.

Where affidavits as to misconduct of a juror are conflicting, the ruling of the court below denying a new trial will not be disturbed.—*People v. Biles*, 2 Idaho, 114, 6 Pac. 120.

Where, in a criminal case, improper evidence has been introduced by the state over defendant's objection and the evidence is conflicting, the supreme court will not attempt to determine whether the legal evidence introduced was sufficient to establish the guilt of the defendant beyond a reasonable doubt. *State v. Anthony*, 6 Idaho, 383, 55 Pac. 884.

A verdict will not be disturbed as unsupported by evidence, unless there is a total failure of evidence, or the verdict is so clearly against the weight of evidence that it shows passion or prejudice on the part of the jury.—*State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

Where there was no complaint of any error of law, and the evidence clearly sustained the

conviction, a judgment overruling a motion for new trial will not be disturbed.—*State v. Driskell*, 12 Idaho, 245, 85 Pac. 499.

Where there are disputed facts submitted to a jury, their verdict will not be disturbed by this court, unless it is apparent from the record that their verdict is unwarranted by the evidence.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

A verdict supported by sufficient evidence or substantially supported by the evidence will not be disturbed on appeal.—*State v. Williams*, 12 Idaho, 483, 86 Pac. 53.

The defendant undertook to prove an alibi, and there is a substantial conflict in the evidence upon that question, and, under R. C. 4824, where there is substantial evidence to support a verdict, it will not be set aside on appeal.—*State v. Silva*, 21 Idaho, 247, 120 Pac. 835.

Evidence examined but not stated, and held that there is no evidence upon which to rest a verdict and judgment of conviction.—*State v. Sayer*, 23 Idaho, 536, 130 Pac. 458.

5. Harmless Error.

See, also, *Homicide, X*.
Construction and effect of charge as a whole. See ante, XII, (G), 6.

The fact "that it nowhere appears that the clerk or other person read the indictment and stated the defendant's plea to the jury, after the panel was completed and the jury sworn to try the cause," is not sufficient to justify a reversal where it does not appear that "the substantial rights" of the defendant have been prejudiced thereby.—*People v. Ah Hop*, 1 Idaho, 698.

Under R. S. 8236, defendant in a criminal case must affirmatively show that alleged error was prejudicial to him, or the judgment will not be disturbed.—*Territory v. Nelson*, 2 Idaho, 651, 23 Pac. 116; *Territory v. Evans*, 2 Idaho, 651, 23 Pac. 232.

All errors not prejudicial to defendant in his substantial rights must be disregarded; and such prejudice must be affirmatively shown on appeal.—*Territory v. Neilson*, 2 Idaho, 614, 23 Pac. 537; *State v. Hurst*, 4 Idaho, 345, 39 Pac. 554.

Though the use of intoxicating liquor by the jury during the progress of a criminal case is improper, a judgment of conviction will not be reversed in the absence of a showing that any of the jurors were intoxicated to any extent or that such action was prejudicial to defendant.—*State v. Reed*, 3 Idaho, 754, 35 Pac. 706; *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Where error is predicated upon remarks made by the district attorney during the trial and it appears that such remarks were in response to remarks by defendant's counsel and that the court admonished the jury that they must disregard the remarks, there is no reversible error.—*State v. Haverly*, 4 Idaho, 484, 42 Pac. 506.

Where, in a criminal case, the record does not show any direct evidence upon the ques-

tion of the insanity of defendant, and there has been no attempt to inquire into the sanity of the defendant under R. S. 8196, and the trial court has instructed the jury to acquit the defendant if they believed him to be insane at the time of committing the act for which he was prosecuted, there is no error.—*State v. St. Clair*, 6 Idaho, 109, 53 Pac. 1.

The giving of erroneous instructions on a criminal trial is no ground for reversal, where they could not in any manner have prejudiced the accused.—*State v. Watkins*, 7 Idaho, 35, 59 Pac. 1106; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Error must affirmatively appear in the record on appeal or the judgment will be affirmed.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

A judgment of conviction will not be reversed on the ground that an erroneous instruction has been given, where such instruction is beneficial, and not prejudicial to the defendant.—*State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

In a criminal prosecution, an instruction stated: "The law requiring a jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish defendant's guilt. It is sufficient if taking all the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty." Held, that though such instruction is erroneous, it will not constitute reversible error, where defendant's rights have been carefully guarded by other instructions.—*State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

The refusal of the court to compel the state to call a witness who had testified before the grand jury, and whose name was indorsed as a witness on the indictment, is not reversible error, since the attendance of such witness could have been compelled by defendant by proper process.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Improper remarks of the prosecuting attorney are ground for reversal of a judgment of conviction unless the record shows that defendant was not prejudiced thereby and that substantial justice has been done.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where the answer to a question does not prejudice defendant's rights, the error in putting the question, if any, is harmless, and will not be cause for reversal of a judgment of conviction.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Where, in a criminal case, it is not claimed that appellant was prejudiced by anything done either at the preliminary examination or at the trial, a technical objection on a motion to quash the information will be overruled on appeal.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

An instruction in the language of R. S. 7697 which abrogates the distinction be-

tween accessories and principals is not prejudicial though it need not have been given.—*State v. Bland*, 9 Idaho, 796, 76 Pac. 780.

Where the record in a prosecution for larceny shows that in the beginning of the trial all proceedings were ordered to be in the name of William I. Rooke and a verdict is returned against William Rooke, and there is no pretense that these are not one and the same party, failure to send back the verdict for correction before being received is not reversible error.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Where other charges of larceny are so closely interwoven with the one on which defendant is being tried that the court admits some evidence as to other crimes, the error, if any, is cured by instructions making it plain to the jury that defendant could only be convicted for the larceny of the animal alleged to have been stolen and as charged in the information.—*State v. Rooke*, 10 Idaho, 388, 78 Pac. 82.

Where a defendant utterly fails to show insanity or any indication thereof as existing at the time of the commission of the offense charged, an erroneous instruction on the question of insanity is not prejudicial.—*State v. Metter*, 11 Idaho, 433, 83 Pac. 341.

An information charged that on November 15, 1905, R. was intrusted with a horse, stating its value and ownership; that by the terms of said trust, R. was to use the horse for a part of one day and return said horse to the owner on November 15, 1904; that R. did not return the horse according to the terms of said trust but did, on November 15, 1904, unlawfully, willfully, feloniously and fraudulently convert said horse to his own use, and embezzle the same contrary to his said trust. The information was filed March 15, 1905. Held, that the error in stating the crime to have been committed in 1905 was harmless and not prejudicial under R. S. 7687.—*State v. Roland*, 11 Idaho, 490, 83 Pac. 337.

Certain incompetent statements made by a witness ruled out by the trial court and the jury admonished not to consider and which are repeated by the witness and the same action thereon taken by the court held not to constitute reversible error.—*State v. McGinnis*, 12 Idaho, 336, 85 Pac. 1089.

The giving of an erroneous instruction that "the jury ought not to convict on the testimony of an accomplice alone unless after a careful examination of such testimony they are satisfied, beyond a reasonable doubt, of its truth," is not sufficient ground for the reversal of a judgment of conviction, where it appears that the court has twice given the statutory instruction that the accomplice must be corroborated, and the evidence shows that he has been corroborated.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

Where evidence introduced on the part of the state on rebuttal was not clearly inadmissible, the action of the court in admitting the same was not erroneous, even though such evidence was remote and had little bearing on the case.—*State v. Gallagher*, 14 Idaho, 656, 94 Pac. 581.

Even though an instruction is erroneous and ordinarily the error would be material, yet if the circumstantial evidence of the defendant's guilt is satisfactory and the result could not have been different had the instruction been omitted, the case will not be reversed because of such erroneous instruction. *State v. Warren*, 17 Idaho, 766, 107 Pac. 993.

Under R. C. 8070 and 8236, a new trial will not be granted, notwithstanding some mistake or misdirection by the trial judge, provided this court is satisfied that justice has been done, and that upon the evidence no other verdict could properly have been found.—*State v. Warren*, 17 Idaho, 766, 107 Pac. 993.

If the evidence of the defendant's guilt is such as ordinarily produces conviction in an unprejudiced mind, beyond a reasonable doubt, and the result would not have been different had the erroneous instruction been omitted, the case will not be reversed because of such erroneous instruction.—*State v. Silva*, 21 Idaho, 247, 120 Pac. 835.

Where the evidence of the defendant's guilt is satisfactory—that is, such as ordinarily produces moral certainty or conviction, beyond a reasonable doubt in an unprejudiced mind—and the result would not have been different had the instruction been omitted, the cause will not be reversed because of an erroneous instruction, where it appears that the court has correctly instructed the jury as to the law of the case in other instructions.—*State v. Brill*, 21 Idaho, 269, 121 Pac. 79.

Where a defendant charged with the commission of a homicide, is endeavoring to establish an alibi, and testifies that at the time the homicide occurred he was at another place and in his room and in bed and that he heard a conversation between two persons in a room opposite his and details the conversation, and the persons who occupied the room opposite the defendant testify that they heard the shooting, and that one of them opened the door and made remarks about the matter, and then the defendant seeks to have such witnesses detail the conversation had, and the court refuses to admit the evidence, held, that, while it would not have been erroneous for the court to have admitted a detailed account of the conversation for the purpose of corroborating the defendant's evidence and establishing his alibi, still the court's ruling excluding such evidence was not prejudicial error for the reason that the evidence admitted covered substantially all the facts tending to corroborate defendant's evidence as to the alibi.—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

Upon a trial where a defendant is charged with murder, and the evidence tends to show that the murder was committed in an attempt to commit a robbery, and the court admits evidence as to the good reputation of the defendant for peace and quietude, there was no prejudicial error in the ruling of the court in thereafter excluding a general offer to prove the good reputation of the defendant "for truth and veracity, and hon-

esty and integrity, morality and immorality, sobriety and inebriety," though it would have been proper to admit such evidence.—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

Where a witness is asked a question in a criminal case, and opposing counsel objects to the same on the ground of immateriality, and the court announces that he would withdraw the evidence if its materiality was not shown, and no further action was taken by counsel for the defendant or the court in regard to the matter, and the ruling of the court is assigned as error on appeal on the ground that the materiality of the testimony was not shown and the evidence was prejudicial to the rights of the defendant, and it appears by the record that such evidence in no way prejudiced the jury against the defendant and in no way strengthened the evidence of the state in showing the defendant guilty, this court will not set aside the ruling of the court on appeal.—*State v. Willis*, 24 Idaho, 252, 132 Pac. 962.

In a prosecution of a cashier of a state bank for making a false report, the erroneous admission of oral testimony relative to contents of bank-books, before material portions of the books were introduced in evidence, was harmless, where the books were subsequently introduced after a proper foundation had been laid for their admission.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

Where a defendant in a criminal case interposes a challenge to a juror for cause, and the challenge is overruled and he accepts the jurymen without exercising all of his peremptory challenges, he cannot be heard on appeal to urge the action of the court in denying his challenge to the jurymen as prejudicial error.—*State v. Fondren*, 24 Idaho, 663, 135 Pac. 265.

Instruction, given in this case, to the effect that the defendant was not justified in killing the deceased simply because the latter was contesting his homestead entry, correctly stated the law, and was not prejudicial to the defendant in the case although defendant was not urging any such a defense. *State v. Fondren*, 24 Idaho, 663, 135 Pac. 265.

6. Error Waived in Appellate Court.

Waiver of statutory right to have two counsel argue case to jury. See *Homicide*, VIII, (A).

Where both a demurrer and a motion to set aside an information are overruled and such rulings are not urged as error on appeal, the error, if any, will be treated as waived.—*State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.

7. Subsequent Appeals.

Where a judgment has been reversed on the ground that the evidence is insufficient to authorize a judgment of conviction, and there is no material change in the evidence on a retrial of the case, the former decision of the supreme court will constitute the law of the case so far as it applies to the insufficiency of the evidence to sustain the verdict.—*State v. Seymour*, 7 Idaho, 548, 63 Pac. 1036.

(H) DETERMINATION AND DISPOSITION OF CAUSE.

Modification of judgment of trial court. See *Homicide*, X.

After a criminal case has been certified back to the district court, the supreme court has no longer any jurisdiction over it, but all necessary orders must be made by the trial court.—*People v. Walters*, 1 Idaho, 274.

Where an indictment is good and no error appears on the trial, but the sentence is void for uncertainty, the appellate court may remand the case to the court below with directions to enter a proper judgment on the verdict.—*Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39.

When a judgment has been reversed on the ground that the evidence is insufficient to sustain the verdict and the case is remanded and a retrial is had if no further or additional evidence is produced on the trial of the defendant's guilt, the court ought to instruct the jury to return a verdict of acquittal.—*State v. Seymour*, 7 Idaho, 548, 63 Pac. 1036.

Under R. S. 8072, providing that on appeal the supreme court may affirm, reverse or modify a judgment of conviction, where the evidence supports the verdict in a rape case, and judgment for the extreme penalty is given, the judgment will not be reversed as excessive, the remedy being with the pardoning power of the state.—*State v. Harness*, 11 Idaho, 122, 80 Pac. 1129.

Under R. S. 8076, the appellate court does not retain jurisdiction of criminal cases after the judgment therein is entered and a certified copy thereof remitted to the trial court. *State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

XVI. PUNISHMENT AND PREVENTION OF CRIME.

Extent of punishment of prisoner violating terms of his parole. See *Pardon*.

Minimum and maximum penalty for gambling. See *Gaming*, III.

Modification of sentence imposed for willfully resisting officer. See *Obstructing Justice*.

On conviction of murder. See *Homicide*, XI.

On appeal from justice's, probate or police court. See *ante*, VIII, (D).

In prosecution for rape. See *Rape*, II, (D).

Ordinance fixing fine for violation of saloon regulations not void as providing excessive penalty. See *Intoxicating Liquors*, II.

Penalty for crime against nature. See *Sodomy*.

Punishment where defendant is found guilty of assault with deadly weapon under indictment for assault with intent to murder. See *Assault and Battery*.

Sentence for forgery under indeterminate sentence law. See *Forgery*.

Where an indictment charged defendant with an assault with intent to commit murder, and the jury found him "guilty of assault only," the trial court had no right to assume that the jury found that the assault was made with a deadly weapon, and pass sentence on that basis as for a felony, but should have sentenced him for a misdemeanor only.—*People v. Cozad*, 1 Idaho, 167.

Where defendant is tried and found guilty of a felony, for which fine or imprisonment will lie in the discretion of the court, there is nothing to prevent imprisonment in the territorial prison in default of payment of the fine imposed.—*Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39.

R. S. 8500, providing that all persons convicted of crime and sentenced to confinement in the state prison must be sentenced to hard labor, was not modified or repealed by Laws 1891, page 21, Laws 1893, page 155, or Laws 1899, page 433, which relate to the government, management and control of the state penitentiary.—*In re Corcoran*, 6 Idaho, 657, 59 Pac. 18.

A statute defining a misdemeanor may fix the minimum punishment only for a violation thereof, since R. S. 6313, provides that, except in cases where a different punishment is prescribed by the code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$300, or by both.—*State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17.

R. S. 159, providing that the repeal of any law creating a criminal offense shall not bar punishment of an act already committed, unless expressly declared in the act, is intended as, and is, a general saving clause to penal statutes, amendatory and otherwise; and hence, when act of February 18, 1899, amending R. S. 8021, by changing the place for the execution of persons sentenced to death, was declared void as to crimes committed before its passage, execution for such crimes can be had under the law as it existed before amendment.—*In re Davis*, 6 Idaho, 766, 59 Pac. 544.

While the legislature in prescribing and fixing punishment for crime has very great latitude in classifying the same, still such classification should be natural and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made the crime, and not with reference to matters disconnected with the crime.—*In re Mallon*, 16 Idaho, 737, 22 L. R. A., N. S., 1123, 102 Pac. 374.

Where on a plea of guilty defendant is sentenced to imprisonment for six months and a fine of \$300 and costs, and the judgment provides that, in case said fine and costs are not paid, defendant be imprisoned in the county jail until such fine and costs are paid at the rate of one day's imprisonment for each two dollars of said fine and costs, not exceeding one hundred and seventy-two days in all, and it is further ordered that upon the payment of said fine and costs, the judgment for six months' imprisonment be suspended until the further order of the court, and defendant pays the fine and costs and is released without bail, the court has no authority to have defendant rearrested and imprisoned to serve said term of imprisonment.—*In re Peterson*, 19 Idaho, 433, 33 L. R. A., N. S., 1067, 113 Pac. 729.

Where a person is tried and convicted under R. C. 7034, and such crime is committed and such judgment entered subsequent to

the taking effect of the indeterminate sentence act, Laws 1909, page 82, and the sentence of the court is that the defendant be confined in the state penitentiary for a period of not less than three years nor more than five years, upon an application for a writ of habeas corpus, where the application is made for release upon the ground that such judgment is void, the sentence should be interpreted in the light of the law upon which it is based, and the minimum fixed by the statute should be read into and considered a part of the sentence and mittimus. The minimum term fixed by the statute under which the applicant was prosecuted and sentenced cannot be, and is not, less than one year, as provided by R. C. 7034.—*In re Setters*, 23 Idaho, 270, 128 Pac. 1111.

Under the indeterminate sentence act, Laws 1909, page 82, every person convicted of a felony or other crime punishable by imprisonment in the penitentiary, except treason and murder in the first degree, if judgment be not suspended or new trial granted, shall be sentenced to the penitentiary as provided by law. The court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum provided by law for the crime for which the person was convicted and sentenced. This act also provides that in all cases where the maximum sentence in the discretion of the court may be for life or any number of years, the court imposing the sentence shall fix the maximum sentence, and that in all cases, where no minimum sentence is fixed by law, the court imposing sentence shall fix such minimum, which minimum shall not be less than six months nor more than five years, the release of such persons to be determined as provided in said section.—*In re Setters*, 23 Idaho, 270, 128 Pac. 1111.

R. C. 6312 prescribes the punishment for felonies only in cases where the punishment is not prescribed by other sections of the statutes.—*Ex parte Miller*, 23 Idaho, 403, 129 Pac. 1075.

The maximum punishment for misdemeanors is fixed by R. S. 6313, where it is not otherwise fixed by other sections of the statutes.—*Ex parte Miller*, 23 Idaho, 403, 129 Pac. 1075.

Editorial Notes.

Cruel and unusual punishment: 35 L. R. A. 561.

Enhancing penalty when crime committed by habitual criminals or prior offenders: 34 L. R. A. 398; 24 L. R. A., N. S., 432.

CROPS.

Conveyances and contracts relating to crops. See Sales; Chattel Mortgages; and other specific heads.

Liability of crops to attachment. See Attachment. — Or execution. See Execution.

Rights between landlord and tenant. See Landlord and Tenant.

Agricultural liens. See Agriculture.

Lease on shares. See Landlord and Tenant.

Measure of damages for destruction. See Damages, VI.

Storage of grain. See Warehousemen.

CURTESY.

Rights of surviving husband in respect of community property. See Husband and Wife.

CUSTOMS AND USAGES.

Of miners. See Mines and Minerals, I, (B), 5, (4); II, (B); III, (C).

Expert evidence. See Banks and Banking, III, (C).

Evidence of custom in action against railroad for accident at crossing. See Railroads, X, (F).

DAMAGES.

I. NATURE AND GROUNDS IN GENERAL.

II. NOMINAL DAMAGES.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

IV. LIQUIDATED DAMAGES AND PENALTIES.

V. EXEMPLARY DAMAGES.

VI. MEASURE OF DAMAGES.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

VIII. PLEADING, EVIDENCE AND ASSESSMENT.

Recovery in particular actions or proceedings. See titles of particular actions, e. g., Claim and Delivery; Libel and Slander; Negligence.

For vexatious appeal or failure to prosecute. See Costs, VII.

For breach of covenant. See Covenants.

Future damages, whether included in award. See Arbitration and Award.

In actions by servant against master. See Master and Servant.

Under sale contracts. See Sales, VIII.

Profits as element. See Sales, VIII.

I. NATURE AND GROUNDS IN GENERAL.

Pleading and evidence. See post, VIII.

"General damages" are such as the law implies and presumes to have occurred from the wrong complained of.—*Lee v. Boise Development Co.*, 21 Idaho, 461, 122 Pac. 851.

"Special damages" are such as actually result from the commission of a wrong, but are not such a necessary result as will be implied by law.—*Lee v. Boise Development Co.*, 21 Idaho, 461, 122 Pac. 851.

II. NOMINAL DAMAGES.

(No paragraphs.)

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

Damages for mental anxiety and suffering caused by separation of husband from wife, when husband ejected from passenger train. See Carriers, IV.

Disfigurement caused by a tortious injury is an element of damage; but annoyance to the plaintiff caused by contemplation of such disfigurement is too remote to be considered as an element of damage.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Both mental and physical suffering are elements of damages, and are to be considered by the jury in tort actions.—*Horn v. Boise City Canal Co.*, 7 Idaho, 640, 65 Pac. 145.

Where plaintiff has an apprentice who is serving him as a horse jockey, and who is riding in a race at a racing association, and is thrown and injured and disabled for future riding by reason of the wrongful act of V. and others in allowing a dog to rush upon the race-track in front of the horse, and plaintiff thereafter sues V. and others for damages on account of the injury to his jockey and his disability for riding in future races, and alleges that he will be unable to secure another jockey of equal skill and ability in riding races, and that he would have won large prizes and premiums had his jockey not been thus injured, the damages claimed by the master on account of the injury to his apprentice, the jockey, are too remote, speculative, contingent and uncertain to be estimated or allowed, and no recovery can be had therefor.—*Cain v. Vollmer*, 19 Idaho, 163, 32 L. R. A., N. S., 38, 112 Pac. 680.

If the latent disease from which it was claimed defendant was suffering, itself did not cause pain, suffering, etc., to the patient, but such condition plus the accident caused such pain, the fall, and not the condition, is the proximate cause of the injury.—*Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 110.

It was error for the court to refuse to give the following requested instruction: "If you find from the evidence that the plaintiff was caused to fall by a defect in the sidewalk negligently permitted to exist by the defendant, the defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which plaintiff then was at the time of such fall, and it is no defense that such injury may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more serious to her than they would have been to a person in robust health."—*Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 111.

Editorial Notes.

What recoverable as damages: 69 Am. Dec. 725.

Compensatory damages, what are: 27 Am. Rep. 528.

Damages for mental suffering disconnected from physical injury: 36 Am. Rep. 306.

Consequential, liability for damages: 36 Am. Rep. 382.

Mental anguish as an element of damages: 7 Am. St. Rep. 534; 30 Am. St. Rep. 711.

Proximate and remote consequences, what are: 36 Am. Rep. 807.

Fright as an element of damages: 77 Am. St. Rep. 859.

Right to recover damages for bodily pain and suffering resulting from fright without actual physical violence: Ann. Cas. 1913E, 505; 12 Ann. Cas. 741.

IV. LIQUIDATED DAMAGES AND PENALTIES.

Treble damages in action for trespass. See *Trespass*.

V. EXEMPLARY DAMAGES.

Sheriff when not liable for exemplary damages for wrongful attachment. See *Sheriffs and Constables*, III, (E).

Exemplary or punitive damages cannot be recovered unless the evidence shows clearly that the action of the wrongdoer is wanton or gross or outrageous, or where the facts are such as to imply malice and oppression.—*Unfried v. Libert*, 20 Idaho, 708, 119 Pac. 885.

Editorial Notes.

Exemplary or punitive damages, when allowable: 27 Am. Dec. 684; 28 Am. St. Rep. 870.

Exemplary damages, rules respecting the allowance of: 50 Am. Dec. 767.

VI. MEASURE OF DAMAGES.

Right of married woman engaged in business to recover prospective profits for wrongful attachment. See *Husband and Wife*, IV.

Measure of damages in actions by property owner against railroad company for taking land. See *Eminent Domain*, IV.

Measure of damages and loss of profits in action against landlord for negligence. See *Landlord and Tenant*.

Measure of damages against telegraph company for mistake in delivering telegram. See *Telegraphs and Telephones*.

Measure and elements of damage in action for collision of boats. See *Collision*.

Measure of damages for conversion. See *Trover and Conversion*.

Question as to measure of damages cannot be raised by demurrer. See *Pleading*, V.

Measure of damages in action by real estate agent for commission or damages. See *Brokers*.

Measure and amount of damages for taking private property and in eminent domain proceedings. See *Eminent Domain*, II, (C).

Measure of damages in action by servant against master for injuries. See *Master and Servant*, III, (A).

In an action for damages sustained by falling into a ditch negligently left unprotected on a public highway, the evidence failed to show that the plaintiff, a married woman, lost any time or was so disabled as to be disqualified from performing her ordinary domestic duties for any length of time. No medical expense was shown to have been incurred. The evidence showed that the plaintiff suffered more or less physical pain for a considerable length of time. Held, that

the measure of damages was for the discretion of the jury and that their verdict would not be disturbed in the absence of a clear abuse of discretion.—*Horn v. Boise City Canal Co.*, 7 Idaho, 640, 65 Pac. 145.

While the measure of damages for the destruction of growing grass is its value at the time and place it was destroyed, such value must be arrived at by the jury from evidence of such facts and circumstances as will disclose the uses for which such crop would have been most profitable, the nearest period at which the crop would be marketable, and the labor and expense necessary to bring the crop to the marketable period and preparing it therefor.—*Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1006.

In an action for temporary injuries to land, where one is simply prevented from raising a crop, the rental value is the proper measure of damages.—*Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296.

Where land is permanently injured but not totally destroyed, the owner will be entitled to recover the difference between the actual cash value at a time immediately preceding the injury and the actual cash value in the condition it was immediately after the injury, with legal interest thereon to the time of the trial.—*Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296.

Where land is taken or the value thereof totally destroyed, the owner is entitled to recover the actual cash value of the land at the time of the taking or destruction with legal interest thereon to the time of the trial.—*Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296.

Where land is temporarily but not permanently injured, the owner is entitled to recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury, with legal interest thereon to the time of trial.—*Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296.

Plaintiff and defendant entered into a contract whereby plaintiff was to furnish all the hardware and put in place more than two million feet of lumber in the construction of flumes, trestles, etc., and defendant was to furnish all the necessary lumber at the times and in the places demanded by plaintiff. This the defendant failed to do but the evidence showed that there was material at other points on the canal which might have been put in place by the contractor. Held, that if the failure to perform on the part of defendant was due to its intention to compel plaintiff to terminate the contract, the measure of damages would include prospective profits, but if defendant was unavoidably prevented from performing, plaintiff's measure of damages, if he chose to terminate the contract, would be the value of his work already performed and whatever damages he had sustained by reason of the delays occasioned by defendant; and the loss, if any, on account of having procured the necessary outfit and appliances for carrying out the contract, should be divided between the parties in the proportion that the work

already done bears to that yet to be done.—*Harris v. Faris-Kesl Const. Co.*, 13 Idaho, 211, 89 Pac. 760.

In cases where prospective profits may be recovered, the rule is to ascertain the difference between the cost of doing the work and what the claimants were to receive for it, making a reasonable deduction for the less time engaged and for the release from the care, trouble, risk and responsibility attending a full execution of the contract.—*Harris v. Faris-Kesl Const. Co.*, 13 Idaho, 211, 89 Pac. 760.

To authorize a contractor to recover prospective profits in an action brought before completion of the work, there must appear a willingness on his part to complete the work and a refusal by the other party to be further bound by the contract or an abandonment thereof.—*Harris v. Faris-Kesl Const. Co.*, 13 Idaho, 211, 89 Pac. 760.

In actions for damage to personal property, the measure of damage should be the value of the property at the time of its destruction, where the property has been totally destroyed or so badly injured or impaired as to render it valueless for the use to which it was originally designed and appropriated. Where, however, the property is merely damaged and is capable of being repaired, the measure of damages should be the cost of repair, together with the value of the use of the property during the time it would take to make the repairs.—*McGuire v. Post Falls Lumber Mfg. Co.*, 23 Idaho, 608, 131 Pac. 654.

The correct rule of law governing the estimation of damages where the issues and facts are as stated in the pleadings and evidence in this case is as follows: "In estimating the damages, however, you may take into consideration the extent of the plaintiff's injuries, if any were suffered by her, the physical and mental pain and suffering which she has endured, if any there be, which was the natural and proximate result of such injuries, and also the pain and suffering which it is reasonable to infer that she will suffer in the future as the natural and proximate result of such injuries."—*Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Idaho, 663, 132 Pac. 112.

Editorial Notes.

Measure of damages for breach of an executory contract: 42 Am. Dec. 48.

Measure of damages for the destruction of property having no market value at the place of destruction: 62 Am. St. Rep. 791; 57 L. R. A. 193.

Damages for injuries to growing crops: 140 Am. St. Rep. 309; 6 Ann. Cas. 949; 12 Ann. Cas. 782; 12 L. R. A., N. S., 267; 27 L. R. A., N. S., 168; 37 L. R. A., N. S., 976.

Measure of damages for breach of contract: 53 L. R. A. 34.

Stipulation for damages in building contract as penalty or liquidated damages: 34 L. R. A., N. S., 588.

Personal injury by dog: 37 L. R. A., N. S., 865.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

Excessive damages in action for causing death. See Death.

A jury is presumed to have found its verdict upon the facts without having been influenced by passion or prejudice, and where a verdict is for a less sum than the full amount demanded in the prayer of the complaint, this presumption is strengthened.—*Cox v. Northwestern Stage Co.*, 1 Idaho, 376.

In an action for personal injuries due to a defective sidewalk, the evidence showed that plaintiff was a strong, healthy, young married woman and that by reason of her injuries she had become an invalid and cripple, unfitted for marital or other duties of a wife. Held, that a verdict for \$12,000 was not so excessive as to indicate passion or prejudice on the part of the jury.—*McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478.

Plaintiff, a miner, twenty-nine years old, had been engaged in mining work for about nine years, his wages ranging from \$3 to \$5 a day. He was injured through the negligence of his master and his earning capacity thereby reduced about fifty per cent, the injury consisting in a comminuted Pott's fracture, which caused eversion of his foot. Held, that a recovery of \$15,000 was excessive and should be reduced to \$10,000.—*Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

In an action by a miner, forty-two years old, whose average earning capacity was \$3.75 per day, a verdict for \$12,000 will be reduced to \$3,000.—*Walsh v. Winston Bros. Co.*, 18 Idaho, 768, 111 Pac. 1090.

Plaintiff, forty-five years old at the time of his accident, was earning \$3.75 per day, and was an able-bodied man, capable of performing labor requiring more than ordinary skill. He was permanently injured, incapacitating him from performing manual labor, and rendering him dependent wholly on the verdict recovered for his support. Held, that a recovery of \$12,000 was not so excessive as to justify interference on appeal.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

In an action by a railroad conductor, forty years of age, whose two legs were cut off by a switching engine, the court instructed the jury that plaintiff was guilty of contributory negligence and that the damages found should be diminished in accordance with the federal employer's liability act, Supp. 1909, Fed. Stats. Ann., page 584. Held, that the verdict of \$35,000 is excessive, even if negligence on the part of the railroad company had been shown.—*Neil v. Idaho & W. N. R. R.*, 22 Idaho, 74, 125 Pac. 331.

Where a man, seventy-six years of age, with a life expectancy of about six years, as estimated by the mortality tables, is permanently injured and maimed by a railroad company through its negligence, and is rendered a permanent sufferer for the remainder of his life, a judgment for \$10,000 will be reduced to \$9,000.—*Keim v. Gilmore & Pittsburgh R. R. Co., Ltd.* (on rehearing), 23 Idaho, 511, 131 Pac. 656.

Plaintiff was a miner and woodsman in good health, forty-six years old, with an expectancy of 23.81 years. He lost his right leg below the knee; his right hand was broken so that he lost the use of the little finger thereof; his tongue was severely cut; his nose was broken; he suffered serious scalp wounds which disfigured him; he had two ribs broken and was generally bruised and injured. He was drawing \$4.50 per day. After the accident he secured employment for a portion of the time at \$3 per day. His medical expenses were \$510. Held, that a verdict for \$15,510 should be reduced to \$11,510.—*Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Idaho, 663, 132 Pac. 112.

Plaintiff, a miner, thirty years old, lost the second, third and fourth toes of his right foot and the joint of his great toe became stiff. The evidence showed that in one or two years the foot would probably return to its normal condition aside from loss of the toes. Held, that judgment for \$7,500 is excessive, and must be reduced, and, unless plaintiff consents to a reduction of the judgment to \$4,000, a new trial is granted.—*Barter v. Stewart Min. Co.*, 24 Idaho, 540, 135 Pac. 68.

VIII. PLEADING, EVIDENCE AND ASSESSMENT.

Where the complaint in an action for personal injuries alleges that plaintiff "became permanently lame and crippled for life, and has suffered, and still suffers, great mental pain and anguish," evidence was admissible to show that plaintiff could not labor to the extent that she could prior to the accident.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Where the amount of damages allowed by the jury and the amount shown by the proofs differs in the sum of only \$26, and the expense of a new trial would greatly exceed this amount, a new trial should be denied under the maxim, "De minimis non curat lex."—*Wood Livestock Co. v. Woodmansee*, 7 Idaho, 250, 61 Pac. 1029.

Where, on cross-examination, a witness testified that his estimate of plaintiff's damages was a mere honest guess, a motion to strike out his former answer would be proper, but if such motion were not made, the action of the trial court in permitting the witness to answer, at the same time, restricting him to his own knowledge, will not be disturbed.—*Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995.

Where the evidence in an action for flooding lands does not show that the value of the land has been totally destroyed by the acts of the defendant, evidence that shows the value of the land but fails to show the amount of injury done thereto or the amount necessary to repair the injury and put the land in its former condition is too indefinite to sustain a verdict for such injury.—*Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296.

In an action for damages for injury to livestock, the age, kind and character and

reasonable value of a certain animal was shown, together with the nature of the injury inflicted on the animal. A witness testified that the animal had been damaged to the extent of a specified sum. Held, that though this was not a proper way to prove damages, it was not reversible error in view of the fact that all the elements of damage were before the jury.—*McKissick v. Oregon Short Line Ry. Co.*, 13 Idaho, 195, 89 Pac. 629.

Where plaintiff and defendant entered into a contract whereby plaintiff was to furnish all the hardware and put in place more than two million feet of lumber in the construction of flumes, trestles, etc., and defendant was to furnish all the necessary lumber at the times and places demanded by plaintiff, and failed to do so, in a suit for prospective profits, evidence of the facts and circumstances surrounding the making of the contract is admissible.—*Harris v. Faris-Keel Constr. Co.*, 13 Idaho, 211, 89 Pac. 760.

In a tort action where there was no allegation of damages on account of loss of time and no evidence given showing the loss of any particular or specific amount of time or the value thereof, an instruction that loss or time might be considered by the jury in assessing damages is erroneous.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

As to mental and physical pain and suffering and humiliation, it is unnecessary to submit any evidence as to the value thereof and the amount of damages to compensate therefor, the same being a matter entirely and exclusively for the jury.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

Where plaintiff claims special damages for loss of time, he must prove both the amount of time lost and the value thereof.—*Tarr v. Oregon Short Line R. R. Co.*, 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

An instruction which requires the jury to fix the amount of damages which the plaintiff may recover within the evidence under the pleadings is not erroneous.—*Whitney v. Woodmansee*, 15 Idaho, 735, 99 Pac. 968.

A minor cannot recover compensation for impaired capacity to pursue the ordinary vocations of life prior to his majority, unless it be alleged and proven that he has been given his liberty, and that his parents do not claim the right to receive such compensation; but evidence may be offered showing his earning capacity to aid and guide the jury in determining the amount of damages to be awarded after he reaches his majority.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

In an action to recover damages for personal injuries, it is competent to show the earning capacity of the party injured, the nature and extent of his business, and his inability to pursue such business in his accustomed way, as aid and guide to the jury in exercising their judgment in determining the amount of damages to be awarded.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63,

20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015.

Where it is alleged in the complaint that because of the personal injury received a total loss of earning capacity resulted, and that such injury was the result of the negligence of the defendants, a cause of action is stated, and in such a case the amount of damages sustained depends on the nature of the injury. If the evidence introduced without objection established the allegations as to bodily pain, mental anguish and incapacity to earn money, the jury would be justified in finding a verdict for the plaintiff.—*Johnson v. Gary*, 18 Idaho, 623, 111 Pac. 855.

It was error to instruct as follows: "And if you find and believe that the said plaintiff was in bad health, and that her generative organs were infected by gonorrhea or other loathsome diseases at the time of the injury complained of, notwithstanding that the same might have been aggravated by the fall on the sidewalk, you can only find for the plaintiff to the extent that her troubles were aggravated by said fall," where there was no evidence in the record to the effect that the plaintiff was in bad health or that her generative organs were infected with gonorrhea or other loathsome disease.—*Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 110.

Unless special damages are specifically pleaded, recovery thereof will not be allowed. *Sommerville v. Idaho Irr. Co.*, 21 Idaho, 546, 123 Pac. 302.

In an action to recover for wrongful and unlawful entry on lands, held under lease by plaintiff, defendants' cross-complaint alleged title in themselves and failure of plaintiff to deliver possession pursuant to notice to vacate. The cross-complaint alleged that defendants had expended a large sum of money in improving the unoccupied portions of said premises, but did not show that the money so expended was lost or that they were in any way damaged by reason of such expenditure, either by loss of customers, profits or otherwise. Defendants alleged the expenditure of a large amount of money for advertising the sale of lots platted on said premises and showing the same to prospective purchasers, but failed to allege the loss of any sales. The cross-complaint did not allege any loss of time, money or profits, either direct or speculative. Held, that only general damages were authorized by the cross-complaint.—*Lee v. Boise Development Co.*, 21 Idaho, 461, 122 Pac. 851.

In an action for destruction of a stock of goods, where the plaintiff testifies that the invoice was destroyed, and that she cannot particularize or enumerate the goods, but that they were of the aggregate value of \$1,250, such evidence, though indefinite, is sufficient upon which to rest a verdict in favor of the plaintiff.—*Russell v. Little*, 22 Idaho, 429, 126 Pac. 529.

Where a woman walking upon the sidewalk of a city fell through a hole in the walk, and it was thereafter found necessary for her to undergo a surgical operation, and there was doubt and conflict in the evidence as to

whether the operation was caused primarily by the fall or by a previously existing diseased and affected condition of the parts operated upon, and expert testimony introduced was indefinite and uncertain as to the primary cause which rendered the operation necessary, the fact that the operation was considered necessary by the attending physicians soon after the accident occurred, and that the operation was actually performed, are circumstances which the jury had a right to consider in concluding that the fall was the primary cause of the operation and of the consequent damages sustained.—*Jones v. City of Caldwell*, 23 Idaho, 467, 130 Pac. 995.

Editorial Notes.

Effect of instruction by court in personal injury case as to allowance for medical expenses where there is no evidence as to such expenses: *Ann. Cas.* 1913D, 150.

Right to recover in action for tort special damages properly pleaded consisting of liability incurred but not paid: *Ann. Cas.* 1913D, 761.

DAMS.

See Navigable Waters; Waters and Watercourses.

Lien for construction. See Mechanics' Liens.

Dams as obstruction to navigation. See Navigable Waters, I. (C).

DANGEROUS WEAPONS.

See Weapons.

Assault with. See Assault and Battery; Homicide.

DE MINIMIS NON CURAT LEX.

See Damages, VIII.

DEAD BODIES.

Authority to hold inquest or autopsy. See Coroners.

DEATH.

Effect of death of party on right or proceedings of appeal. See Appeal and Error, VI.

Action for death of pedestrian killed at street crossing. See Street Railroads.

Of debtor prior to issue of writ of execution. See Execution, III.

Of partner. See Partnership, VI.

Action for death of lineman by electrocution. See Electricity.

Where the complaint in an action by a widow and her minor son for the death of the husband and father fails to allege whether or not deceased was a minor, such uncertainty is a ground for special demurrer and cannot be taken advantage of by general demurrer. *Palmer v. Utah etc. Ry. Co.*, 2 Idaho, 315, 13 Pac. 425.

It was not error to refuse to instruct that, in an action by a parent for the death of his minor child, the measure of damages is the value of the child's services until he becomes of age, less the expenses of his support during that time.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

An instruction that "in determining the question of negligence, you should take into consideration the situation and conduct of both parties at the time of the death of plaintiff's infant child, as disclosed by the evidence; and if you believe from the evidence that the death of plaintiff's infant son was caused by the negligence of defendant's servants or employees, as charged in the complaint, and without any greater want of care on the part of the plaintiff than was reasonably to be expected from a person of ordinary care and prudence in looking after and caring for his own infant son, then the plaintiff is entitled to recover" is proper.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

A father may maintain an action for the injury or death of his minor child, and in such action such damages may be given as, under all the circumstances of the case, may seem just.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

In an action for damages due to the death of plaintiff's minor child, the court, on its own motion, instructed the jury that if they found for the plaintiff they should award him "such damages as they think him entitled to." Held, error.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

In an action for damages for the death of plaintiff's infant child, the court instructed the jury that if they found for the plaintiff "such damages may be given as under the circumstances of the case may be just," and among other things, in awarding damages, they might take into consideration "the relation proved as existing between plaintiff and deceased, and the injury, if any, sustained by plaintiff in loss of said deceased child's society." The complaint did not claim damages for the loss of society and no proof was offered showing the social relations existing between plaintiff and defendant. Held, that the instruction was erroneous, as the expression "all the circumstances of the case," used in *R. S.* 4100, meant relevant circumstances presented under the evidence and pleadings. *Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

Where damages are claimed for the death of a minor child by reason of the negligence and carelessness of defendant in leaving a well uncovered into which the child fell, it must affirmatively appear that the accident resulted wholly from the negligence of defendant, and that the negligence or imprudence of the plaintiff did not contribute to the result.—*Holt v. Spokane etc. Ry. Co.*, 4 Idaho, 443, 40 Pac. 56.

In an action to recover for the death of plaintiff's minor son, alleged to have been drowned in defendant's canal by reason of its carelessness and negligence in constructing and maintaining a walk across the canal, the evidence showed that the walk was intended for the exclusive use of defendant and not for public use; that it consisted of a solid plank floor, three feet eight inches wide, with a hand-rail on one side, and was constructed in a substantial manner and well adapted for the purpose for which it was in-

tended; that deceased was an unusually bright child, nine years old, and that he carelessly ran upon the bridge or walk at an angle and struck his foot against a cleat two inches thick, nailed to a headgate which was about four and one-half feet from the hand-rail on the walk; that the plaintiff did not consider the bridge dangerous and bad, neither warned the child nor defendant that it was dangerous for children to play there. Held, that a verdict for plaintiff should be reversed.—*Thomas v. Pocatello Power etc. Co.*, 7 Idaho, 435, 63 Pac. 595.

In an action by a parent for the death of a stout, healthy child, with ordinary faculties, and less than five years of age, a verdict for \$2,000 will not be held excessive.—*York v. Pacific etc. Ry. Co.*, 8 Idaho, 574, 69 Pac. 1042.

Where an injury results in the death of an employee, and his legal representatives, in an action for damages, establish the fact of his death and that it resulted from the negligence of defendant, they may then rest on the legal presumption which at once arises in favor of life and the instincts of self-preservation, since the law will presume that a sane man will exercise reasonable care and precaution in the preservation of his life and will not knowingly expose himself to dangers and risks of mortal injury.—*Adams v. Bunker Hill etc. Min. Co.*, 12 Idaho, 637, 11 L. R. A., N. S., 844, 89 Pac. 624.

In an action under R. S. 4100 by the father of a minor child whose death has been caused by the wrongful or negligent act of another, it is not error for the court to instruct the jury that in considering the amount of pecuniary damages sustained by the plaintiff, they may take into consideration "the degree of intimacy existing between the father and the child and the loss of companionship if such be shown."—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

In an action under R. S. 4100 by a father for the death of his minor child through the wrongful or negligent act of defendant, the complaint alleged that the infant "always had been a strong healthy child, bright, smart and intelligent in all ways, and a great comfort to plaintiff, and capable of earning for plaintiff before its maturity large sums of money, and thus adding to the wealth, welfare, comfort and happiness of plaintiff." Held, not error to refuse to strike from the complaint the words "welfare, comfort and happiness," and also the words "and the companionship of said child."—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

In an action by a father under R. S. 4100 for the death of his minor child, an instruction to the effect that the jury "have no right to consider anything but the actual pecuniary loss the plaintiff sustained on account of the death of his child" was properly refused.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

In an action by the father for the wrongful death of a son seven years of age, caused by collision on the railway, where it is ad-

mitted that the death occurred through the negligence and carelessness of the servants of the defendant, the value of the child's services to the father during the period of his minority should be ascertained by the jury from the evidence introduced and by using their own judgment, common sense, and discretion, as an estimate of such services must of necessity to a considerable extent be a matter of opinion.—*Golden v. Spokane etc. R. Co.*, 20 Idaho, 526, 118 Pac. 1076.

A verdict of \$4,000 for the death of a bright, healthy, active boy of seven years of age is not excessive under the facts of this case.—*Golden v. Spokane etc. R. Co.*, 20 Idaho, 526, 118 Pac. 1076.

In an action by a father for the death of his unmarried daughter, a trained nurse, thirty-six years of age, the evidence showed that plaintiff at the time of his daughter's death was about sixty-one years of age. Held, that a verdict for \$6,000 was excessive and should be reduced to \$4,535.—*Golden v. Spokane etc. R. R. Co.*, 20 Idaho, 531, 118 Pac. 1077.

Where a husband and father in good health, thirty-two years of age, earning a monthly salary of \$85, was electrocuted, through negligence of an electric light company, by coming in contact with a live wire, a verdict and judgment for \$15,000 in favor of the widow and two minor children is not excessive.—*Staab v. Rocky Mountain Bell Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078.

The word "heirs," as used in R. C. 4100 authorizing the prosecution of an action for wrongfully causing death, means such heirs as are entitled to inherit from a deceased person under the statute of this state, and is not limited to common-law heirs.—*Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Where a death has been wrongfully caused in this state, the prosecution of an action therefor under R. C. 4100 in a foreign state for the benefit and in behalf of a part only of those who are "heirs" under the laws of Idaho, is not a bar to a subsequent action in this state by an heir who was not represented in such action in the foreign state.—*Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Where an administratrix appointed under the laws of one foreign jurisdiction sued in another foreign jurisdiction for recovery on a death claim arising under the death statute of Idaho (R. C. 4100), and the courts of the state of her appointment hold that she was not a representative of and had no authority to represent the mother of the deceased, who was not an heir of the deceased under the laws of the state where the administratrix was appointed, held, that in an action by the mother in the courts of Idaho, where the mother is one of the heirs of the decedent, failure to make the administratrix, either officially or personally, a party plaintiff or defendant, is not prejudicial error, and is not fatal to the jurisdiction or to a judgment recovered in such action.—*Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Laws 1909, page 34, relating to the liability of employees and masters, did not repeal R. C. 4100, which authorizes the prosecution of an action by the heirs or personal representatives of one whose death is caused by the wrongful act or neglect of another.—*Chiara v. Stewart Min. Co.*, 24 Idaho, 473, 135 Pac. 245.

The presumption must be indulged, in the absence of proof to the contrary, that one who was killed while engaged at his duties was exercising reasonable care and precaution for the protection and preservation of his person and life, and that he was possessed of the ordinary instincts for self-preservation.—*Chiara v. Stewart Min. Co.*, 24 Idaho, 473, 135 Pac. 245.

Editorial Notes.

Action to recover damages for the wrongful causing of death: 48 Am. Dec. 632; 70 Am. St. Rep. 669.

Statute of limitations running after death and before administration granted: 65 Am. Dec. 594.

Presumption of death: 91 Am. Dec. 526; 92 Am. Dec. 704; 46 Am. Rep. 761; 104 Am. St. Rep. 198.

Damages, whether recoverable for death when resulting from negligence: 37 Am. Rep. 716.

Damages, measure of in actions for causing death of human being: 12 Am. St. Rep. 375; 17 L. R. A. 71.

"Dependent": who is "dependent" within statute giving right of action for death by wrongful act to persons dependent on deceased: Ann. Cas. 1912B, 733.

Measure of damages recoverable by parent for death of minor child by wrongful act: Ann. Cas. 1912C, 58.

Law governing distribution of damages recovered for death by wrongful act: Ann. Cas. 1913D, 282.

Suit in foreign jurisdiction under statute permitting recovery for death by wrongful act: Ann. Cas. 1913D, 570.

Elements of damages recoverable by child for death of parent: 19 L. R. A., N. S., 128.

DECEIT.

See False Pretenses; Fraud.

DECISION.

Former decision in same case as law of the case.

See Appeal and Error; Criminal Law.

Of cause on appeal. See Appeal and Error; Criminal Law.

DECREE.

See Judgment.

DEDICATION.

Dedication by city council after entry of townsite.

See Public Lands, II, (B), 4.

Evidence in a suit by a road overseer to compel the removal of a building from a public street held sufficient to show a dedication

of such street to the public.—*Smith v. Montgomery*, 3 Idaho, 472, 31 Pac. 812.

Where lots are sold with reference to a recorded plat, a dedication of the streets and alleys, as laid out in such plat is perfected without any affirmative action on the part of the city, as the right vests in the public when some of its members purchase lots in accordance with the plat.—*Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167.

Where lots are sold with reference to a recorded plat, the dedication of streets shown thereon is complete, notwithstanding the fact that the city did not open said streets at the time of dedication nor until the population and travel of that section made it necessary.—*Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167.

Where the owner of land plats the same into lots, blocks, streets and alleys, and files the plat thereof for record and sells lots with reference to said plat, the dedication of such streets and alleys to the public is complete and irrevocable.—*Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167; *Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

Where land was platted and laid out as an addition to Boise City and lots and blocks were sold therein with reference to such plat, an act of the legislature extending the corporate limits of Boise City so as to include said addition was an implied acceptance by the city of the dedication of streets and alleys shown on the plat.—*Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167.

To constitute dedication by user, it is necessary to find the probative facts which of themselves constitute dedication, or the ultimate fact of dedication, it being insufficient to find facts which merely have a tendency to prove dedication.—*Village of Hailey v. Riley*, 14 Idaho, 481, 17 L. R. A., N. S., 86, 95 Pac. 686.

Before the findings of a court can establish a dedication of water by user it must appear therefrom that the owner intended to dedicate the water to the public use.—*Village of Hailey v. Riley*, 14 Idaho, 481, 17 L. R. A., N. S., 86, 95 Pac. 686.

Where a court finds that a desert entryman and his successors in interest intended that the occupants of a townsite should have the free use of certain water on the streets of the town and that the use thereof is necessary for a reasonable enjoyment of the streets and that private rights and public convenience and accommodation would be materially affected by an interruption of the use of the water on such streets, such findings are findings of probative facts tending to prove dedication but not sufficient to show a dedication to public use, since they are not inconsistent with mere permissive use or a license.—*Village of Hailey v. Riley*, 14 Idaho, 481, 17 L. R. A., N. S., 86, 95 Pac. 686.

The making and filing of a plat laying out a townsite on a desert entry will not dedicate to the public the waters used upon the streets and alleys of said townsite under a water right subsequently located and acquired.—*Village of Hailey v. Riley*, 14 Idaho, 481, 17 L. R. A., N. S., 86, 95 Pac. 686.

A finding to the effect that unless a certain use be held to amount to a dedication private rights and public accommodation would be materially affected, and that an interruption or cessation thereof would materially affect both public and private interests, is a conclusion of law rather than a finding of fact, and it is the duty of the trial court to find the facts upon which such conclusion must necessarily rest.—*Village of Hailey v. Riley* (on rehearing), 14 Idaho, 499, 17 L. R. A., N. S., 86, 95 Pac. 692.

Under the facts shown in this case there has been such a dedication of water to the streets, alleys and lots of the village of Hailey within the purview and meaning of section 4, article 15 of the constitution and the statutes of this state, that the water cannot hereafter be withheld from such streets, alleys and lots to which it has been applied, so long as the consumer pays the reasonable rental therefor, as the same may be established by authority of law, and to that extent the public and individual use of such water cannot be disputed or interrupted. *Village of Hailey v. Riley* (on rehearing), 14 Idaho, 499, 17 L. R. A., N. S., 86, 95 Pac. 692.

Laws 1893, page 127, section 93, making the acknowledgment and recording of the plat therein referred to equivalent to a deed in fee simple of such portion of the premises platted as is therein set apart for streets or other public uses, is not applicable to the plat of Bryon's addition to the city of Boise, because such plat was filed prior to the enactment of the statute.—*Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

Under Laws 1893, page 127, section 93, the acknowledgment and filing of a plat of a city or town or an addition thereto is a dedication of the streets and alleys marked thereon the same as if such plat contained a certificate in express language dedicating such streets and alleys to the public.—*Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

The general rule and presumption is, in the absence of a positive statute, that the public takes simply an easement in the streets.—*Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

There may be dedicated to the public, land for street purposes which is not at the time of dedication in a condition to be traveled by the public.—*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

Where in the certificate of dedication to a plat it is provided, "we do hereby dedicate to the use of the public forever all the streets and alleys as shown on said plat," and Dora avenue is clearly marked on the plat and appears to be a part of it, the fact that a line is drawn across the end of said avenue does not show an intention not to dedicate said avenue.—*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

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The first essential of a dedication is the intention of the owner of the land to dedicate it, and such intention is usually shown by the plat filed. The contrary intention cannot be shown by something hidden in the mind of the land owner.—*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

Where a certain avenue is clearly marked on a plat, if there was an actual intent to reserve and not dedicate it, it should have been made manifest in some manner of equal certainty and of equal publicity as the plat itself.—*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

By the filing of a plat and the selling of lots with reference thereto, the dedicatory and grantor is estopped from revoking the dedication of any streets marked thereon.—*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

The assessor has no authority to assess streets for taxation, and, if he does assess them, such unauthorized assessment and tax sale thereunder would not deprive the public, or those who had purchased lots with reference to the plat, of such street or highway.—*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

When a dedication of a street is made by filing a plat in the proper office and selling lots with reference to it, the only way the title to said land can revert is by having the same vacated in the manner provided by law.—*Hanson v. Proffer*, 23 Idaho, 705, 132 Pac. 573.

Where the owner of a tract of land abutting on a lake lays it out into lots and blocks, streets and avenues, and files a plat thereof, in accordance with law, noting on the plat the lots and blocks, and the dimensions of each, and the streets and avenues, and between the lots nearest the water line and the water line designates a vacant strip of land, varying from twenty-five to one hundred feet in width, as "beach" and "sand beach," and files with the plat a dedication of the streets and avenues, the filing of such plat and dedication does not amount to a dedication of the beach to the public, as it does of the streets and avenues designated on such plat.—*Deffenbaugh v. Washington Water P. Co.*, 24 Idaho, 514, 135 Pac. 247.

Editorial Notes.

Dedication to a public use, what amounts to: 27 Am. Dec. 559.

Dedication of lands to a public use, acceptance, when inferable: 58 Am. Rep. 146.

Dedication, by maps and plats: 10 Am. St. Rep. 189; 14 L. R. A., N. S., 878.

Dedication of highways, what amounts to: 57 Am. St. Rep. 749.

Dedication and acceptance of public street, what constitutes: 129 Am. St. Rep. 576.

DEEDS.**I. REQUISITES AND VALIDITY.**

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I. REQUISITES AND VALIDITY.**(A) NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.**

(No paragraphs.)

(B) FORM AND CONTENTS OF INSTRUMENTS.

Where a direction or course given in a deed is impossible or senseless, it must be omitted or disregarded; and if the other calls or parts of the description are sufficient to identify the land conveyed, the deed must be sustained.—*Brose v. Boise City Ry. etc. Co.*, 5 Idaho, 694, 51 Pac. 753.

Where a plat is referred to in a deed for a description of the premises conveyed, all

the particulars appearing upon the plat are to be regarded as expressly recited in the deed.—*Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167.

(C) EXECUTION.

Evidence. See post, IV.

Deed executed to correct error in void deed. See post, III, (A).

(D) DELIVERY.

In escrow. See Escrows.

Right to have deed canceled on nonperformance of conditions on which delivery was made. See Cancellation of Instruments, I.

Evidence. See post, IV.

A deed absolute on its face cannot be delivered in escrow to the grantee therein named, and if such a deed is so delivered, the title at once vests in the grantee.—*Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A., N. S., 572, 80 Pac. 1117.

Even though a valid delivery of a deed has not been made at the time of its execution, the grantor may thereafter ratify the wrongful taking of the deed after he has complete knowledge of the facts and taking, and thereby perfect the title.—*Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A., N. S., 572, 80 Pac. 1117.

A grantor, by a warranty deed absolute on its face, cannot convey such a title to his grantee as would enable the grantee to pass a good and perfect title to a corporation to be formed, and at the same time attach such parol conditions to the deed upon its delivery as to preclude his grantee from conveying and transferring an equally good title to any other person or corporation.—*Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A., N. S., 572, 80 Pac. 1117.

Where the managing agent of a corporation executes a deed thereto and causes his attorney, who is also a director of the corporation, to have the deed recorded, but no other officer has any knowledge of the transfer and no action of the corporation is taken in the matter and the consideration for the deed is held in escrow, there is no sufficient delivery of the deed to entitle the corporation to interpose the claim of being a bona fide purchaser in proceedings by creditors against the property.—*California etc. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50.

Where the grantee fraudulently secures possession of a deed without the knowledge or consent of the grantor, such deed conveys no title.—*Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

The question of whether a deed conveying mining claims has been delivered is one of fact and depends primarily upon the intention of the grantor.—*Flynn v. Flynn*, 17 Idaho, 147, 104 Pac. 1030.

As to what constitutes a sufficient delivery of a deed is largely a matter of intention, and the usual test is: Did the grantor by his acts or words, or both, manifest an intention to make the instrument delivered his deed,

and thereby divest himself of title.—*Flynn v. Flynn*, 17 Idaho, 147, 104 Pac. 1030.

Where it is shown that a married man is desirous of giving to his wife the property they have accumulated during their marital relation, and, in order to carry out such purpose, makes a conveyance of said property to a third party who conveys to the wife, and it appears that such deeds of conveyance are intended as the deeds of the grantor, and both deeds are duly executed and delivered to the wife, who receives and accepts the same and records the same, there is a sufficient delivery of said deeds, and the title to the property passes to the grantee.—*Huff v. Huff*, 20 Idaho, 450, 118 Pac. 1080.

Editorial Notes.

Delivery of deeds: 16 Am. Dec. 35; 58 Am. Rep. 289; 53 Am. St. Rep. 537; 12 L. R. A. 171.

Delivery of deeds, whether presumed to have been at their dates or at the dates of their acknowledgment: 86 Am. Dec. 63.

Delivery of deeds to a third person for the use of the grantee: 40 Am. Rep. 217; 54 L. R. A. 865; 9 L. R. A., N. S., 224; 38 L. R. A., N. S., 941.

Presumption of delivery and acceptance of deed from parent to infant child: Ann. Cas. 1912A, 230.

Delivery of deed by deposit by grantor for registration: 7 Ann. Cas. 226.

(E) VALIDITY.

Time of recording as affecting validity. See post, II. Pleading and evidence. See post, IV.

Undue influence cannot exist where the party acting has not sufficient mental capacity to know what he is doing.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

Undue influence is proven by showing that a person who has mental capacity to understand, and does understand what he is doing, was impelled by artifice, force or fear to do something against his will which he would not have done but for such influence.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

Excessive use of intoxicating liquors does not disqualify one from conveying real estate unless he did not fully understand the nature of the business when he entered into it.—*Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760.

The fact that the grantor believed in spiritualism and made many apparently unreasonable statements is not evidence of insanity.—*Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760.

Influence gained by kindness and affection will not be regarded as "undue" in the absence of any proof of imposition or fraud being practiced by the grantee of a deed of gift.—*Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33.

"Undue influence," to justify the setting aside of a deed, must have been such as to

overcome the will of the grantor, and to destroy, to some extent at least, the free agency of the grantor. It must further appear that the undue influence alleged was exercised at the time the act in question was done, and it will not be presumed from the fact that the deed is made by a parent in favor of a child that it is unjust or unfair.—*Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33.

Evidence held insufficient to establish undue influence in procuring plaintiff to make a conveyance.—*Shaughnessy v. Hood*, 21 Idaho, 709, 123 Pac. 641.

Evidence held insufficient to sustain a finding that plaintiff had not sufficient mental capacity to make the deed sought to be set aside.—*Shaughnessy v. Hood*, 21 Idaho, 709, 123 Pac. 641.

Editorial Notes.

Blanks in deeds, filling in after execution: 13 Am. Dec. 669; 3 Am. Rep. 340; 10 Am. Rep. 267; 38 L. R. A., N. S., 423.

Validity of deed to blank grantee: Ann. Cas. 1912A, 538.

Effect of omission of grantor's name from body of deed, effect of: Ann. Cas. 1912C, 1050.

II. RECORDING AND REGISTRATION.

The fact that a deed of gift, which was afterward attacked on the ground of undue influence, although delivered to the grantee at the time of execution, was not recorded by the latter until about the time of the death of grantor, does not affect the question of the validity of such deed.—*Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33.

Editorial Notes.

Registration, effect of defective: 91 Am. Dec. 106; 45 Am. Rep. 188; 96 Am. St. Rep. 397.

III. CONSTRUCTION AND OPERATION.

See Covenants.

Mistake in name of donee. See Religious Societies.

(A) GENERAL RULES OF CONSTRUCTION.

A deed executed to correct an error in a void deed, and not for the purpose of conveying title, does not amount to a ratification of such void deed, or pass title to the property therein described.—*Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

(B) PROPERTY CONVEYED.

Where a quitclaim deed clearly indicates that it was the intention of the grantor to convey the after-acquired title, that effect should be given the instrument.—*Broese v. Boise City Ry. etc. Co.*, 5 Idaho, 694, 51 Pac. 753.

The purchaser under a deed referring to a map or plat on which are laid out streets and alleys cannot be regarded as ignorant of such streets and alleys as defined upon the map or plat, and is bound thereby.—*Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167.

The vesting of title is determined by the legal effect of the terms of the grant, and cannot be controlled or affected by subsequent statements or declarations of the vendor.—*Josselyn v. Daly*, 15 Idaho, 137, 96 Pac. 568.

Editorial Notes.

Description, construction of by subsequent acts of the parties: 35 Am. Dec. 373.

(C) ESTATES AND INTERESTS CREATED.

Patent to heirs of deceased entryman, heirs take by purchase and not by descent. See *Public Lands*, II, (J).

Under R. C. 3076, the "Rule in Shelley's Case" has been abrogated and the term "heirs" has been changed from a word of limitation to one of purchase.—*Wilson v. Linder*, 18 Idaho, 438, 138 Am. St. Rep. 213, 110 Pac. 274.

Editorial Notes.

Construction, Shelley's Case, when fall within the rule of: 11 Am. St. Rep. 99.
"Children" as a word of purchase or limitation: 12 L. R. A., N. S., 283.

(D) EXCEPTIONS AND RESERVATIONS. (No paragraphs.)

(E) CONDITIONS AND RESTRICTIONS. (No paragraphs.)

(F) LOSS OR RELINQUISHMENT OF RIGHTS. (No paragraphs.)

IV. PLEADING AND EVIDENCE.

Admissions by grantor, admissibility. See, also, Evidence, VII.

Equitable defense of fraud in procuring deed. See Ejectment.

Where a party seeks to have a deed annulled on the ground of undue influence, he must plead the facts constituting the undue influence, the rule of pleading being the same as in cases of fraud.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

In an action to set aside a deed on the ground of undue influence, the fact that the husband of the grantee was indebted to the grantor on a note and that he acted unfairly in regard to the possession of such note was not pertinent to the issues and hence inadmissible.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

In a suit to set aside a deed on the ground of the incompetency of the grantor, there is no error in instructing the jury that "the opinion of an expert is not entitled to much weight, as against the testimony of persons who are familiar with the party and the transaction and who testify as to the facts from which the competency of a grantor is to be determined."—*Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760.

Parol evidence is inadmissible to show that a deed delivered to a grantee and absolute on its face was to take effect only on the happening of some contingency not expressed therein.—*Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117.

Since a deed never shows upon its face nor by the terms thereof a delivery, parol evidence of the delivery of the deed is admissible.—*Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117.

Evidence in an action to quiet title held insufficient to show a delivery of deeds to the grantee therein named.—*Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

Evidence held to show that there was a delivery of the deed.—*Flynn v. Flynn*, 17 Idaho, 147, 104 Pac. 1030.

Where deeds are attacked as void because of nondelivery thereof and because they were given in fraud of creditors, a finding of the court that the deeds were never delivered makes it unnecessary to find on the question of the deeds being in fraud of creditors.—*Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

Where all the facts with reference to the delivery of a deed are facts arising out of a contract in escrow, and there is nothing on the face of the deed to control or make conditional its delivery, and there is some evidence to show delivery, the deed is admissible to show transfer of title if a delivery was made.—*Leggat v. Blomberg*, 15 Idaho, 496, 98 Pac. 723.

The confidential relations naturally existing between a mother and daughter do not of themselves raise any presumption of undue influence on the part of the daughter, nor does the love and affection ordinarily manifested between parent and child create such presumption.—*Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33.

In an action to set aside a deed of gift from an aged woman to her daughter with whom she was living, the burden of proof of undue influence rests upon the party bringing such action.—*Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33.

Declarations made by a grantor prior to the execution of a deed, and inconsistent with the execution of such deed, are not admissible in evidence.—*Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33.

With reference to the mental condition of a grantor, whose deed of gift is attacked on the ground of undue influence, the testimony of the officer who took the acknowledgment and of the witnesses who were present at that time is entitled to greater weight than the testimony of interested witnesses or of those who had not seen the grantor on the occasion of the execution of such deed or for a considerable time prior thereto.—*Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33.

Evidence in this case examined, and held not to be sufficient to show undue influence of the wife over the husband or fraud in inducing the execution and delivery of a deed of conveyance of real property from the husband to the wife.—*Huff v. Huff*, 20 Idaho, 450, 118 Pac. 1080.

DEFAMATION.

See Libel and Slander.

DEFAULT.

Does not prevent court from extending time to answer. See Pleading, III, (A).

In application to settle bill of exceptions. See Exceptions, Bill of, II.

Not necessary to serve amended pleading on parties in default. See Pleading, X.

Judgment against garnishee. See Attachment and Garnishment, VI.

Of defendant in condemnation proceeding. See Eminent Domain, III.

Review of order setting aside or refusing to set aside default. See Appeal and Error, XVI, (F), 7.

DELIVERY.

Delivery of deeds. See Deeds, I, (D); Escrows.

DEMAND.

See Bills and Notes, VI.

When not necessary. See Trover and Conversion.

Affecting limitations in action to recover property acquired by tort. See Limitation of Actions, II.

Not necessary where useless. See Banks and Banking, II.

Necessary to set statute of limitations running against depositor. See Banks and Banking, III, (C).

For return of property. See Claim and Delivery, I.

DENTIST.

See Physicians and Surgeons.

DEPOSITARIES.

See Bailment; Banks and Banking; Escrows.

Rights, duties and liabilities of depositaries of escrows. See Escrows.

Receiving deposits while bank is insolvent. See Banks and Banking, II.

Public money deposited in a bank on general deposit by the state treasurer becomes a trust fund, and not part of the estate of the bank, and if the bank is insolvent the receiver must treat such money as belonging to the state and not to the assets of the bank.—*State v. Thum*, 6 Idaho, 323, 55 Pac. 858.

Under R. S. 6975 to 6977, providing a punishment for misapplication, etc., of public moneys, the state treasurer has no authority to deposit state moneys with a bank on general deposit nor has the bank any authority to receive such moneys on general deposit.—*State v. Thum*, 6 Idaho, 323, 55 Pac. 858.

County funds deposited in a bank in violation of law are trust funds and do not become the property or assets of the bank to be distributed to creditors by the receiver appointed on the insolvency of the bank.—*First Nat. Bk. v. Bunting*, 7 Idaho, 27, 59 Pac. 929, 1106.

A county whose funds have been unlawfully deposited in a bank is not estopped to claim that such funds are trust funds, by the action of the county treasurer in receiving a pro rata payment thereon from the receiver of the insolvent bank in common with the general creditors.—*First Nat. Bk. v. Bunting*, 7 Idaho, 27, 59 Pac. 929, 1106.

Where the state treasurer deposited state funds in a bank without authority of law, and the bank had notice of the character of the funds, and of the relation the depositor sustained to the funds, and the trust funds were mixed and commingled with the general assets of the bank, and used from day to day in the commingled form promiscuously in the payment of the debts of the bank and in the purchase of paper and securities, and the bank thereafter suspended payment and went into the hands of a receiver, and at the time the receiver took charge there was not enough cash on hand to pay the trust account, the lien of the state will attach against all the assets of the bank as a preferred claim for the payment of the trust funds and not merely against the cash on hand when the bank suspended.—*State v. Bruce*, 17 Idaho, 1, 134 Am. St. Rep. 245, 102 Pac. 831.

A "deposit" is a naked bailment of goods to be kept for the depositor without reward, and to be returned when he shall demand it.—*Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277.

In an action of claim and delivery by a married woman against a bank to recover certain mortgage bonds, evidence held to show that plaintiff deposited the bonds in the defendant bank for safekeeping, and not as collateral security for the payment of her husband's debts.—*Bates v. Capital State Bank*, 21 Idaho, 141, 121 Pac. 561.

DEPOSITIONS.

Competency of evidence in general. See Evidence. Competency, attendance and examination of witnesses in court. See Witnesses.

Review on appeal of case tried wholly on depositions.

See Appeal and Error, XVI, (D).

Taken at preliminary examination. See Criminal Law, VIII; X, (L).

Taken at coroner's inquest. See Homicide, VII, (D).

Costs of. See Costs, V.

Contempt for failure to testify. See Contempt.

Where a witness is beyond the reach of the process of the court, a party desiring his testimony must sue out a commission to take his deposition, and a failure to do so shows a want of due diligence and a neglect to use the proper means to obtain the evidence.—*Alvord v. United States*, 1 Idaho, 585.

Where there is a return by the commissioner which was not objected to at the trial, the objection that there was no certificate as provided by code, section 965, will be considered waived.—*Darby v. Heagerty*, 2 Idaho, 13 Pac. 85.

It need not affirmatively appear that the deposition was read to the witness and corrected by him as provided by code, section 969.—*Darby v. Heagerty*, 2 Idaho, 282, 13 Pac. 85.

The common-law rule that evidence by depositions is in derogation of the common law, and that statutes providing therefor are to be strictly construed is superseded by Code Civ. Proc., section 3, providing that the provisions of the code are to be liberally construed, with a view to effect its objects and promote justice.—*Darby v. Heagerty*, 2 Idaho, 282, 13 Pac. 85.

In determining the admissibility of a deposition, the presumption is that the commissioner discharged his duty by doing all that the statute requires, except as to matters which he must return specifically as done.—*Darby v. Heagerty*, 2 Idaho, 282, 13 Pac. 85.

Where there is an application in a criminal case to take depositions outside the state and it appears that the evidence would not change the result, a denial of the application will not be disturbed.—*State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.

Where the evidence of a witness is taken by deposition after notice given as provided by statute, and the adverse party neglects to appear and cross-examine the witness, and thereafter gives notice in conformity with law of the taking of the deposition of the same witness, and in pursuance of such notice takes the deposition of such witness and in so doing cross-examines the witness on the deposition previously given by him, it is erroneous procedure to admit the later deposition as a part of plaintiff's case and before defendant has opened his side of the case. The party taking such deposition should be required to withhold the same, and introduce it as a part of his defense in making his own proofs.—*Vaughn v. Johnson*, 20 Idaho, 669, 37 L. R. A., N. S., 816, 119 Pac. 879.

Editorial Notes.

Right to raise objections to deposition on subsequent trial not made on first trial: Ann. Cas. 1913B, 1057.

Competency of deposition as determined by status of witness at time deposition is taken or at time it is offered in evidence: Ann. Cas. 1913C, 1064.

Necessity that action be pending in order to warrant taking of depositions: Ann. Cas. 1913D, 853.

Bill to perpetuate testimony: 25 L. R. A., N. S., 873.

DEPOSITS IN COURT.

Payment of money into court incident to particular proceedings. See Costs; Bail; Appeal and Error; Eminent Domain.

Right to file complaint in intervention. See Parties, III.

Under R. S. 4339, providing that when it is admitted by the pleading or shown on the examination of a party, that he has in his possession or under his control money or other property capable of manual delivery, which, being the subject of litigation, is held by him as trustee for another party or belongs to another party, the court may order the same to be delivered to such party subject to such conditions as may be just until further order of the court, the court has jurisdiction to grant an application that money so held be deposited in court.—*Reid v. Steele*, 7 Idaho, 571, 64 Pac. 892.

DESCENT AND DISTRIBUTION.

Administration of decedent's estate in general. See Executors and Administrators.

Community property. See Husband and Wife.

Administration and succession of partnership property. See Partnership.

Decree of distribution. See Executors and Administrators.

Inheritance tax. See Taxation, XIII.

Right to amend pleading on appeal to district court on probate matter. See Pleading, VI.

Rights and disabilities of aliens. See Aliens; Escheat.

Sufficiency of appearance to stop running of statute of limitations against alien. See Aliens.

Patent to heirs of deceased entryman, heirs take by purchase and not by descent. See Public Lands, II, (J).

Right of surviving wife in homestead. See Homestead, III.

Appeals from probate court in probate proceedings. See Courts, V.

A relinquishment by an heir of the estate of a deceased person of his right, interest and claim in and to the estate of the deceased does not divest such heir of his title or interest in and to a homestead that has been patented to the heirs of the deceased, subsequent to the death of the original entryman.—*Council Improvement Co. v. Draper*, 16 Idaho, 541, 102 Pac. 7.

Editorial Notes.

Degrees of consanguinity and affinity, how computed for the purposes of: 56 Am. Dec. 293.

Half-blood, inheritance by: 61 Am. Dec. 665.

Who entitled to succeed to estates of intestates: 12 Am. St. Rep. 82.

Who are heirs: 15 L. R. A. 300.

DETAINDER.

See Forcible Entry and Detainer.

DILIGENCE.

See Specific Performance, III.

Failure to take depositions as showing lack of diligence. See Depositions.

DISBARMENT.

Of attorney. See Attorney and Client, I.

DISCOVERY.

Of minerals. See Mines and Minerals.

DISCRETION.

In granting or refusing new trial. See New Trial, I.
Of court to permit amendment of return to writ of attachment. See Attachment and Garnishment, IX.

Of court to compel specific performance. See Specific Performance, I.

Of trial court as to alimony or counsel fees. See Divorce, V.

Review of discretionary matters passed on by trial court. See Appeal and Error, XVI, (F); Criminal Law, XIII, (A); XV, (G), 3.

To grant medical license. See Physicians and Surgeons.

DISMISSAL AND NONSUIT.

Right to dismiss divorce action where no cross-complaint filed. See Divorce, IV, (E).

Dismissal or nonsuit on failure of proof at trial.

See Trial.

Effect of dismissal on right to bring subsequent action. See Abatement and Revival.

Right of appeal from judgment of nonsuit. See Appeal and Error, III, (D).

Of appeal. See Appeal and Error.

Of criminal prosecutions. See Criminal Law.

In proceedings before justices of the peace. See Justices of the Peace.

Right to dismissal of eminent domain proceedings. See Eminent Domain, III.

I. VOLUNTARY.

In proceedings against an officer for neglect of duty his successor in office has no standing in court to move a dismissal.—*Beachy v. Lamkin*, 1 Idaho, 50.

Under R. S. 4354, subdivision 1, the plaintiff may dismiss his action before the defendant has filed an answer or counterclaim seeking affirmative relief.—*Elliot v. Collins*, 6 Idaho, 266, 55 Pac. 301.

Under R. S. 4354, providing that an action may be dismissed at any time before trial, upon payment of costs, provided a counterclaim has not been made or affirmative relief sought by defendant, the plea of the statute of limitations is not a counterclaim or a demand for affirmative relief within the meaning of the statute.—*Boyd v. Steele*, 6 Idaho, 625, 59 Pac. 21.

Under R. S. 4354, providing that an action may be dismissed at any time before trial, upon payment of costs, provided a counterclaim has not been made or affirmative relief sought by defendant, the plaintiff in such a case is entitled to dismissal upon payment of costs and filing his dismissal with the clerk and is not prejudiced by the failure of the clerk to enter a formal judgment of dismissal. *Boyd v. Steele*, 6 Idaho, 625, 59 Pac. 21.

Where a telephone company and an electric light company were both made defendants in an action for damage, it was not error for the plaintiff to elect as to which of the defendants it would proceed against, and dismiss as to the other defendant.—*Staab v. Rocky Mountain Bell Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078.

Editorial Notes.

Right of plaintiff to take voluntary nonsuit or dismissal after verdict or finding but before judgment: *Ann. Cas.* 1913D, 525.

II. INVOLUNTARY.

Where the answer puts in issue material allegations of the complaint, and plaintiff fails or refuses to introduce any evidence, judgment of dismissal is proper.—*Mills Novelty Co. v. Dunbar*, 11 Idaho, 671, 83 Pac. 932.

R. C. 4354 specifies the grounds upon which an action may be dismissed or a judgment of nonsuit entered, and the insufficiency of the complaint to state a cause of action is not one of the grounds specified in such statute.—*Ludwig v. Ellis*, 22 Idaho, 475, 126 Pac. 769.

Editorial Notes.

Right to enter nonsuit or direct verdict on opening statement of counsel: 29 L. R. A., N. S., 218.

DISORDERLY HOUSE.

Right of a private party to maintain action to abate as a nuisance. See Nuisance.

Nuisances in general. See Nuisances.

Restraining keeping. See Injunction.

Gambling-houses. See Gaming.

Act of January 12, 1877, "relating to houses of ill-fame in Boise City," does not itself create any offense, but delegates the authority to the mayor and common council to create the offense therein named by ordinance.—*People v. Buchanan*, 1 Idaho, 681; *People v. Ah Ho*, 1 Idaho, 691.

To establish the fact that a house is kept for the purpose of prostitution evidence of its general reputation as such is competent.—*People v. Buchanan*, 1 Idaho, 681; *Territory v. Bowen*, 2 Idaho, 640, 23 Pac. 82.

On the trial of an indictment for keeping a house of ill-fame, evidence of the general character for chastity of women or men who dwell in or frequent the house is admissible. *People v. Buchanan*, 1 Idaho, 681.

In a prosecution for keeping a bawdy-house, it is not error to refuse to instruct that more women than one must live or resort together to make such a house.—*People v. Buchanan*, 1 Idaho, 681.

Residing in a bawdy-house is not an offense against any statute of the territory, nor is it an offense at common law.—*People v. Ah Ho*, 1 Idaho, 691.

Editorial Notes.

What is disorderly house: 134 Am. St. Rep. 819.

Disorderly house, reputation, evidence of is admissible: 50 Am. Rep. 209; 12 Ann. Cas. 273; 20 L. R. A. 610.

DISTRICT AND PROSECUTING ATTORNEYS.

Particular proceedings by prosecuting attorneys. See Grand Jury; Indictment and Information; and other specific heads.

Argument and conduct of counsel in criminal trials. See Criminal Law, XII, (E).

Attorney general. See Attorney General.

Competency of prosecuting attorney to testify as to dying declaration. See Homicide, VII, (O).

Illegal appointment of attorney to act as prosecuting attorney before grand jury. See Grand Jury.

Effect of presence of attorney other than county attorney before grand jury. See Grand Jury.

Congress having failed to provide that the district attorney of the United States should prosecute in cases arising under territorial laws, he can act as prosecuting attorney only when the courts are exercising jurisdiction as circuit and district courts of the United States.—*People v. Heed*, 1 Idaho, 402.

The district attorney has no authority to enter into a stipulation in a case after it has passed out of the jurisdiction of the district

court.—*Penny v. Nez Perce County*, 4 Idaho, 642, 43 Pac. 570.

The amendment to Const., article 5, section 18, providing for the election of a prosecuting attorney, etc., does not go into operation until the time fixed by law for county officers to qualify and enter upon the discharge of their duties by virtue of their election in November, 1898; in other words, the district attorneys holding office at the time the amendment was adopted should complete the full term for which they were elected.—*Hays v. Hays*, 5 Idaho, 154, 47 Pac. 732.

Where the county commissioners have employed assistant counsel in a criminal case, it is not error for the court to appoint such assistant counsel.—*State v. Crump*, 5 Idaho, 166, 47 Pac. 814.

Under Laws 1891, page 46, section 3, making it the duty of the district attorney to prosecute or defend all actions, civil as well as criminal, in which the state is interested or is a party, it is the duty of the district attorney to prosecute an action for the foreclosure of a mortgage securing a loan from the permanent school fund of the state.—*State v. Fitzpatrick*, 5 Idaho, 499, 51 Pac. 112.

Laws 1891, page 46, section 3, makes it the duty of the district attorney to prosecute or defend all actions, civil as well as criminal, in which the state is interested or is a party. Laws 1893, page 139, section 29, provides that the secretary of the state board of land commissioners may employ counsel to represent the state in all suits, controversies, etc., relating to state lands or timber. Held, that the state board is not authorized to employ an attorney to prosecute the foreclosure of a mortgage securing a loan from the permanent school fund of the state.—*State v. Fitzpatrick*, 5 Idaho, 499, 51 Pac. 112.

Under Laws 1899, page 249, amending R. S. 1779, requiring that on appeal from the decision of the board of commissioners, the matter must be heard anew, the county attorney cannot limit the jurisdiction of the trial court by a stipulation limiting the matter in issue to a single point.—*Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76; *Ellis v. Bingham Co.*, 7 Idaho, 86, 60 Pac. 79.

Under act of February 2, 1899, section 2, providing that when there is no county attorney or when for any cause he is unable to act, the district court may appoint some suitable person to act temporarily as such attorney, the fact that a person appointed to such office is a resident of another county does not disqualify him from acting.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

In an action by a county to recover a road poll tax from a corporation due from employees of the corporation the prosecuting attorney has authority to appeal in the name of the county from an adverse judgment and such appeal need not be taken by or in the name of the attorney general.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

R. S. 1759, subdivision 13, as amended, gives the board of commissioners the power to direct and control the prosecution and defense of all suits to which the county is a party in interest. Laws 1899, page 25, makes it the duty of the prosecuting attorney to prosecute or defend all actions or proceedings in the district court in which the people of the state or the county is interested as a party. Held, that the county attorney has authority to take an appeal from the district court without awaiting directions therefor from the board of commissioners.—*Board of Commrs. v. Bassett*, 14 Idaho, 324, 93 Pac. 774.

U. S. Rev. Stats. 380 (U. S. Comp. Stats. 1901, page 213, 5 Fed. Stats. Ann. 179), requiring actions brought by an officer of the United States to be conducted by the United States district attorney is merely directory and an action of that character may be brought by the receiver's special attorney.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

DISTRICT COURTS.

See Courts.

DITCHES.

Across a public highway as a nuisance. See Nuisances.

Drainage ditches. See Drains.

On public land entered as townsite. See Public Lands, II, (B), 4.

Specific performance of oral agreement to enlarge. See Specific Performance, II.

Irrigation ditches. See Waters and Watercourses.

DIVORCE.

I. NATURE AND FORM OF REMEDY.

II. GROUNDS.

III. DEFENSES.

IV. JURISDICTION, PROCEEDINGS AND RELIEF.

(A) Jurisdiction, Venue and Limitations.
(B) Parties, Process and Incidental Proceedings.

(C) Pleading.

(D) Evidence.

(E) Dismissal, Trial or Hearing, and New Trial.

(F) Judgment or Decree.

(G) Appeal.

(H) Fees and Costs.

V. ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY.

VI. CUSTODY AND SUPPORT OF CHILDREN.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

Validity of agreement to marry, effect of prior divorce decree. See Breach of Marriage Promise.

Validity of agreement to marry made within six months from divorce decree. See Breach of Marriage Promise.

Effect of marriage of party under belief of existence of valid divorce. See Marriage.

I. NATURE AND FORM OF REMEDY.

(No paragraphs.)

II. GROUNDS.

Pleading and evidence. See post, IV.

Failure of a husband to provide for his wife, who has refused to take up her residence with him, is not ground for divorce.—*Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213.

In an action for divorce, the evidence showed that defendant obtained employment in a mining camp, that there were conveniences for residence there, that he was paying the expenses of two of his children at school, that the third child of the parties was with the mother, that he sent plaintiff money to defray her expenses to the place of his employment and requested her to come, that this money was expended for other purposes, and that plaintiff refused to go to her husband on the ground that it was not a fit place for her to live with her minor child. No further communication was had for several years and in the meantime defendant continued to defray the expenses of his two children at school, while the plaintiff earned a reasonably fair livelihood for herself and minor child. The evidence showed, further, that the place of the husband's residence had no social advantages, churches, or schools, and that for about five months of the year it was cold and disagreeable in the country. Held, that a decree of divorce was properly denied.—*Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213.

In cases of desertion the offending party may at any time return and offer reconciliation, and the injured party cannot reject such offer if made prior to the expiration of the one year period during which time the desertion ripens into a cause of action, but if made after the right of action has accrued the injured spouse may reject such offer without affecting the right of action for desertion either as an affirmative cause of action or a defense.—*Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938.

Willful desertion as a ground for divorce must be voluntary and continued for a period of one year, with intent to desert, prior to the commencement of the action.—*Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196.

R. C. 2652, in defining habitual drunkenness, does not mean that a person would have to be drunk all the time, nor that he shall be incapacitated from pursuing his usual labors during any particular hours or at any time, nor that he shall be generally drunk or that he is drunk more hours than he is sober, but it does mean one who has a fixed habit of frequently getting drunk, and that such drunkenness causes the innocent party to suffer mental anguish and suffering. It is sufficient that he have the habit, and that the habit is firmly fixed upon him, that he gets drunk with recurring frequency or that he is unable to resist when opportunity and temptation is presented.—*De Cloedt v. De Cloedt*, 24 Idaho, 277, 133 Pac. 664.

Editorial Notes.

Desertion as ground for divorce: 119 Am. St. Rep. 617.

Desertion, what constitutes, as a ground for divorce: 138 Am. St. Rep. 146.

Refusal of wife to follow husband to new domicile as desertion: 5 Ann. Cas. 852; 4 L. R. A., N. S., 145.

Desertion by forcing spouse to leave marital home: 29 L. R. A., N. S., 614.

Drunkenness as ground for divorce: 34 L. R. A. 449.

III. DEFENSES.

A husband who fails, neglects or refuses to furnish his wife with a suitable home, according to his condition, and refuses to support her, is not in a position to successfully charge her with desertion if she leaves him and seeks employment whereby she may support herself.—*Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196.

Where a decree of divorce is asked by the husband on the grounds of cruelty by the wife, and such cruelty is alleged to have consisted in the wife's hostile demonstrations and lecturing, nagging, and hectoring the husband on account of what she deemed to be undue attentions and intimate relations on the part of the husband toward other women, and the evidence discloses that he had been so indiscreet in his conduct toward others as to arouse suspicion on the part of his wife, the conduct of the wife in her protests and outbursts of feeling will not be viewed with the same severity and rigidity by the law as it would be in a case where no such apparent provocation existed.—*Spofford v. Spofford*, 18 Idaho, 115, 108 Pac. 1054.

Editorial Notes.

Recriminatory defenses in suits for divorce: 15 Am. Dec. 211; 86 Am. St. Rep. 333.

Condoned adultery as recriminative bar for divorce for adultery on part of condoning party: 90 Am. Dec. 611.

Adultery, connivance in, what is not: 54 Am. Rep. 492.

Connivance as a bar to divorce: 120 Am. St. Rep. 520.

Condonation, as defense in action for divorce: Ann. Cas. 1912C, 3.

Condonation of desertion: 39 L. R. A., N. S., 1121, 1126.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(A) JURISDICTION, VENUE AND LIMITATIONS.

Under R. S. 2469, a suitor for a divorce must be an actual resident of the state for a period of at least six months next preceding the commencement of the action therefor.—*Strode v. Strode*, 6 Idaho, 67, 96 Am. St. Rep. 249, 52 Pac. 161.

Editorial Notes.

Jurisdiction over absent citizens in suits for divorce: 53 Am. St. Rep. 182.

Character of residence essential to give jurisdiction in divorce proceedings: 12 L. R. A., N. S., 1100; 28 L. R. A., N. S., 992.

Validity of divorce decree obtained on publication or service out of state when defendant did not appear: 19 L. R. A. 814.

(B) PARTIES, PROCESS AND INCIDENTAL PROCEEDINGS.

In foreign divorce suit. See post, VII.

Where the record fails to show that a copy of the summons was sent to defendant's address as directed by the order of publication, service of the summons is not complete, and the court therefore has no jurisdiction to enter a decree of divorce in the action.—*Strode v. Strode*, 6 Idaho, 67, 96 Am. St. Rep. 249, 52 Pac. 161.

(C) PLEADING.

Where adultery is charged in a complaint for divorce, the time when, the place where, and the person with whom such offense was committed, must be stated.—*Stover v. Stover*, 6 Idaho, 193, 56 Pac. 263.

(D) EVIDENCE.

Under R. S. 2471, providing that no divorce can be granted on the uncorroborated testimony of the parties, the uncorroborated evidence of plaintiff as to defendant's cruelty will be insufficient to authorize a decree.—*Strode v. Strode*, 6 Idaho, 67, 96 Am. St. Rep. 249, 52 Pac. 161.

Evidence in an action for divorce based on desertion held insufficient to warrant a decree. *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938.

In a divorce action based on the ground of desertion, letters of one of the parties are admissible as tending to prove desertion, but they must be corroborated by other evidence than the statements of the parties.—*Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196.

Under R. S. 2471, providing that a divorce cannot be granted upon the uncorroborated statement, admission or testimony of the parties, the statement, admission or testimony of either of the parties is not of itself sufficient corroboration of the testimony of the other party to the facts introduced to establish the main issue in the action, but there must be some other and different corroboration of the main fact in issue.—*Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196.

Evidence in an action for divorce on the ground of willful desertion held insufficient to establish willful desertion or that plaintiff had offered to furnish defendant a suitable home or to support her.—*Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196.

Evidence in a divorce case examined but not stated and held to show sufficient corroboration of plaintiff's testimony.—*Hores v. Hores*, 20 Idaho, 769, 119 Pac. 876.

In an action charging extreme cruelty where it is alleged and shown that blows were inflicted upon the plaintiff, and the defendant hit the plaintiff with his fist, such evidence is admissible and tends to prove acts of extreme cruelty when considered with other evi-

dence in the case.—*De Cloedt v. De Cloedt*, 24 Idaho, 277, 133 Pac. 664.

In a divorce proceeding where the plaintiff testifies that she was not properly cared for during her marriage relation with the defendant at times when she was sick, and that vile language was used by the defendant addressed to her, calling her vile names, such evidence is proper as showing acts of the defendant, proving cruelty and improper treatment.—*De Cloedt v. De Cloedt*, 24 Idaho, 277, 133 Pac. 664.

In a suit for divorce, where the complaint alleges extreme cruelty, and acts of cruelty are alleged, as controversies and quarrels over religious matters, and evidence is introduced which shows that the defendant persisted during the period of marriage in reviling the Protestant faith and applying vile names to the Protestant reformer Luther, and in furnishing literature and insisting at different times when the plaintiff was tired and after hard work that she "pray the beads" with him, and as a result that plaintiff was sickened and affected nervously, and that such remarks became a horror and would drive her to frenzy, such evidence is admissible and may be considered as corroborative of the allegations of the complaint as to acts of cruelty.—*De Cloedt v. De Cloedt*, 24 Idaho, 277, 133 Pac. 664.

The degree of corroboration required by R. C. 2661 has never been defined, and it has been said that "in the very nature of the case, it would be impossible to lay down a general rule as to the degree of corroboration which will be requisite; hence the statute only requires that there shall be some corroborating evidence," and the statute can only be construed that the testimony of the plaintiff as to extreme cruelty must be sufficiently corroborated.—*De Cloedt v. De Cloedt*, 24 Idaho, 277, 133 Pac. 664.

Editorial Notes.

Divorce, admissions in suits for divorce, effect of: 30 Am. Dec. 544.

Divorce on uncorroborated testimony of party to suit: Ann. Cas. 1913B, 5.

Degree of proof required to establish cause for divorce: Ann. Cas. 1913B, 1216.

(E) DISMISSAL, TRIAL OR HEARING, AND NEW TRIAL.

Under R. S. 4354, which provides when actions may be dismissed, it is error to refuse to permit a wife to dismiss an action for divorce, when there is no affirmative relief sought by defendant by way of cross-complaint or counterclaim.—*Stover v. Stover*, 7 Idaho, 185, 61 Pac. 462.

Where, in a divorce action, defendant pleads a former adjudication and the court finds against the plaintiff on the merits, its finding on the plea of former adjudication becomes immaterial.—*Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213.

Where, in an action for divorce, the court finds that no divorce should be granted, it is

unnecessary to make any finding as to separate or community property.—*Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213.

In actions for divorce, the question of the ownership of real estate will not be determined unless the divorce is granted.—*Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196.

(F) JUDGMENT OR DECREE.

Findings on incidental questions unnecessary where no divorce granted. See ante, IV, (E).

Where a motion is made to set aside and vacate a decree of divorce, and it appears that at the time of the hearing on the motion one of the parties has remarried, the court will ordinarily require a stronger showing before vacating the judgment than he would require under other circumstances or in an ordinary case.—*Richards v. Richards*, 24 Idaho, 87, 132 Pac. 576.

(G) APPEAL.

Appeal from order as to suit money, attorneys' fees or alimony. See post, V.

In an action for divorce an appeal will lie from a restraining order to save the property pending the litigation.—*Wyatt v. Wyatt*, 2 Idaho, 236, 10 Pac. 228.

Where the cross-complaint in an action for divorce consists solely of allegations of defendant's capacity to take care of the children of the marriage and plaintiff's incapacity to do so, the charge of adultery in such complaint having been dropped and no evidence offered thereon, and the findings of the jury simply negative the allegations of the complaint, the only affirmative finding being that defendant has at all times used reasonable care and diligence for the comfort and welfare of plaintiff and the children, a decree of divorce in favor of defendant will be set aside.—*Stover v. Stover*, 6 Idaho, 493, 56 Pac. 263.

R. S. 4814 provides that "whenever an appeal is perfected as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein." Held, that the district court is not prohibited thereby from allowing suit money and attorneys' fees for the prosecution of an appeal from a final judgment in a divorce action.—*Roby v. Roby*, 9 Idaho, 371, 3 Ann. Cas. 50, 74 Pac. 957.

R. S. 4927 provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal is passed, unless the judgment be sooner satisfied. R. S. 2472 provides that the court may require the husband to pay alimony and suit money pending the action. Held, that the district court retains jurisdiction to order payment of costs and expenses for preparing and prosecuting an appeal from its judgment in a divorce action, even though an appeal has already been taken.—*Roby v. Roby*, 9 Idaho, 371, 3 Ann. Cas. 50, 74 Pac. 957.

Under the provisions of R. S. 4456, the default of the defendant in not answering should be indorsed upon the complaint; but if the

clerk neglects to make such indorsement, it is a mere irregularity that cannot be taken advantage of in a collateral attack on the judgment; and especially is that true where the judgment recites the fact that the default of the defendant was duly entered.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

On the affidavits filed to set aside a default, held that there was no abuse of discretion in refusing to open the default judgment.—*Hamilton v. Hamilton*, 21 Idaho, 672, 123 Pac. 630.

The supreme court will not disturb a finding of the trial court that particular acts constitute grievous mental suffering, unless the evidence in support of such finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion on the part of the trial court.—*De Cloedt v. De Cloedt*, 24 Idaho, 277, 133 Pac. 664.

(H) FEES AND COSTS.

Alimony. See post, V.

Effect of appeal on power of trial court to allow attorneys' fees and suit money. See ante, IV, (G).

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

Effect of appeal on right of trial court to allow suit money and attorneys' fees. See ante, IV, (G).

Right of wife to bind husband or community property for counsel fees in divorce action. See Husband and Wife, I.

Opening default on intervention by plaintiff in divorce action to enjoin disposition of community property. See Judgment, IV, (B).

The allowance of alimony to the wife and counsel fees pending an action of divorce rests in the sound discretion of the trial court. *Wyatt v. Wyatt*, 2 Idaho, 236, 10 Pac. 228.

No appeal lies from an order in an action of divorce for the payment of alimony pendente lite and counsel fees.—*Wyatt v. Wyatt*, 2 Idaho, 236, 10 Pac. 228.

Const., article 5, section 9, providing that the supreme court has jurisdiction to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction, gives the supreme court jurisdiction to allow either attorneys' fees or suit money after the case is brought up on appeal when the same is proper or necessary to the complete exercise of its appellate jurisdiction.—*Roby v. Roby*, 9 Idaho, 371, 3 Ann. Cas. 50, 74 Pac. 957.

Where the wife appeals from a decree refusing her a divorce, and the record shows that she is not in a position to meet the expenses of the appeal and has no separate property, and the amount allowed for the expenses of her appeal is insufficient, the supreme court will direct the defendant to pay the additional expense, even though the decree of the trial court is affirmed.—*Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213.

Under R. S. 4807, subdivision 3, providing inter alia that an appeal may be taken to the supreme court from any special order made after final judgment, an order for the payment of attorneys' fees and expenses for the

prosecution of an appeal, made after final judgment in an action for divorce, is appealable.—*Roby v. Roby*, 9 Idaho, 371, 3 Ann. Cas. 50, 74 Pac. 957.

Where, in a divorce suit, it appears that defendant is a wealthy man, and his wife is without means to properly prosecute her suit for divorce, the court will allow her attorneys' fees on an appeal from an order refusing to change the place of trial.—*Day v. Day*, 12 Idaho, 556, 10 Ann. Cas. 260, 86 Pac. 531.

In a divorce action, the court may order at the time costs pendente lite are allowed that the party to whom the same are allowed, on the final taxation of costs, shall fully account for all costs allowed by the statute and by such person paid out of said sum, but an order requiring that a specified sum for costs should be placed with the clerk of court and by him paid out upon the order of the court only, said orders to be made "as the necessities require," is unfair to the wife and improper.—*Day v. Day*, 15 Idaho, 107, 96 Pac. 431.

In determining the amount of allowance of alimony and suit money, the court should take into consideration the wealth and social standing of the parties, their manner of living, the present available means of the wife, and the ability and income of the husband, her health and probable needs while the suit is pending, as well as other circumstances which may aid the court in determining the amount necessary to maintain the wife during the suit, according to her former manner of living.—*Day v. Day*, 15 Idaho, 107, 96 Pac. 431.

Where the marriage of the parties is admitted, in determining the amount of alimony the court should attempt to place each party in that position that neither should have the advantage of the other, in waging the suit or in presenting the evidence to prove or disprove the falsity of the allegations made.—*Day v. Day*, 15 Idaho, 107, 96 Pac. 431.

On appeal by a husband from a decree denying him a divorce, the supreme court will award attorneys' fees to respondent where the trial court's decision is affirmed.—*Spofford v. Spofford*, 18 Idaho, 115, 108 Pac. 1054.

In a divorce action, where the marriage is admitted, and the evidence shows that for seven months prior to the marriage the husband paid the plaintiff, who afterward became his wife, \$200 monthly as an allowance, and for the month immediately preceding the marriage \$500, and expended upon their wedding tour about six months \$4,000, and for jewelry \$3,000 between January and July after the marriage, and the further sum of \$2,700 for a home for the plaintiff, and is worth \$600,000, and has an income of not less than \$16,600 per annum, and where the charge of the plaintiff against the defendant is extreme cruelty, denied by the defendant, and a cross-complaint is filed by the defendant against the plaintiff also charging extreme cruelty, which is denied, and such charges are made in detail so that the complaint and the answer to the cross-complaint embrace seventy pages of the printed transcript, and the answer and the cross-complaint embrace

ninety pages of the transcript, said pleading containing charges of crimination and recrimination in both the complaint and cross-complaint, the court abused its discretion in only allowing the plaintiff \$800 for counsel fees, \$600 for suit money and \$100 per month alimony, and a proper and fair allowance to the plaintiff for counsel fees, pendente lite, is \$4,500, for suit money \$2,000, and for alimony \$250 per month.—*Day v. Day*, 15 Idaho, 107, 96 Pac. 431.

In a divorce suit where property rights are involved and a post-nuptial settlement is presented and relied upon as a settlement of all property rights, and such agreement is challenged on the ground that it is unfair and inequitable and fraudulent, the evidence must show clearly and with certainty that the post-nuptial settlement is in every way fair and unexceptionable on equitable grounds.—*De Cloedt v. De Cloedt*, 24 Idaho, 277, 133 Pac. 664.

Editorial Notes.

Alimony and its allowance: 60 Am. Dec. 664.

Proper proportion of husband's estate to be awarded to wife as permanent alimony: Ann. Cas. 1913A, 803.

Jurisdiction to avoid temporary alimony, suit money and counsel fees pending appeal: 27 L. R. A., N. S., 712.

Award of alimony on constructive service: 16 L. R. A. 234; 50 L. R. A. 583; 59 L. R. A. 178; 9 L. R. A., N. S., 593.

VI. CUSTODY AND SUPPORT OF CHILDREN.

Where, after judgment for divorce awarding the custody of the children to the mother, the father obtains an order permitting him to visit the children and restraining the mother or others from estranging the children from him, such order is appealable and a writ of review will not lie thereto.—*Porter v. Steele*, 7 Idaho, 414, 63 Pac. 187.

Editorial Notes.

Right of court refusing divorce to award custody of children: Ann. Cas. 1912B, 350.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

The judgment-roll of a divorce suit tried in a California court showed that the period of publication of the summons expired on May 28th and that the judgment was entered on June 29th following. Held, that thirty days after the expiration of the period of publication had expired before the entry of judgment.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

The courts of Utah, having decided that a divorce granted by the Mormon church was illegal and void, and did not terminate the marriage relation between the parties thereto, in an action involving the validity of said divorce, fixed and determined the status of such parties, and such decision controls and

governs the courts of this state in an action involving the validity of such divorce.—*Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

Editorial Notes.

Divorce granted in another state: 7 Am. Dec. 206; 26 Am. Rep. 31.

Foreign divorce, effect of: 21 Am. Dec. 747.

Extraterritorial effect of decrees of divorce: 83 Am. St. Rep. 616; 94 Am. St. Rep. 553.

DOMICILE.

As affecting right to support as indigent sick person. See Paupers.

As affecting right to sue for divorce. See Divorce, IV, (A).

Nonresidence as ground for attachment. See Attachment and Garnishment.

Of corporations. See Corporations.

If a person has established an actual residence in a town or village, his temporary absence therefrom would not forfeit such residence.—*Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126.

The domicile of a married woman and of her minor child follows that of her husband. *Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126.

Editorial Notes.

Domicile, definitions of and how ascertained and changed: 59 Am. Dec. 111.

Loss or change of domicile: 32 Am. Dec. 427; 40 L. R. A., N. S., 986.

Where is domicile, and how may be lost or changed: 48 Am. St. Rep. 711.

Domicile of married women: 84 Am. St. Rep. 27; 85 Am. St. Rep. 559.

Wife, right of to require separate domicile after abandonment of marriage relations: Ann. Cas. 1912D, 397.

DOWER.

Community property. See Husband and Wife; Descent and Distribution.

DRAINS.

Drains and sewers constructed by incorporated cities and towns. See Municipal Corporations.

Irrigation ditches. See Waters and Watercourses.

Surface waters, natural drainage and private rights of drainage on adjoining lands. See Waters and Watercourses.

Extent of easement for ditch acquired by adverse possession. See Easements.

Liability of city for failure to cover. See Municipal Corporations, XII, (C).

Liability of city for defects or obstructions. See Municipal Corporations, XII, (D).

R. C. 2448, which provides the qualification of voters at an election for the establishment of a drainage district, is in contravention of Const., article 6, section 2, which defines qualified electors.—*Ferbrache v. Drainage Dist.* No. 5, 23 Idaho, 85, 128 Pac. 553.

R. C. 2448, prescribing the qualification of voters at an election for the establishment of

a drainage district, violates Const., article 1, section 20, providing that no property qualification shall be required for any person to vote or hold office except in school elections or elections creating indebtedness.—*Ferbrache v. Drainage Dist.* No. 5, 23 Idaho, 85, 128 Pac. 553.

R. C. 2448, prescribing the qualifications of voters at an election for the establishment of a drainage district, contravenes Const., article 6, section 4, providing that "the legislature may prescribe qualifications, limitations and conditions for the right of suffrage additional to those prescribed in this article, but shall never annul any of the provisions in this article contained."—*Ferbrache v. Drainage Dist.* No. 5, 23 Idaho, 85, 128 Pac. 553.

The provisions of House Bill No. 92, approved February 21, 1913, for the bonding of a drainage district without a vote of the people within the district, is not in violation of Const., article 8, section 3, the indebtedness there provided for not being a municipal indebtedness contemplated by the constitution. *Elliott v. McCrea*, 23 Idaho, 524, 130 Pac. 785.

The assessment of benefits provided for in House Bill No. 92 approved February 21, 1913, is not a "tax" within the purview and meaning of the Const., article 7, section 5. The assessment made under this act is dependent wholly upon the benefits to accrue; and, where no benefits will accrue, no assessment can be made, and the charge is one in rem against the specific tracts of land assessed for benefits and to the extent of the assessment only.—*Elliott v. McCrea*, 23 Idaho, 524, 130 Pac. 785.

Editorial Notes.

Procedure for establishment of drains: 60 L. R. A. 161.

DRUNKARDS.

Drunkenness as affecting contracts, deeds, etc. See Contracts; Deeds, etc.

— As excuse for crime. See Criminal Law.

— As ground for divorce. See Divorce, II.

DURESS.

As affecting validity of contract. See Contracts, I, (E).

Of deeds. See Deeds, I, (E).

DYING DECLARATIONS.

See Homicide, VII, (O).

EASEMENTS.

Public easements. See Highways; Navigable Waters; Dedication.

Easements affecting particular species of property. See Mines and Minerals; Party-walls; Waters and Watercourses; Railroads; and other specific heads. Existence as breach of covenant. See Covenants, III. Application of statute of frauds. See Frauds, Statute of.

Where the owner of a building agrees with adjoining owners that he will build a stairway on the side of his building and that they may use the stairway for ingress and egress to and from the second story of their building in consideration of their allowing him to erect

a porch on a five-foot strip of a vacant lot behind his building, and the parties agree thereto and enter on the use so agreed upon, the permission to use such stairway does not amount to the grant of an easement, but is a license, revocable by the licensor.—*Howes v. Barmon*, 11 Idaho, 64, 114 Am. St. Rep. 255, 69 L. R. A. 568, 81 Pac. 48.

It is the duty of the owner of an easement or right of way over the lands of another to keep up, maintain and protect such easement or right of way, and in an action based on the theory that such duty rests on the owner of the fee, facts must be alleged and proven from which the duty or obligation arises.—*City of Bellevue v. Daly*, 14 Idaho, 545, 125 Am. St. Rep. 179, 14 Ann. Cas. 1136, 15 L. R. A., N. S., 992, 94 Pac. 1036.

Where a purchaser of a right of way for a ditch across a tract of land has failed to record its conveyance prior to the record of a subsequent conveyance made in good faith, and in an action to quiet title seeks to recover on the grounds of adverse possession for the statutory period, the extent of the right of way or easement must be determined by the facts proven as to the extent of the use and occupation, and cannot be determined by the calls of such unrecorded deed.—*Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

A legal distinction exists and should be maintained between the absolute fee, title and ownership of property itself, and those contractual rights which arise out of mutual consent and give a contracting party certain claims, easements or servitudes in and to the property, and which by their very nature impress themselves upon the property itself, either for a time or perpetually.—*Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho, 1, 107 Pac. 989.

Editorial Notes.

Easements, when revocable: 43 Am. Rep. 195.

Ways, private, rights and obligations of parties to: 95 Am. St. Rep. 318.

Creation and conveyance of easements appurtenant: 136 Am. St. Rep. 680.

Duty to repair and protect easement as resting on owner of dominant or servient tenement: 14 Ann. Cas. 1138.

Easements by severance of tract of land with apparent benefit existing: 26 L. R. A., N. S., 316.

EJECTMENT.

Foreclosure and not ejectment proper remedy when plaintiff holds title under absolute deed which is in fact a mortgage. See *Mortgages*, I.

Evidence in an action of ejectment held to show that plaintiff had neither an equitable nor legal title to the land in controversy.—*Green v. Christie*, 4 Idaho, 438, 40 Pac. 54.

Where the evidence in an ejectment action fails to show that the plaintiff had a record title to the land, or any title whatever, or that he had acquired title by adverse possession, the court erred in denying defendant's motion at the close of the testimony to in-

struct the jury to return a verdict for defendant.—*Green v. Christie*, 4 Idaho, 438, 40 Pac. 54.

In an action of ejectment, defendant alleged that the deed under which plaintiff claimed title was fraudulently procured and by way of affirmative relief asked to have such deed annulled and tendered to plaintiff the consideration paid. Plaintiff filed a written acceptance of the tender, which was thereupon withdrawn by defendant. Held, that the equitable defense of fraud in procuring the deed was properly stricken from the answer.—*Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928.

In an action of ejectment, it was shown that plaintiff's title rested on a deed from one of the defendants, a married woman, which deed was not signed by her husband at the time of its execution. At the date of the deed, the husband was not in the country, but on his return, he signed the deed exacting a further payment over and above the amount received by his wife. The property was the separate property of the wife. Defendant attempted to show that the conveyance was intended to be a mortgage and to cover property other than that described, but such testimony was contradicted by various witnesses and by the record of the acknowledgment of the wife. Held, that the defense was not sustained.—*Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928.

To maintain the action of ejectment, it is essential that the plaintiff allege and prove his right of possession, his possession, and his ouster by defendant.—*McMasters v. Torsen*, 5 Idaho, 536, 51 Pac. 100.

R. S. 4538, providing that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," does not do away with the action of ejectment.—*McMasters v. Torsen*, 5 Idaho, 536, 51 Pac. 100.

Where a clerical mistake occurs in the description of land in an ejectment suit both in the complaint and the judgment, such mistake will be corrected on motion under R. S. 4229, which provides that the court may relieve a party or his legal representatives from a judgment, etc., taken against him through mistake, etc.—*Wilcox v. Wells*, 5 Idaho, 786, 51 Pac. 985.

Proof of a state of facts that might entitle plaintiff to recover under the statutory action of quia timet cannot be made available in an action of ejectment and plaintiff will be bound by his election of the remedy of ejectment to make his case thereunder.—*McMasters v. Torsen*, 5 Idaho, 536, 51 Pac. 100.

Under R. S. 4556, providing that in an action for the recovery of real property situated in any city, town or village on the public lands, the plaintiff must be required to prove an actual inclosure or the erection of a dwelling-house or other substantial building thereon, an action to recover possession of premises located on public lands is not an action of ejectment.—*Maydole v. Watson*, 7 Idaho, 66, 60 Pac. 86.

Where the complaint does not contain the allegations required in an action of ejectment and only prays for a restitution of the premises and for damages for the detention thereof, an instruction that the action is ejectment and that the party showing the better title must recover is erroneous.—*First Nat. Bk. v. Hays*, 7 Idaho, 139, 61 Pac. 287.

Where the evidence in an ejectment action shows that defendant is rightfully in possession of the demanded premises under a lease, the action must fail.—*Tyson v. Neill*, 8 Idaho, 603, 70 Pac. 790.

Where a complaint in ejectment alleges that on November 3, 1904, plaintiff was lawfully possessed of a certain tract of land, and that on said day defendant ousted plaintiff therefrom, a notice and claim of possessory right dated November 4, 1904, was not competent evidence for plaintiff.—*Whitman v. McComas*, 11 Idaho, 564, 83 Pac. 604.

In an ejectment case, it is error to exclude from evidence the deeds under which plaintiff derails his title.—*Whitman v. McComas*, 11 Idaho, 564, 83 Pac. 604.

Where plaintiff in ejectment establishes his own title and right to possession and that defendant is withholding possession from him, he is entitled to recover, and he need not show that he was actually on the land prior to the entry and ouster by defendant.—*Froman v. Madden*, 13 Idaho, 138, 88 Pac. 894.

Editorial Notes.

Statute of limitations, defense of in ejectment: 4 Am. St. Rep. 382.

Ejectment for what property, or invasion of possession, maintainable: 116 Am. St. Rep. 568.

When title must exist in plaintiff to support suit in ejectment: 7 Ann. Cas. 1125.

Right of action by owner of dominant estate subject to easement: 18 L. R. A. 787.

ELECTION OF REMEDIES.

In criminal causes. See Criminal Law.

In action for breach of contract for fraud. See Contracts, VI, (A).

By creditor attaching mortgaged personal property. See Attachment and Garnishment, II.

Compelling election between causes of action, counts or defenses. See Pleading, XI.

Error in bringing assumpsit not bar to action in tort. See Action, II.

By land owner whose property has been appropriated by railway company. See Eminent Domain, IV.

By bringing an action of ejectment, plaintiff will be barred to recover under the statutory action of quia timet.—*McMasters v. Torsen*, 5 Idaho, 536, 51 Pac. 100.

When a party has under the law two remedies and selects and proceeds under one of them, after obtaining a decision thereunder, he cannot abandon that remedy and proceed under the other.—*Bernhard v. Idaho Bank and Trust Co.*, 21 Idaho, 598, Ann. Cas. 1913E, 120, 123 Pac. 481.

Where C. commences an action against S. upon a check issued by S. to C. against a de-

posit in a bank, and caused attachment to be issued against S., C. is not estopped from intervening and defending in an action wherein another creditor of S. is seeking to subject the deposit of S. in said bank, against which such check is drawn, to the payment of such creditor's claim.—*Kaesemeyer v. Smith*, 22 Idaho, 1, 123 Pac. 943.

In order to apply the doctrine of election of remedies to a party, he must actually have had at command two inconsistent remedies. He must not only have thought he has such remedies, but must have in fact had them available. To pursue a supposed remedy which the court holds to be no remedy at all and not to be available to the party is no bar to subsequently pursuing an available remedy. *Whitley v. Spokane Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Editorial Notes.

Election of remedies, resort to one, when bars the prosecution of another: 1 Am. St. Rep. 626.

Election of remedies when irrevocable: 10 Am. St. Rep. 487.

Doctrine of election of remedies as defense to prosecution of first remedy: Ann. Cas. 1913D, 1199.

Pursuit of mistaken remedy as election of remedies: 5 Ann. Cas. 962.

Bringing suit not prosecuted to judgment as a conclusive election of remedies: 34 L. R. A., N. S., 310.

ELECTIONS.

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Election precinct as justice's precinct. See Justices of the Peace.

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Right to trial by jury in action to try title to office.

See Jury, II.

County seat elections. See Counties, II, (B).

Under the local option statute. See Intoxicating Liquors, III.

Requirements of registration under local option statute. See Local Option, III.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

The right of suffrage is not a natural right, nor an unqualified personal right, but in a territory is a right conferred by law, which may be abridged or withdrawn by the authorities that conferred it, subject to constitutional limitations and restrictions.—*Innis v. Bolton*, 2 Idaho, 442, 17 Pac. 264; *Hayward v. Bolton*, 2 Idaho, 452, 17 Pac. 457; *Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

The legislative authority of the territory, having concurrent authority with Congress, may legislate upon the subject of suffrage within the constitutional limitations and the restrictions imposed by Congress.—*Innis v. Bolton*, 2 Idaho, 442, 17 Pac. 264; *Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

The right of suffrage is not a natural nor an unqualified personal right, but derived from constitutions and statutes and regulated by the states, whose power to fix the qualifications of voters is limited only by the fifteenth amendment to the constitution.—*Shepherd v. Grimmett*, 3 Idaho, 403, 31 Pac. 793.

Act of Congress of March 22, 1882, touching the qualifications of electors in the territories, does not repeal sections 1851 and 1860 of the organic acts, which give the territorial legislature power to prescribe the qualifications of electors of the territory.—*Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

A city charter may be amended, so as to prescribe a property qualification for all voters otherwise eligible to vote at any election creating an indebtedness against the city under Const., article 6, section 4, providing that the legislature may prescribe qualifications, limitations and conditions additional to those prescribed by Const., article 1, section 20, which prohibits the requirement of property qualifications to vote or hold office, except for school elections or elections to create indebtedness.—*Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286.

II. ORDERING OR CALLING ELECTION, AND NOTICE.

Sufficiency of publication of notice calling for election for organization of road district. See Highways, II.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

Election precinct as justice's precinct. See Justices of the Peace.

IV. QUALIFICATIONS OF VOTERS.

See, also, ante, I.

Qualification of voters at drainage district elections. See Drains.

Under Const., article 6, section 4, which provides that the legislature may prescribe

qualifications, limitations and conditions for the right of suffrage additional to those prescribed in this article, the legislature had the power and right to pass Laws 1890-91, page 57, section 43, prescribing the "test oath" for electors.—*Shepherd v. Grimmett*, 3 Idaho, 403, 31 Pac. 793.

The "test oath" act, creating additional disqualifications for voting and prescribing a test oath as a mode of ascertaining the qualifications of persons offering to vote, is not in violation of the constitution of the United States.—*Innis v. Bolton*, 2 Idaho, 442, 17 Pac. 264; *Wooley v. Watkins*, 2 Idaho, 590, 22 Pac. 102.

Under Const. article 5, section 6, providing that for the purpose of voting no person shall be deemed to have gained or lost a residence "while kept at any almshouse or other asylum at public expense," inmates of the soldiers' home while kept therein at the public expense cannot acquire, by reason of their living at such institution, the right to vote in the precinct and county in which such institution is located.—*Powell v. Spackman*, 7 Idaho, 692, 54 L. R. A., 378, 65 Pac. 503.

The fact that a man belongs to a church which teaches that marriage ceremonies celebrated by its duly authorized officers and ecclesiastics remain in force and effect during both this life and all eternity does not disqualify him for an elector under Const., article 6, section 3, so long as it does not teach or countenance more than one of such marriages for the same person during the same period of time so as to make such marriage bigamous or polygamous.—*Toncray v. Budge*, 14 Idaho, 21, 95 Pac. 26.

Editorial Notes.

Qualifications for voters and for holders of office, power of the states to impose: 97 Am. Dec. 263.

Acquiring residence as voter while attending school or public institution: 23 L. R. A. 215; 40 L. R. A., N. S., 168.

V. REGISTRATION OF VOTERS.

Under the election law, R. S. 504, 505, power is conferred on the registrar to administer the election oath.—*Territory v. Anderson*, 2 Idaho, 573, 21 Pac. 417.

Const., article 6, section 2, commits the subject of registration of voters entirely to the legislature, and fully authorizes the legislature to enact such registration law as it deems wise; provided, of course, such law in no way contravenes any constitutional right of the elector.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

There is no constitutional requirement that registration must be had for elections in special municipal corporations created by the legislature, such as irrigation districts, drainage districts, and good road districts and no provision being made for registration in the act providing for the organization and government of such special municipal corporation, or by general law, none is required.—*Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 219.

Editorial Notes.

Registration laws, constitutionality of: 23 Am. Dec. 642; 54 Am. Rep. 843; Ann. Cas. 1913B, 17; 25 L. R. A. 484.

Registration, power of the state to require and to prescribe mode of proof of: 28 Am. St. Rep. 260.

Registering or voting illegally, meaning of term "knowingly": Ann. Cas. 1912A, 436.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

Primary election law, personal expenditure provisions not unconstitutional. See Constitutional Law, V.

(A) IN GENERAL.

The only method provided by the laws of this state for nominating candidates for presidential electors is: First, by the state central committee of an organized political party; and, second, by an organization not governed by the direct primary election laws (Laws 1909, page 196), holding a convention on the day of the direct primary in conformity therewith.—State ex rel. Spofford v. Griford, 22 Idaho, 613, 126 Pac. 1060.

The only method provided by the statute of this state for nominating candidates for Congress is: First, by political parties under the direct primary election law (Laws 1909, page 196); and, second, by organizations holding conventions on the day of the direct primary election.—State ex rel. Spofford v. Griford, 22 Idaho, 613, 126 Pac. 1060.

(B) NOMINATIONS BY POLITICAL PARTIES.

Contests and determination. See post, VI, (F).

Where two factions of the same political party have held separate conventions and nominated separate tickets, the ticket nominated by the convention called by the regular state central committee of the party is entitled to be placed on the official ballot under the party name.—Williams v. Lewis, 6 Idaho, 184, 54 Pac. 619.

Where two rival conventions of the same political party are held, that convention which has the party organization behind it will be entitled to have the county auditor file the ticket nominated by it and to have such ticket placed upon the official ballot.—Addle v. Davenport, 7 Idaho, 282, 62 Pac. 681.

The proceedings of a party convention composed of legal delegates will be recognized as the proceedings of the regular party convention, in preference to the proceedings of a convention composed partly of legal delegates and partly of illegal delegates, if it appears that a majority of the legal delegates participated in and controlled the former convention.—Walling v. Landson, 15 Idaho, 282, 97 Pac. 396.

A county convention of a political party is not required to nominate a county ticket or adopt resolutions supporting the platform of the state convention, and the fact that it adjourns without doing either of these acts does

not dissolve it as a county political organization or authorize persons claiming to be in sympathy with the state platform to organize such political party in the county and thereby succeed to the regular organization of the party.—Walling v. Landson, 15 Idaho, 282, 97 Pac. 396.

A minority of legal delegates elected to a state convention has no right or authority to combine with illegal delegates, and thereby deprive the legal majority elected to such convention of the right to organize and control the convention; and if, by so doing, the legal majority is denied such right, it may organize the convention in the same hall or elsewhere, and will be recognized as the legal convention.—Walling v. Landson, 15 Idaho, 282, 97 Pac. 396.

A minority of legal delegates elected to a state convention cannot combine with illegal delegates, and thereby constitute such legal minority a legal majority, and thereby govern and control a convention, and deny the right to sit or participate therein to delegates elected according to law.—Walling v. Landson, 15 Idaho, 282, 97 Pac. 396.

A party state committee or a party state convention has no power or authority to seat or recognize as members of such convention delegates not elected to such convention according to the law or deny the right to sit or participate therein to delegates elected according to the law.—Walling v. Landson, 15 Idaho, 282, 97 Pac. 396.

(C) NOMINATIONS BY PRIMARY ELECTION.

Provisions as to nomination by organization of electors not governed by primary law. See post, VI, (D). See, also, ante, VI, (A).

Certificate of nomination. See post, VI, (F).

Objections and contests. See post, VI, (G).

Under Laws 1903, page 360, providing for primary elections, delegates to a state convention can be elected in two methods only; first, by a direct vote at such primary for such delegates; second by a convention composed of delegates elected at a primary held under the law.—Walling v. Landson, 15 Idaho, 282, 97 Pac. 396.

Laws 1903, page 360, the primary election law, is mandatory, and applies to and governs all political parties not therein specifically excepted.—Walling v. Landson, 15 Idaho, 282, 97 Pac. 396.

Laws 1909, page 196, section 14, relating to and providing for the nomination of candidates of political parties, etc., and commonly known as the primary election law, which requires a voter to vote for both first and second choice if there are more than twice as many candidates as there are positions or offices to be filled, is not in conflict with Const., article 1, section 19, which provides that "no power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage."—Adams v. Lanedon, 18 Idaho, 483, 110 Pac. 280.

All of the provisions of the direct primary law in regard to the nomination of a candi-

date by payment of a fee or by petition and also the provisions in regard to personal expenses must be construed together, and the candidate is prohibited from expending for all such purposes more than fifteen per cent of the yearly salary of the office he is seeking.—*Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280.

A person is a candidate for nomination within the intent of the primary election law when he is expending his money in employing and sending out workers or perfecting an organization, or advertising and exploiting himself, or influencing public opinion in his favor or against an opponent, or in numerous other ways that present themselves to the office seeker for the purpose of increasing and enhancing his ultimate chances of nomination for a given office, or to aid or promote such nomination.—*Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280.

Under the direct primary law the purpose of the expenditure by a candidate is the test of its lawfulness without reference to the time at which it was made.—*Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280.

Precinct officers may, under Laws 1909, page 196, section 29, be nominated in any reasonable way provided by a party committee or organization.—*Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280.

Under direct primary election law (Laws 1909, p. 196, sec. 1), a "political party" is an affiliation of electors representing a political organization under a given name which at the last preceding general election cast for any candidate on their ticket for office within the state at least ten per cent of the total vote cast for all candidates for the same office within the state, and all political parties coming within this definition are required to make nominations at the direct primary election held on the last Tuesday in July of election years.—*State ex rel. Spofford v. Gifford*, 22 Idaho, 613, 126 Pac. 1060.

The failure to vote for both a first and second choice under the primary election law (Laws 1909, p. 196, sec. 14, 34) will not avoid the ballot except as to the particular office, where both a first and second choice vote is required, and for which the voter has failed to express both a first and second choice.—*Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280.

Laws 1909, page 196, section 14, the primary election law, which reads as follows: "Vote for both first and second choice if there are more than twice as many candidates as there are positions," is mandatory.—*Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280.

Editorial Notes.

Constitutionality of primary election laws: 22 L. R. A., N. S., 1136; 41 L. R. A., N. S., 132.

(D) NOMINATION BY CONVENTION OR OTHER REPRESENTATIVES OF THE PARTY.

Party divisions and conflicting nominations. See ante, VI, (E).

Determination of objections and contests. See post, VI, (G).

Where a convention or primary meeting representing a political party or principle has put in nomination a ticket, naming therein the candidates of such party to be voted for at an ensuing election, it is prima facie entitled to have such ticket filed and duly certified by the Secretary of State, upon presentation to him as required by law.—*Williams v. Lewis*, 6 Idaho, 184, 54 Pac. 619.

Where there was a regular Democratic county organization, and a county convention was held and a central committee elected and such central committee regularly issued a call for primaries, which were regularly and legally held in said county for the purpose of electing delegates to a county convention to elect delegates to a state convention, the state central committeeman from such county had no authority to appoint delegates to the state convention.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

Under Laws 1903, page 360, delegates to a state convention elected on a day other than that prescribed by law are not entitled to representation therein, even though there is no contesting delegation.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

A majority of the legal delegates elected to a state convention under the primary election law of this state has the power and authority to organize and control the convention to which they are elected, and may take such steps and adopt such methods, not in violation of law, as will give to such majority a right to organize and act for and as the convention.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

In the absence of a statute of this state in relation thereto, a party state central committee has such authority and power as may be given it by the authority creating it, or as is generally exercised by such committees, and may make up a temporary roll of delegates who are entitled to sit in the temporary organization of a state convention, but in so doing can only place on such roll legal delegates.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

"Convention," as used and employed in the direct primary election law (Laws 1909, p. 196), means an organized body of delegates or representatives assembled for the purpose of making nominations, and does not have reference to a mass meeting or assemblage of persons who represent themselves only, but is intended to be an assemblage or body selected or appointed by some class, body, or party of electors as representatives of the people, party, or district making the selection or appointment.—*State ex rel. Spofford v. Gifford*, 22 Idaho, 613, 126 Pac. 1060.

Under the direct primary law (Laws 1909, p. 199, sec. 11), "any organization of electors not governed by the terms" of that act must hold their conventions for the nomination of candidates on the same day that the direct primary election is held.—*State ex rel. Spofford v. Gifford*, 22 Idaho, 613, 126 Pac. 1060.

(E) NOMINATION BY ELECTORS.

Under the election laws, the presentation, in time prescribed by the statute, of a petition signed by the requisite number of qualified electors, entitles the candidate to have his name placed upon the official ballot, as an "elector's nominee" of the party designated in the petition, but not upon the regular ticket of any party.—*Phillips v. Curtis*, 4 Idaho, 193, 38 Pac. 405.

Under election laws, section 29, providing that "no person shall join in nominating more than one person for each office to be filled," the names of the persons signing a petition for nomination, who participated in the nomination for the same office of another person in another political convention, should be rejected; but the petition is sufficient if it contains the requisite number of names after such rejection.—*Phillips v. Curtis*, 4 Idaho, 193, 38 Pac. 405.

Though it be conceded that members of the legislature are, in a general sense, state officers, not being officers to be voted for by the electors of the entire state, they do not come within the class whose nomination as independent candidates requires a petition to be signed by three hundred electors.—*Phillips v. Curtis*, 4 Idaho, 193, 38 Pac. 405.

The statutes of this state do not authorize or permit the nomination of candidates for presidential electors or candidates for Congress by petition.—*State ex rel. Spofford v. Gifford*, 22 Idaho, 613, 126 Pac. 1060.

Under R. C. 385 and 386, persons nominating candidates for public offices by petition are authorized to "designate in not more than five words the party name or principle" which they desire to give the ticket so nominated, and, where the required number of electors signing a petition for the nomination of candidates for public office designate the name of the ticket the "Electors' Progressive Party," such name or designation is not in conflict with the name of an organized party called the "Progressive Party."—*State ex rel. Spofford v. Gifford*, 22 Idaho, 613, 126 Pac. 1060.

(F) CERTIFICATE OF NOMINATION.

Under Laws 1899, page 33, section 22, providing that certificates of nomination to a public office shall be filed not more than sixty days and not less than thirty-five days before the day fixed by law for the election, a certificate presented for filing on September 28th is presented in time where the general election occurs on November 3d.—*Grant v. Landson*, 15 Idaho, 342, 97 Pac. 960.

In an application for a writ of mandate to compel the Secretary of State to file a certificate of nomination as the Democratic state ticket, when his answer thereto denies the allegations of the petition and alleges that the convention making such nominations was not the regular Democratic state convention, a general demurrer to the answer will be overruled.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

The provisions of the election laws, as amended by direct primary law (Laws of

1909, p. 197), section 5, requires a certificate of nomination to be filed with the Secretary of State at least thirty days, and not more than sixty days, prior to the primary to be held to nominate candidates for such office. Held, that a certificate presented for filing twenty-nine days before the election cannot be legally filed by the Secretary of State, since thirty days must intervene between the date of filing and the date of the primary.—*Seawell v. Gifford*, 22 Idaho, 295, Ann. Cas. 1914A, 1132, 125 Pac. 182.

(G) OBJECTIONS AND CONTESTS.

See, also, post, X.

Duty of auditor to place names on ballot. See post, VII.

Courts will not go into the realm of politics to inquire into the motives of electors for seeking or advocating the nomination or election of any person to office, and will not inquire into or investigate the motives or purposes of any person in either circulating or signing a petition for the nomination of a candidate to public office.—*State ex rel. Spofford v. Gifford*, 22 Idaho, 613, 126 Pac. 1060.

Under the direct primary nomination law of this state, there is no provision for the contest of nomination of a candidate for the office of governor.—*Lansdon v. State Board of Canvassers*, 18 Idaho, 596, 111 Pac. 133.

Where the legislature of the state has regulated the method and manner of holding primary elections, the selection of delegates and the conduct and duty of conventions, the courts will not be governed or controlled by the action or decision of the party authorities in such matters but will determine and protect the legal rights of the citizen participating therein.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

Party conventions, committees or the party authority cannot decide or determine a matter which is regulated by law, and thereby abrogate the law or oust the courts of jurisdiction to hear and determine such matter.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

In a contest between two factions of a political party as to which is the regular organization and entitled to represent the party, the court will look to the law, and if the matter is regulated by law, the respective rights of the factions will be determined by the law, but, where there is no law governing the rights of the contesting factions, the same will be relegated to the party forum.—*Walling v. Landson*, 15 Idaho, 282, 97 Pac. 396.

VII. BALLOTS.

Where a candidate for a county office neglects to have an alleged defect in an official ballot corrected as provided by section 59 of the election laws, he cannot, after the election, raise the objection that the name of his successful opponent was improperly placed on the official ballot.—*Baker v. Scott*, 4 Idaho, 596, 43 Pac. 76.

Plaintiff was regularly nominated by the state convention of the Democratic party as

a candidate for state senator and his name placed on the regular ballot of that party. Plaintiff then demanded that his name be placed on the ticket of the People's party as a candidate for the same office and in support of said claim presented a petition signed by 153 electors of said senatorial district. Plaintiff further demanded that his name be so placed on said ballot by virtue of a certificate of the chairman and secretary of the state committee of the People's party, alleging in substance, that, no nomination having been made by the state convention of said People's party for the said office said convention empowered the state committee to fill such vacancy, and that, by virtue of the authority thus conferred said state committee have nominated said petitioner for said office, and said chairman and secretary demand that the Secretary of State place his name upon the official ballot as the nominee of said People's party for said office. The certificate of said chairman and secretary was not filed "within sixty days and not less than thirty-five days" before election, as required by the election law. Held, that a writ of mandate would issue, directing the name of petitioner to be placed on the official ballot as the "Electors' People's Party" candidate for the office of state senator.—Phillips v. Curtis, 4 Idaho, 193, 38 Pac. 405.

Only one ticket under the recognized name or designation of a political party is entitled to be placed on the official ballot.—Williams v. Lewis, 6 Idaho, 184, 54 Pac. 610.

It is the duty of the county auditor in preparing official ballots for state and county elections to place upon the official ballot the names of candidates for state and judicial district offices made by the different political parties and certified to such auditor by the Secretary of State, and the auditor has no authority to inquire into the eligibility of candidates since such duty is purely ministerial.—Miller v. Davenport, 8 Idaho, 593, 70 Pac. 610.

The prohibition contained in R. C. 408, against election officers furnishing the electors with ballots containing distinguishing marks, is directed against the officers charged with the preparation and furnishing of the ballots, and directs and commands the officers as to the manner and method of discharging their public duties, but the statute nowhere prescribes that the penalty for violating this duty or for a failure to faithfully discharge it shall be visited upon the electors or avoid the election.—McGrane v. Nez Perce County, 18 Idaho, 714, Ann. Cas. 1912A, 165, 112 Pac. 312.

Where an auditor of a county furnishes ballots to the election officers of the several precincts of his county, and the ballots so furnished had been numbered consecutively from 1 to 15,000 and the number contained on each ballot correspond with the number on the stub to that ballot, and the error, mistake or wrongful act in numbering the ballots was not known to the electors, and the same was done without their knowledge or consent, and no opportunity was presented to the electors for having the error cor-

rected, and the election was held by using such ballots in the several precincts of the county, the election will not be void, either upon the ground that the numbering was an invasion of the constitutional secrecy of the ballot guaranteed to the people by Const., article 6, section 1, nor upon the ground that the ballots contained distinguishing marks, in violation of R. C. 408.—McGrane v. Nez Perce County, 18 Idaho, 714, Ann. Cas. 1912A, 165, 112 Pac. 312.

Where a candidate for nomination under the direct primary law has been duly and regularly certified by the canvassing board to the county auditor as having received the nomination of his party for a county office, the duty of causing the name of such nominee to be printed on the official ballot to be used at the succeeding general election is purely a ministerial act, and the auditor cannot refuse to have his name printed on the ticket on account of his failure to file an expense account either within the time or in the manner provided by Laws 1909, page 204, sections, 25, 26.—Fulher v. Corey, 18 Idaho, 558, 110 Pac. 1035.

Editorial Notes.

Ballots, distinguishing marks which invalidate: 49 Am. St. Rep. 240; 47 L. R. A. 806.

Name not on official ballot, right of electors to vote for: 91 Am. St. Rep. 682.

Effect on ballots cast at election of official irregularity therein: Ann. Cas. 1912A, 171; 12 Ann. Cas. 722.

Number of times name of candidate may appear on official ballot: Ann. Cas. 1913B, 177; 3 Ann. Cas. 796.

VIII. CONDUCT OF ELECTION.

Where an election has been so irregular and fraudulent that the true result thereof cannot be ascertained from the returns, the poll must be set aside; but the parties may produce those who voted, and by inquiring into their qualifications, and how they voted, ascertain the true result.—Chamberlin v. Woodin, 2 Idaho, 642, 23 Pac. 177.

The rights of electors should not be prejudiced by the errors or wrongful acts of the election officers, unless it be made to appear that a fair election was prevented by reason of such irregularities.—Pickett v. Board of Commrs., 24 Idaho, 200, 133 Pac. 112.

Editorial Notes.

Irregularities which will avoid elections: 90 Am. St. Rep. 46.

Validity of election conducted by less than required number of officers: Ann. Cas. 1912D, 149.

Validity of ballot cast at election after time for closing of polls: Ann. Cas. 1913B, 166.

IX. COUNT OF VOTES, RETURNS, AND CANVASS.

Under Laws 1890-91, pages 57 to 108 (Gen. Elec. Law.), the board of canvassers are not

authorized to declare any person elected to an office, nor are they required or authorized to declare what person has been elected to an office, their duty simply being to canvass the votes, make out abstracts of votes for each of the officers separately, and deliver them to the auditor of the county.—*Cunningham v. George*, 3 Idaho, 456, 31 Pac. 809.

Under Laws 1890-91, pages 57 to 108 (Gen. Elec. Law), the auditor of the county, on receiving the abstracts of votes from the board of canvassers, must immediately make out a certificate of election to each of the persons having the highest number of votes for county and precinct officers respectively; and in the performance of this duty, he is not in any sense under the direction or control of the board of canvassers.—*Cunningham v. George*, 3 Idaho, 456, 31 Pac. 809.

X. CONTESTS.

There is no such action known to the common law as contesting an election before user, and no authority has been conferred on the district courts by statute for trying the title except by an action which has taken the place of the old action of quo warranto.—*Lindsay v. People*, 1 Idaho, 438.

Evidence in an election contest held sufficient to show that alleged withdrawals from the Mormon Church for the purpose of qualifying to vote were not made in good faith.—*Chamberlin v. Woodin*, 2 Idaho, 642, 23 Pac. 177.

A complaint in an election contest charged a number of commissions by the judges of election in "permitting" certain acts to be done, but failed to charge that the judges had knowledge of or consented thereto. The complaint did not contain the names of illegal voters or the names of any of the persons committing the acts complained of. Held, demurrable.—*Ball v. Campbell*, 6 Idaho, 754, 59 Pac. 559.

Laws 1899, page 33, provides a full and complete scheme and procedure for holding elections and the contests thereof and repeal all territorial laws relating to elections and election contests.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

At common law election contests were not known and the only way to contest the right of a person to an office was by the writ of quo warranto and that remedy was invoked in the name of the crown by the public prosecutor.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

An election contest, as distinguished from quo warranto, is of purely statutory origin, and in the absence of legislation providing for and authorizing an election contest, no such right would exist, and there would be no remedy therefor cognizable in either a court of law or equity.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

When the constitution of this state was adopted, neither the common law nor the statutes recognized an election contest as "a case at law or in equity," and such a proceeding is therefore not necessarily included

within the original jurisdiction of district courts as conferred by Const., article 5, section 20.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Laws 1899, page 33, section 124, giving the supreme court original jurisdiction in the matter of a contest of the election of a district judge, is constitutional and valid.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Election contests being purely within the legislative control and discretion and belonging to the political power of the state, the legislature may confer the jurisdiction to hear and pass upon such contests upon any court it sees fit, or upon a board or body specially created for the purpose or withhold the right entirely.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Under R. C. 5026, subdivision 2, providing that the election of any person to any public office may be contested when the incumbent was not eligible to the office at the time of the election, a complaint contesting an election on such ground should allege such facts as would show the disqualification of the contestee at the time of the election.—*Bradfield v. Avery*, 16 Idaho, 769, 23 L. R. A., N. S., 1228, 102 Pac. 687.

Editorial Notes.

Contesting elections because of illegal votes, admissibility of evidence to show what votes were illegal and for whom they were cast, and power to compel unqualified voter to disclose for whom he voted: 84 Am. Dec. 268.

Ballofs produced at contests, when and when are not the best evidence of the vote cast: 11 Am. St. Rep. 798.

Equity jurisdiction of election contests: Ann. Cas. 1912C, 691.

Right to jury trial in election contest: Ann. Cas. 1913C, 161.

Statutory remedy for contest of election as exclusive: Ann. Cas. 1913E, 982.

XI. VIOLATIONS OF ELECTION LAWS.

(No paragraphs.)

ELECTRICITY.

See Telegraphs and Telephones.

Condemnation of lands for purpose of generating or transmitting. See Eminent Domain.

Liability of city for injuries due to defective lighting plant. See Municipal Corporations, XII, (A).

The highest degree of care and diligence is required on the part of those who are operating electrical plants to avoid injuries to persons or property who may accidentally or otherwise come into contact with their wires. *Younie v. Blackfoot L. & W. Co.*, 15 Idaho, 56, 96 Pac. 193.

Under the allegations of a complaint charging defendant with carelessness and negligence in erecting, operating and maintaining its electric light system and plant, whereby plaintiff's horses were killed by coming in contact with an electric light wire,

evidence is admissible that plaintiff had endeavored some hours prior to the injury to inform defendant that certain wires had become crossed, but had been unable to do so by reason of the fact that defendant had no one in its office at the time.—*Younie v. Blackfoot L. & W. Co.*, 15 Idaho, 56, 96 Pac. 103.

In an action for the death of horses caused by their coming in contact with an electric wire in a livery barn, the evidence showed that it would take something like one thousand volts to kill a horse. Held, that evidence was admissible to show that one hundred and fifteen volts of electricity would be sufficient to light the building and that if a proper fuse wire had been used, the wire would have burned out or melted in case of an excessive current coming on the wire.—*Younie v. Blackfoot L. & W. Co.*, 15 Idaho, 56, 96 Pac. 103.

A company engaged in generating, transmitting, and distributing a highly dangerous and unseen force, like electrical energy, is chargeable with a legal duty of handling it with such care and caution as to protect the public against its dangers, and especially to protect those who may be called upon to come near or in close contact with the transmission wires from dangers which they may not see or appreciate or may readily overlook.—*Staab v. Rocky Mountain Bell Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078.

Where an employee of a telephone company, known as the "trouble man," was employed at a regular monthly salary, and his regular hours of employment were from 7:30 in the morning to 5:30 in the evening, and it is shown that it was his duty to respond to calls at all times when needed and he was responding to such a call after regular hours and received a fatal injury, he was not a trespasser or mere volunteer on the company's property, but was engaged in the line of his duty, and received his injury while in the discharge of such duty.—*Staab v. Rocky Mountain Bell Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078.

Where an electric light and power company maintains its poles within a foot of the poles of a telephone company, and carries and maintains live wires charged with electrical current, it is chargeable with notice that laborers and linemen working on the telephone company's poles and wires may and will come in close contact with the electric light wires, and such company is chargeable with the duty of protecting such persons against receiving injury from the current carried on such wires, and this duty is commensurate with the danger apparent.—*Staab v. Rocky Mountain Bell Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078.

Where a telephone lineman, known as "trouble man," while seated on a messenger wire, was suddenly and without apparent cause precipitated onto a live wire maintained by an electric light company immediately under the telephone wires, and was suddenly electrocuted, and no cause is shown for the fall, and he is afterward found to have had an electric burn on the foot which was nearest to the electric light wires, the evidence

is sufficient to justify the jury in returning a verdict that his death was primarily caused by an electric shock, and the court and jury may presume, in the absence of proof to the contrary that the person who lost his life under such circumstances exercised reasonable care and precaution in an effort to preserve his life and that he did not expose and subject himself to injuries and risks that he might reasonably have anticipated or expected would inflict mortal injuries.—*Staab v. Rocky Mountain Bell Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078.

Editorial Notes.

Electricity, duties and liabilities of electric corporations: 100 Am. St. Rep. 515.

Doctrine of *res ipsa loquitur* as applicable to injury to person from electric appliances on private property: Ann. Cas. 1913A, 1184.

Liability of one maintaining wires in highway for injury to traveler coming in contact with live wire: Ann. Cas. 1913D, 912.

Use of force in aid of right to set telephone, telegraph or electric pole on land: Ann. Cas. 1913E, 476.

Liability of electric company for injuries resulting from one of its wires charging wire of other company or person: 16 Ann. Cas. 1194.

Liability for injury or death of traveler coming in contact with electric wire in highway: 31 L. R. A. 566; 22 L. R. A., N. S., 1169.

ELISOR.

To summon jury. See Jury, IV.

EMBEZZLEMENT.

Evidence of the pecuniary condition of defendant charged with embezzlement immediately prior to the time and during the time the offense is alleged to have been committed is competent.—*United States v. Camp*, 2 Idaho, 231, 10 Pac. 226.

An instruction that if the jury "believe from the evidence that the circumstances and testimony point as strongly to some other persons as being guilty of taking the funds charged as being embezzled as they do to the defendant, then the jury are instructed that they must find the defendant not guilty," was properly refused.—*United States v. Camp*, 2 Idaho, 231, 10 Pac. 226.

An information for embezzlement charged that on November 15, 1905, R. was intrusted with a horse, stating its value and ownership; that by the terms of said trust, R. was to use the horse for part of one day and return it to the owner on November 15, 1904; that R. did not return the horse to the owner, according to the terms of said trust, but did, on November 15, 1904, in the county of Nez Perce and state of Idaho, willfully, etc., convert said horse to his own use, and embezzle the same contrary to his said trust. Held, that the information was not indefinite or uncertain as to the time of the commission of

the offense, or as to facts sufficient to apprise defendant of the nature thereof.—*State v. Roland*, 11 Idaho, 490, 83 Pac. 337.

In a prosecution against a sheriff for embezzlement of moneys paid over to him by an applicant for a liquor license, defendant offered in evidence a certain judgment-roll, wherein it was claimed the district court of another county found that money paid to a sheriff under circumstances similar to the case at bar was not the property of the county. Held, that such evidence was incompetent.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

In a prosecution against a sheriff for embezzlement, the introduction of all minutes of the board of county commissioners made after the sheriff's term of office had expired, directing the county attorney to investigate the receipt of certain moneys by the sheriff and bring action for what might be found to be due, was not prejudicial error.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

In a prosecution against a sheriff for embezzlement it was not error to sustain objections to questions asked of the county attorney to the effect that defendant's bondsmen and certain citizens had requested him to delay criminal proceedings until civil suit arising out of the same transaction should be decided.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

In a prosecution against a sheriff for embezzlement, evidence to show that defendant's counsel had advised him not to turn over the money alleged to have been embezzled unless the court should hold it to be county money was inadmissible.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

An information for embezzlement charged that defendant, at and within B. county, and within three years prior to the filing of this information, being then and there sheriff of B. county and by virtue of his said office a collector of license taxes and authorized by law to receive said moneys and acting as such officer, did willfully fraudulently and feloniously, without authority of law, appropriate to his own use the sum of \$500 paid to and received by him as said sheriff for said B. county, by and from S. on a specified date for a license to sell intoxicating liquors within said county. Held, that a demurrer on the grounds that the information does not state facts constituting a public offense, that it does not state whether the money claimed to have been embezzled was the property of B. county or of S., that it does not state the time of the commission of the offense or whether the offense was committed while defendant was sheriff, and that it does not in any manner comply with R. S. 7677, 7678, 7679, prescribing the requirements and form of indictments and informations, was properly overruled.—*State v. Steers*, 12 Idaho, 174, 85 Pac. 104.

R. C. 7072, provides that any evidence of debt, negotiable by delivery only and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not. Held, that certain bank checks were the subject of embezzle-

ment.—*State v. Sage*, 22 Idaho, 489, 126 Pac. 403.

On a charge of embezzlement, the intent may be established, either by direct or circumstantial evidence.—*State v. Sage*, 22 Idaho, 489, 126 Pac. 403.

In a prosecution for embezzlement, an instruction that the section of the statutes under which the information is brought reads as follows (reading R. C. 7068) is not erroneous, in including the phrase "or secretes with a fraudulent intent to appropriate it to such use or purpose."—*State v. Sage*, 22 Idaho, 489, 126 Pac. 403.

Editorial Notes.

Embezzlement, what is: 98 Am. Dec. 126.
What constitutes embezzlement and who may commit: 87 Am. St. Rep. 19.

EMINENT DOMAIN.

I. NATURE, EXTENT AND DELEGATION OF POWER.

II. COMPENSATION.

- (A) Necessity and Sufficiency in General.
- (B) Taking or Injuring Property as Ground for Compensation.
- (C) Measure and Amount.
- (D) Persons Entitled and Payment.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

IV. REMEDIES OF OWNERS OF PROPERTY.

V. TITLE OR RIGHTS ACQUIRED.

Collateral attack on decision of board in highway proceeding. See Highways, I.

Right to jury trial. See Jury, II.

I. NATURE, EXTENT AND DELEGATION OF POWER.

Navigability within meaning of eminent domain statute. See Navigable Waters.

R. S. 933, providing for the laying out of private or by-roads, for the convenience of one or more residents of any road district, in the same manner as public roads are opened, since thereunder the road when laid out may be used for any purpose to which it is adapted by the general public, is not unconstitutional, but is within Const., article I, section 14, providing that the necessary use of lands "for rights of way for the construction of canals, or any other use necessary to the complete development of the material resources of the state," is a public use.—*Latah County v. Peterson*, 3 Idaho, 398, 29 Pac. 1089.

The Idaho admission act, granting sections 16 and 36 in each township to the state for school purposes and providing that such lands shall be disposed of only at public sale, does not prevent a suit against the state to condemn state lands for public purposes.—*Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.

Const., article 5, section 10, provides that the supreme court shall have original jurisdiction to hear all claims against the state, but its decision shall be merely recommendatory. R. S. 5212, section 2, makes state lands subject to eminent domain. Sess. Laws 1899,

page 381, grants the right of way over state lands for ditch and water purposes on payment of compensation therefor. Held, that an action to condemn state lands for a public use was authorized by the latter statute.—*Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.

Under R. S. 5210, enumerating the public uses for which the right of eminent domain may be exercised, and Const., article 7, section 14, declaring what are public uses, the condemnation of land to furnish electricity for lighting purposes for an unincorporated town and its inhabitants, to furnish electric power for pumping water for domestic and irrigation purposes, to construct and operate a railroad and to furnish electricity for power, lighting and transportation and other purposes necessary to develop the material resources of certain specified counties, sufficiently shows that the condemnation is sought for a public use.—*Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.

Though Const., article 1, section 14, declaring the necessary use of lands to the complete development of the material resources of the state to be a public use, is not self-executing, the legislature has provided the procedure to subject such lands to that use.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

The power of eminent domain is an incident of sovereignty inherent in the federal government and the several states by virtue of their sovereignty, and such power with all its incidents is vested in the legislature of the several states.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

Under Const., article 1, section 14, declaring the necessary use of lands for the complete development of the material resources of the state to be a public use, the term "public use" means public usefulness and advantage and productive of general benefit.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

One who receives the power of eminent domain in the improvement of non-navigable rivers for the purpose of floating logs and timber products does not thereby secure the exclusive use and control of such streams, but they remain open to the use of anyone who may have occasion to use them for any purpose.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

One who exercises the power of eminent domain assumes certain obligations to the public, and the grant of that right carries with it the right of public supervision and reasonable control.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

Under Const., article 1, section 14, declaring to be a public use for which private property may be taken "any other use necessary to the complete development of the material resources of the state," the lumbering interest of the state is one of the material resources of the state and cannot be com-

pletely developed without the exercise of the power of eminent domain.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

An action to condemn grounds through and over which to build a sewerage system and for sewerage dumpage and outlet, in which no reference is made to or mention made of any waters flowing in, along or over such strip of land, and where no waters or water rights are mentioned or described in the judgment, is an action purely for the condemnation of the land itself as distinguished from any water or water right which may be appurtenant thereto or flow thereover, and such a judgment will not be viewed or considered as a condemnation or appropriation of any waters. *Village of Twin Falls v. Stubbs*, 15 Idaho, 68, 96 Pac. 195.

A sewerage system is a public use within the meaning and intent of R. S. 5210, as amended by Laws 1903, page 203, authorizing the exercise of the power of eminent domain by any incorporated city, town or village, for any and all public uses.—*Village of Twin Falls v. Stubbs*, 15 Idaho, 68, 96 Pac. 195.

Under Laws 1905, page 335, section 1, authorizing and empowering cities, towns and villages to construct and maintain sewerage systems, a city or village may construct a sewer system, and for the purpose thereof may exercise the power of eminent domain either within or without the territorial jurisdiction of such municipality.—*Village of Twin Falls v. Stubbs*, 15 Idaho, 68, 96 Pac. 195.

The power of eminent domain is an inalienable right of sovereignty and may be exercised over all the property within the state.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

Primarily, the power and exercise of the right of eminent domain rests with the legislature, which may determine the necessity for the taking, its determination thereon being final.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

The legislature of this state has delegated to the courts the power to determine the necessity for the taking of property under eminent domain, and jurisdiction is thereby vested in the courts to determine and adjudicate all the matters and things specified by the statute to be determined before the taking is finally consummated and title devested.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

Where the necessity for the taking is shown, one canal company will be allowed to condemn a part of the right of way of another canal company, for the purpose of enlarging the old canal to a sufficient capacity to carry such additional volume of water as may be needed for the use of the latter company.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

Where it is sought by condemnation proceedings to take a piece of property that is already devoted to a public use, the necessity will not be measured by the extent to which the use is actually applied, but rather by the

public nature and character of the use to which it has been previously applied.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

Under the constitution and statutes of this state, irrigating canals are declared to be a public use.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

R. C. 5210, which authorizes the condemnation of land for necessary use in constructing lines to be "used in transmitting electric current for power, lighting, heating or other purposes," constitutes a legislative interpretation and construction that the authority somewhere exists for condemning lands for power sites and power stations for generating electrical current and electrical energy, and carries with it the implied power to do those things necessary in order to generate the electrical current which is to be transmitted over such lines.—*Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682.

Under the facts as disclosed by the record in this case, held, that the construction of a dam in the Spokane river at Post Falls, and the raising the same to such a height as to increase the height of the waters in Coeur d'Alene Lake for storage purposes to be used in the low-water season for power purposes in generating electrical current and energy for lighting, heating, and power, is a public use within the meaning and purview of Const., article 1, section 14, and R. C. 5210.—*Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682.

Where it is found and determined that the use for which land is sought to be condemned is a public use, the extent or area of land to be taken, and the necessity for the taking of the particular tract or parcel of land, must be left in some measure to the judgment and discretion of the agency on which the state has conferred the power of eminent domain, subject always to the ultimate and supervising judgment and control of the courts.—*Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682.

Const., article 1, section 14, conferring the right of eminent domain, does not limit the "necessary use of lands" for "the construction of reservoirs or storage basins" to the "purposes of irrigation" alone, but rather intends to confer the power and authority to condemn lands for reservoirs or storage basins "for any useful, beneficial, or necessary purpose" to which water can be used or applied or for which it can be stored or impounded.—*Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682.

In enacting the eminent domain act, the legislature intended to provide a speedy method of procedure by which railroad corporations are given authority and power to make improvements, quasi-public in character, without delay, and thus prevent embarrassment in the construction of the same, and thereby benefit both the railroad company and the owner of the land.—*McLean v. District Court*, 24 Idaho, 441, 134 Pac. 536.

Editorial Notes.

Public use, taking property for, what is a: 16 Am. St. Rep. 610; Ann. Cas. 1912D, 1002; 2 Ann. Cas. 50; 14 Ann. Cas. 903.

Public use, power of the legislature to determine what is a: 88 Am. St. Rep. 926; 22 L. R. A., N. S., 50.

Uses for which power of eminent domain cannot be exercised: 102 Am. St. Rep. 809.

Right of railroad company to condemn land for spur track to private establishment: Ann. Cas. 1912D, 234.

Right of county to exercise power of eminent domain: Ann. Cas. 1913E, 1079.

Irrigation as public use or benefit: 1 Ann. Cas. 304.

Drainage of land as public use: 20 Ann. Cas. 272; 49 L. R. A. 781; 1 L. R. A., N. S., 208; 22 L. R. A., N. S., 163.

Roads as public use: 22 L. R. A., N. S., 99.

Combination of public and private uses: 21 L. R. A., N. S., 539.

II. COMPENSATION.

(A) NECESSITY AND SUFFICIENCY IN GENERAL.

The fact that the statute grants to a defendant in condemnation proceedings the right to a trial subsequent to the assessment made by the commissioners, and also the right of appeal, does not render the provision of the statute, authorizing the appointment of the commissioners and assessment of damages and the taking of possession after payment of the amount so assessed, obnoxious to the constitution.—*Portneuf Irr. Co. v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

The damages to be assessed for the taking of property in condemnation proceedings is fixed by R. C. 5221 as of the date of the issuance of the summons, and if the damages so assessed are paid to the land owner, the fact that the plaintiff in condemnation may subsequently commit waste or damage on the lands so condemned, and may not prosecute the proceeding to final judgment, can in no way prejudice the land owner whose damages are assessed as of a previous date.—*Portneuf Irr. Co. v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

Under Const., article 1, section 14, providing that "private property may be taken for public use, but not until a just compensation to be ascertained in a manner prescribed by law shall be paid therefor," the legislature had the power and authority to enact R. C. 5226 and provide for assessing the damages sustained by any land owner by three commissioners to be appointed by the court.—*Portneuf Irr. Co. v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

A corporation having the power of eminent domain has no right to enter upon and take possession of the premises sought to be condemned until it either pays to the owner of the property the amount assessed and found as damages by commissioners duly appointed,

or, in case the owner refuses to accept the award, has paid the same to the clerk of the court to abide the result of the action.—*Pyle v. Woods*, 18 Idaho, 674, 111 Pac. 746.

A riparian proprietor who makes no protest or objections to the improvement of a stream by deepening and widening and straightening the same, and cutting away timber along the banks thereof, by a company that represents to him that it is acting under a license and franchise from the state, is not estopped by his inaction or quiescence from thereafter maintaining an action against the company for damages caused in the overflowing of his land and depositing logs and timber and debris thereon which is directly caused by the cutting away of the timber and the weakening of the banks and the erection of splash-dams above his lands whereby the volume of water in the stream is greatly augmented and a flooding is caused.—*Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 35 L. R. A., N. S., 824, 113 Pac. 92.

Where a water company has constructed a dam across a stream for the purpose of impounding water, and the dam or structure results in the flooding of the lands of another, and an action for condemnation of such land is thereafter prosecuted in the federal court, and a judgment is entered in favor of the land owner for the value of the land taken, and the company thereupon appeals to the United States circuit court of appeals, the state court has the jurisdiction to issue an injunction to restrain such company from flooding and submerging the land sought to be condemned until such time as the admitted value thereof has been paid to the land owner or into court for his use and benefit as provided by law.—*Ryan v. Weiser Valley L. & W. Co.*, 20 Idaho, 288, 118 Pac. 769.

Under the constitution and laws of this state, the condemnor cannot acquire any right or interest in the lands of another which would entitle him to the possession and occupation thereof, against the will and without the consent of the land owner, until he first pays such just compensation as may be ascertained in the manner prescribed by law.—*Ryan v. Weiser Valley etc. Co.*, 20 Idaho, 288, 118 Pac. 769.

The method and manner of securing private property for public use is regulated by law, but does not apply until just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for public use, and the manner of ascertaining what is a just compensation for the taking of private property for a public use is prescribed by law, and is either by contract with the owner of the land sought to be taken, or by condemnation proceedings.—*Tobey v. Bridgewood*, 22 Idaho, 566, 127 Pac. 178.

Editorial Notes.

Damages or injuries for which compensation must be made: 31 Am. Dec. 373; 88 Am. Dec. 113; 9 Am. St. Rep. 144; 19 Am. St. Rep. 459; 22 Am. St. Rep. 50; 85 Am. St. Rep. 291.

(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

In improving and keeping open navigable streams of this state, neither the state nor its licensee has any right to trespass upon the lands of the riparian proprietors, cut timber therefrom, cut away the banks, or impair the littoral rights of such proprietors without first compensating the proprietor in the manner provided by law.—*Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 35 L. R. A., N. S., 824, 113 Pac. 92.

The noise usually incident to the operation of railway trains should not be taken into consideration as an element of damage in ordinary condemnation cases, for the reason that the taking of property for railroad purposes is authorized by the constitution and statute, and condemnation is allowed therefor, and the noise of operating the road goes along with the use. Where, however, the property is already devoted to such a special and peculiar use that the taking of a part brings the use and the incidental noise so near to the remaining property as to render the noise a private nuisance to the owner of the remaining property except for the condemnation, and greatly depreciates its value for such special use, the question of noise may be considered in ascertaining the damage that will be suffered to the remaining property after the severance.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Editorial Notes.

"Damaged," meaning of this word in provisions guaranteeing that private property shall not be damaged for public use without compensation: 109 Am. St. Rep. 904.

Injury to abutter's rights by railroad in street: 36 L. R. A., N. S., 873.

(C) MEASURE AND AMOUNT.

Evidence and instructions as to damages. See post, III.

Pleading. See post, III.

Noise as element of damage to school property. See ante, II, (B).

Measure and amount of damages recoverable in action by property owner. See post, IV.

Necessity of payment before taking. See ante, II, (A).

In a condemnation suit an instruction "that the measure of damages of defendant would be the amount in dollars and cents, if any, saved to the plaintiff corporation in the construction or enlargement of the proposed canal by reason of the existence of the ditch of defendant, as constructed at the time of the issuance of summons, bearing in mind said defendant's continued future use of the proposed enlarged canal in common with that of the plaintiff corporation," does not correctly state the rule for estimating and fixing damages, and is in direct conflict with the further instruction that "The jury are instructed that they are not to measure the value of the right sought to be condemned from the defendant, by the necessity the

plaintiff is under of obtaining that right, or the value it may have to the plaintiff alone, under the peculiar circumstances of this particular case. The reasonable market value of the property sought to be taken is the true measure of damages for the amount so taken." The latter instruction correctly states the law, and was a proper instruction for the jury.—*Portneuf-Marsh etc. Co. v. Portneuf Irr. Co.*, 19 Idaho, 483, 114 Pac. 19.

The constitution prohibits the taking of the property of another for any use until just compensation has been paid therefor, and this must be done whether the property has a market value or not. In every case a fair and just compensation must be ascertained, and this should be done as nearly as possible in the same manner and by taking into consideration the same facts, circumstances and elements of value which would be taken into account by the vendor and purchaser if they were bargaining between themselves as to the fair price which the one would accept, and the other would pay, for the property.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

In estimating the value of property taken for public use, it is the market value of the property which is to be considered, and the market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is not obliged to have the property.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 569, 119 Pac. 60.

Where property sought to be taken under condemnation proceedings has no market value, evidence is admissible to show that the property is valuable for some peculiar or specific purpose or is especially valuable on account of its formation, location, natural or artificial adaptability to a particular use or to the peculiar use to which it is then applied, and in such a case evidence to the foregoing effect is admissible, and may be considered by a jury as a proper subject of inquiry in arriving at a just estimate of the value to be placed upon the property taken and the damage that will be sustained by reason of severing the same from the property remaining.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Under R. C. 5220, where a condemnor is seeking to take a portion of a larger tract of land for a public use, it is proper and necessary to take into consideration and to introduce evidence to show the damage that will be sustained to the remaining parcel of land "by reason of its severance from the property sought to be condemned" and the "construction of the improvement proposed" by the condemnor.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Editorial Notes.

Measure of when lands are taken for public use: 88 Am. Dec. 113.

Right to compensation in condemnation proceedings for improvements placed on land by condemnor with authority

or color thereof: Ann. Cas. 1912A, 244; 6 Ann. Cas. 382; 13 Ann. Cas. 980; 16 L. R. A. 805.

(D) PERSONS ENTITLED AND PAYMENT.

Where the parties to a condemnation proceeding are unable to agree in the first place upon the value of the property and the damages that will be sustained if the damages are subsequently assessed by commissioners appointed in conformity with R. C. 5226, and the plaintiff voluntarily pays the award to the defendant or into court to abide the result of the action, and the defendant voluntarily receives and accepts such award, the payment thus made by the party plaintiff and received and accepted by the party defendant constitutes a contract or voluntary agreement between the parties and terminates the proceeding and entitles the plaintiff to its decree in condemnation.—*Pyle v. Woods*, 18 Idaho, 674, 111 Pac. 746.

Where a plaintiff in condemnation has procured the appointment of commissioners to assess the damages that would be sustained by the property owner, and has thereafter voluntarily paid the award to the defendant or to the clerk of the court and taken possession of the premises sought to be condemned, such plaintiff is not thereafter, on its own motion, entitled to have the question of damages and compensation submitted to a jury, and the court has no jurisdiction to do so over the objection and protests of the defendant who is ready and willing to accept the award as full compensation for the damages he will sustain by reason of the condemnation.—*Pyle v. Woods*, 18 Idaho, 674, 111 Pac. 746.

Upon an award of commissioners in condemnation proceedings, if the amount awarded is paid by the plaintiff and accepted by the defendant, a decree confirming such action of the parties will be in substance a decree by consent or confession, and will come as fully within the purview of the statute as if the case had gone to trial before a jury and judgment and decree had been entered on the verdict.—*Pyle v. Woods*, 18 Idaho, 674, 111 Pac. 746.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

In proceedings to condemn land for railroad purposes, it is error to estimate the damages on what has been paid by the corporation, seeking to condemn, to owners of adjacent property.—*Spokane etc. Ry. Co. v. Lieuallen*, 3 Idaho, 381, 29 Pac. 854.

Where, in condemnation proceedings for a railroad, one witness stated the basis of his estimate of damages to be the value of land at the time of the trial, and others based their estimate on the value at the time of taking, and the court repeatedly charged the jury that the value of the property at the time of the taking was the true basis, the refusal of the court to strike out the testimony of the first witness was not reversible error.—*Spokane etc. Ry. Co. v. Lieuallen*, 3 Idaho, 381, 29 Pac. 854.

In proceedings for the condemnation of land for railroad purposes, the value of the land at the time it is taken is the measure of damages, and it is error to admit evidence of its value at the time of trial.—*Spokane etc. Ry. Co. v. Lieuallen*, 3 Idaho, 381, 29 Pac. 854.

A person whose land has been condemned for a highway cannot be heard to complain that a strip of land only thirty feet wide was taken, instead of fifty feet, which is required for the width of highways.—*Latah Co. v. Peterson*, 3 Idaho, 398, 29 Pac. 1089.

Allegations in a complaint to condemn land for a highway held sufficient.—*Canyon County v. Toole*, 8 Idaho, 501, 69 Pac. 320.

Though a complaint in condemnation proceedings is ambiguous and uncertain in its description of the owners and of the property sought to be condemned, and therefore does not conform to the requirements of R. S. 5216, a defaulting defendant, by failing to demur, waives all right to raise such objection on appeal.—*Hollister v. State*, 9 Idaho, 651, 77 Pac. 339.

Where in condemnation proceedings a map is attached to and made part of the complaint, and plaintiff alleges that defendant has no interest in the property sought to be condemned, defendant by failing to demur or answer admits the descriptions of the map and that he had no interest in the property.—*Hollister v. State*, 9 Idaho, 651, 77 Pac. 339.

In an action by a private lumbering corporation to condemn lands for the improvement of a river for storing water to float logs and other timber products, the allegations of the complaint held to state a cause of action.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 83 Pac. 426.

Where a railroad corporation organized under the laws of this state commences proceedings to condemn land for its right of way, averments in the answer that such corporation is not a public service corporation but that it has been organized fraudulently by a lumber company for its own private use so that the lumber company might exercise the right of eminent domain and that it does not intend to serve the public, are properly stricken from the answer as being no defense.—*Connolly v. Woods*, 13 Idaho, 591, 92 Pac. 573.

The question as to the necessity for the taking of a definite piece of property for a public use, when denied, should be determined by the court in limine before appointing commissioners to assess the damages that will be sustained by reason of the taking.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

R. C. 1526 providing for the appointment of commissioners to assess damages that the defendant will sustain by reason of the condemnation and appropriation of his property, and for the payment of the sum so assessed to the defendant, or, in case of his refusal to accept the same, its being paid into court to abide the result of the action, and for the plaintiff thereupon to enter upon and take possession of the property pending the final

hearing and determination of the proceeding, does not conflict with Const., art. 1, sec. 14, providing that private property may be taken for public use on payment of just compensation.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

R. C. 5226, confers all the jurisdiction necessary to a hearing and assessment of damages in eminent domain proceedings, and all the means necessary to carry into effect the proceedings had is conferred by the general statute R. C. 3925, which provides that when jurisdiction is conferred on a court or judicial officer, all the means necessary to carry it into effect are also given.—*Pyle v. Woods*, 18 Idaho, 674, 111 Pac. 746.

R. C. 5213 provides that before property can be taken by eminent domain, it must appear that the use to which it is to be applied is a use authorized by law, that the taking is necessary to such use, and that if already appropriated to some public use, the public use to which it is to be applied is a more necessary public use. Held, that such questions must be tried and determined by the court before commissioners to assess the damages are appointed.—*Pyle v. Woods*, 18 Idaho, 674, 111 Pac. 746.

R. C. 5227, provides that costs in eminent domain cases "may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides in the discretion of the court." Held, that, where a plaintiff commences an action in condemnation and procures the appointment of commissioners and has a hearing, and the commissioners make an award and file their findings and report and the plaintiff refuses to pay the award and thereafter dismisses the action, all costs usually taxed in civil actions should be taxed against the plaintiff, and that it would be an abuse of discretion not to do so under such circumstances, and that the provisions of the general statute relative to costs in "civil actions" would apply in such case.—*Chicago, M. & St. P. Ry. Co. v. Truman*, 18 Idaho, 687, 112 Pac. 210.

Where a plaintiff in condemnation has, subsequent to the filing of the report of the commissioners appointed to assess the damages, dismissed the action under R. C. 4354, subdivision 1, the defendants must file their memorandum of costs within five days after notice of the dismissal, as provided by R. C. 4912.—*Chicago, M. & St. P. Ry. Co. v. Truman*, 18 Idaho, 687, 112 Pac. 210.

R. C. 5228, which is a part of the title on eminent domain, makes the general provisions of the code relative to "civil actions" applicable to proceedings under the eminent domain title, except as otherwise specially provided; and R. C. 4354, dealing with actions generally, provides that "an action may be dismissed or a judgment of nonsuit entered . . . by the plaintiff himself, at any time before trial, upon the payment of costs; provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant." Held, that the latter section is applicable to actions and proceedings in eminent domain, and au-

thorizes the plaintiff to dismiss an action in condemnation after the filing of a report by commissioners appointed to award the damages, or at any time before trial.—*Chicago, M. & St. P. Ry. Co. v. Trueman*, 18 Idaho, 687, 112 Pac. 210.

In condemnation proceedings the owner of the property taken should receive his just compensation clear of any expense of the proceedings, either in the trial court or on appeal.—*Portneuf-Marsh etc. Co. v. Portneuf Irr. Co.* (on rehearing), 19 Idaho, 483, 114 Pac. 19.

In a condemnation suit the plaintiff necessarily admits that the taking of the property would be a damage to defendant in some amount, and with regard to a question based upon the theory entertained by the plaintiff as to the measure of damages, where the court sustains an objection to the question, it is not necessary that the plaintiff should state the evidence he expects to produce in answer to such questions, for the reason that it is apparent that there would be some evidence as to damages, and that the plaintiff could have produced evidence fixing the damages in some amount.—*Portneuf-Marsh etc. Co. v. Portneuf Irr. Co.*, 19 Idaho, 483, 114 Pac. 19.

One seeking to condemn land is liable for all costs of the proceeding in the lower court and on appeal.—*Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682.

An educational institution, commonly known and designated as a college, is not ordinarily a commercial or money-making institution, and cannot be said to have a market value in the ordinary and legal acceptance of that term; and, where property devoted to such use is sought to be taken by a railroad company under the power of eminent domain, it is proper to introduce proofs showing the character of the location, its special fitness and adaptability for the uses to which it is then or may be devoted, the state of development and improvement of the property, the nature of the improvements, and the depreciation that will result to the remaining portion of the property after the severance therefrom of the part taken under condemnation, and such evidence is proper for the consideration of the jury in arriving at the true value of the property to be taken and the damage that will be sustained.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Where a railroad company is condemning a part only of a tract of land, and does not indicate or stipulate the specific manner in which it intends to use the property or the number of tracks it proposes to lay or whether it will use the land for switching purposes, it is competent and proper for the land owner to introduce evidence to show the probable damage that it will sustain by reason of the most numerous and injurious uses to which the railroad company might lawfully put the property under its condemnation for railroad purposes.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Under R. C. 5220, in assessing and determining the value of the land sought to be condemned, the improvements appertaining to the land sought to be condemned are assessed as a part of the realty, and the finding of the value of the realty includes the improvements. *Big Lost River Irr. Co. v. Davidson*, 21 Idaho, 160, 12 Pac. 88.

Under R. C. 5220, it is not necessary that the jury find the value of each legal subdivision of the tract sought to be condemned. If, however, there is more than one parcel of land, or several separate parcels or tracts, each separated from the other, then it is necessary for the jury to determine the value of each separate tract or parcel. But where the tract is a single or consolidated tract, the value may be fixed as a single parcel or tract. "Parcel" or tract of land, as used in this section, does not mean legal subdivision, but does mean a consolidated or single tract. *Big Lost River Irr. Co. v. Davidson*, 21 Idaho, 160, 121 Pac. 88.

Upon damages being assessed by the court, jury or referee, under R. C. 5220, a judgment should be rendered by the court in the common, ordinary form for the recovery of money in favor of the defendant against the plaintiff, where damages are allowed, and such judgment is the final judgment mentioned in R. C. 5223, and is a judgment in personam against the plaintiff for such damages.—*Big Lost River Irr. Co. v. Davidson*, 21 Idaho, 160, 121 Pac. 88.

Under R. C. 5223, 5224 and 5225, two judgments are to be entered by the court in which eminent domain proceedings are tried, the first in favor of defendant for the damages as assessed under the provisions of R. C. 5220, and the second in favor of plaintiff for condemnation of the property after the first judgment is paid, and the second judgment should describe the property and the purposes for which the same is condemned.—*Big Lost River Irr. Co. v. Davidson*, 21 Idaho, 160, 121 Pac. 88.

By the various provisions of the eminent domain act of this state, it was intended that where proceedings are prosecuted for the purpose of condemning private property for public use, and the value on such property has been assessed and determined in the manner provided by the statute, the plaintiff should not be left to his own discretion as to whether or not he will pay such judgment, and leave the defendant's property charged with a liability to be taken at the will or convenience of the plaintiff, and, to guard against such possible condition, the legislature provided for a personal judgment and for means by which the same can be enforced; and that the plaintiff is not at liberty or privileged to abandon such proceedings, whether in or out of possession of the property, and leave the defendant without a remedy.—*Big Lost River Irr. Co. v. Davidson*, 21 Idaho, 160, 121 Pac. 88.

In proceedings under the eminent domain statute, where there are several separate parcels or tracts of land, and the jury in assessing the damages sustained by the owner of

such land finds the damages to be of an aggregate value, and does not designate in such verdict the value of the land taken in each of several parcels, and no objections are made to the form of the verdict, and a motion for a new trial is not made on such ground, and the sufficiency of such verdict has in no way been presented to the trial court, the court will not reverse the judgment entered upon the ground that the verdict is insufficient when the objection is raised for the first time in this court.—*Big Lost River Irr. Co. v. Davidson*, 21 Idaho, 160, 121 Pac. 88.

R. C. 4807, as amended by Laws 1911, page 367, subdivision 1, relating to appeals from final judgments and R. C. 5226 making the general provisions of the code applicable to eminent domain proceedings, and R. C. 5226, wherein it is expressly provided that the condemning party should be let into possession, clearly provide for an appeal from a final judgment in an action or special proceeding, and that such appeal does not stay or interfere with the rights of either party to the condemnation suit to proceed in the district court or upon an appeal as provided by law.—*McLean v. District Court*, 25 Idaho, 441, 134 Pac. 536.

R. C. 4807, as amended by Laws 1911, page 367, subdivision 1, provides that an appeal may be taken from a final judgment in an action or special proceeding commenced in the court in which the same is rendered within sixty days after the entry of such judgment. R. C. 5228 provides that, except as otherwise provided, the provisions of the code relative to civil actions and new trials and appeals are applicable to, and constitute, the rules of practice in proceedings under the eminent domain statute. Held, that said statutes are applicable to and constitute the rules of practice in condemnation actions.—*McLean v. District Court*, 24 Idaho, 441, 134 Pac. 536.

When a judgment is rendered upon the right to condemn land and the necessity for the condemnation, and the court makes findings and renders a judgment in favor of the plaintiff that the right of condemnation exists, and that the necessity exists, and the judgment affects substantial rights, such judgment is not an interlocutory order, nonappealable, but is a final judgment upon the issues in a special proceeding, and may be reviewed on appeal.—*McLean v. District Court*, 24 Idaho, 441, 134 Pac. 536.

Editorial Notes.

Eminent domain, benefits, how far may be considered as offsets in proceedings under: 45 Am. Dec. 532; 13 Ann. Cas. 603; 19 Ann. Cas. 859; 9 L. R. A., N. S., 781.

Damages, evidence of: 22 Am. St. Rep. 49.

Evidence of the special value of property taken in the exercise of right of: 124 Am. St. Rep. 536.

Admissibility in evidence, in eminent domain proceeding, of admission or declaration of owner as to value of property condemned: Ann. Cas. 1912D, 289.

IV. REMEDIES OF OWNERS OF PROPERTY.

Compensation in proceedings to condemn. See ante, II, III.

Actions against railroad and other public service corporations for damages committed by them in the construction of their roads differ from actions for damages sustained by reason of the maintenance of a nuisance, and should not be governed by the rule applicable to nuisance cases.—*Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

Where a land owner sued a railroad company for the value of lands taken, the following instruction was erroneous: "If you believe from the evidence as alleged in the answer that plaintiff committed injuries to the lands of the defendant in the building of the railway grade, mentioned in the pleadings and the evidence, and you further believe from the evidence that since the commission of such injury defendant has sold and disposed of his said lands, then the court instructs you that the defendant may not recover for any injuries to said lands, save such as may have accrued to the same as you may believe from the evidence accrued thereto, between the building of such grade or embankment and the time of the sale of such lands," the true rule being that where the acts of the tort-feasor have been completed and consummated, and the causes from which the injury must necessarily flow are patent and obvious, in such case the injury is of such a permanent nature that the whole damages, past, present and prospective, may be recovered in one action, and that one recovery only should be allowed.—*Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

While the fact that a land owner permitted a railroad company to construct its road over his lands without objection would preclude him from thereafter resorting to the action of ejectment against the railroad company, and also preclude him from obtaining an injunction against the company continuing its work and operations, still such conduct would not divest him of the title to his property, and would not be inconsistent with the assumption on his part that the company would pay him reasonable compensation for the land taken.—*Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

The rule in this state as to the measure of damages to real property is as follows:

"If land is taken or the value thereof totally destroyed, the owner is entitled to recover the actual cash value of the land at the time of the taking or destruction, with legal interest thereon to the time of the trial.

"If the land is permanently injured, but not totally destroyed, the owner will be entitled to recover the difference between the actual cash value at a time immediately preceding the injury and the actual cash value of the land in the condition it was immediately after the injury, with legal interest thereon to the time of the trial.

"If the land is temporarily, but not permanently, injured, the owner is entitled to recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury with legal interest thereon to the time of the trial."—*Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296; *Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

Where K.'s land has been appropriated by a railroad company for its right of way and a road has been built thereon, K. may elect to waive his remedies in ejectment, injunction, and trespass, and may sue as upon an implied promise and contract to pay reasonable compensation for the lands taken.—*Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

Where a person seeking to condemn a tract of land for a public use has entered upon and taken possession of the land without paying for the same, and without the consent of the land owner, he cannot defend, in a suit for injunction to restrain him from continuing his occupation and possession thereof, on the ground that the land is of little or no value to the land owner, and that the necessity for the use and occupation thereof by the party seeking to condemn is great or imperative.—*Ryan v. Weiser Valley etc. Co.*, 20 Idaho, 288, 118 Pac. 769.

Under the facts and circumstances of this case, held, that the alternative order and injunction made and entered in this case was not an abuse of the power of the court and the discretion vested in courts of equity.—*Ryan v. Weiser Valley etc. Co.*, 20 Idaho, 288, 118 Pac. 769.

Where an action is brought against a village for failure to ascertain and assess damages under R. C. 2238, subdivisions 26, 27, authorizing cities or villages to open, widen or vacate any street, it is necessary to allege in the complaint the acts and procedure of the village, including the ordinances passed under which said village proceeded in condemning or taking the property, and the ascertainment and assessment of damages and the payment of such damages; and until such damages are assessed and paid there is no condemnation or taking of such street by the village, and no right of action lies to collect from the village such damages.—*Trueman v. Village of St. Maries*, 21 Idaho, 632, 123 Pac. 508.

Editorial Notes.

Remedies of owners of property for damages accruing after condemnation: 5 Am. St. Rep. 537.

V. TITLE OR RIGHTS ACQUIRED.

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EMPLOYER'S LIABILITY LAW.

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Excessive damages in action under federal employer's liability law. See Damages, VII.

ENTICEMENT.

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EQUAL PROTECTION OF LAWS.

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EQUITY.

I. JURISDICTION, PRINCIPLES AND MAXIMS.

II. LACHES AND STALE DEMANDS.

III. PARTIES AND PROCESS.

IV. PLEADING AND EVIDENCE.

V. HEARING AND SUBMISSION OF ISSUES TO JURY.

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VII. DECREES AND ENFORCEMENT THEREOF.

VIII. BILL OF REVIEW.

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Particular Subjects of Equitable Jurisdiction:

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Appeal and Error:

Questions of appellate practice, rights on appeal, etc., are treated under Appeal and Error.

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— Of findings of fact. See Appeal and Error.

Equitable relief and defenses in law actions. See Action.

I. JURISDICTION, PRINCIPLES AND MAXIMS.

Equity will not entertain jurisdiction where there is an adequate remedy at law.—*Washington etc. R. R. Co. v. Coeur d'Alene etc. Co.*, 2 Idaho, 580, 21 Pac. 562; *School Dist. No. 25 v. Rice*, 11 Idaho, 99, 81 Pac. 155.

The fact that the property is not within the jurisdiction of the court constitutes no bar

in a court of equity, for a court of equity acts upon the person.—*Gamble v. Dunwell*, 1 Idaho, 268.

Equity will not relieve where the parties have had a plain and speedy remedy at law, of which, by their own negligence, they have failed to avail themselves.—*Wilkerson v. Walters*, 1 Idaho, 564.

The doctrine of the interposition of a court of equity to prevent a multiplicity of suits cannot be maintained where there is simply a great number of plaintiffs, whose several interests are not dependent on one another.—*Wilkerson v. Walters*, 1 Idaho, 564.

An action will not lie in a court of equity to enforce a decree against a person not a party to such decree.—*Ray v. Ray*, 1 Idaho, 566.

Equity will not aid one in maintaining an interest in leased premises, acquired by him with full knowledge that his acquisition thereof was contrary to the express covenants of the lease.—*Aveline v. Eidenbaugh*, 2 Idaho, 168, 9 Pac. 601.

A judgment creditor is without an adequate legal remedy when the title of the defendant's property is clouded by a fraudulent assignment thereof and by another judgment which, though fraudulent, is held a prior lien, and the property is in the hands of a receiver to be sold for the benefit of such fraudulent judgment.—*Martin v. Atchison*, 2 Idaho, 624, 33 Pac. 47.

Where, in a suit to quiet title to certain mining claims, certain interests therein are sold pursuant to stipulation of the parties and the proceeds paid into court to abide the adjudication, the court has jurisdiction to determine whether or not plaintiffs are entitled to such proceeds, under the rule that equity does not favor a multiplicity of suits.—*Pence v. Sweeney*, 3 Idaho, 181, 28 Pac. 413.

A court of equity, having obtained jurisdiction of a cause for any purpose, may retain it for all purposes, and proceed to a determination of all matters in issue.—*Burke Land etc. Co. v. Wells, Fargo & Co.*, 7 Idaho, 42, 60 Pac. 87.

As far as possible, courts of equity should adapt their practice to existing conditions, and should not too strictly adhere to rules and forms established under different circumstances, and decline to administer justice and enforce rights for which there is no other remedy.—*Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733.

Under the rule that a court of equity will not relieve a party where he has had a plain, speedy and adequate remedy at law, of which he has negligently failed to take advantage, relief will not be granted against the judgment of a justice from which no appeal has been taken.—*Presley v. Dean*, 10 Idaho, 375, 79 Pac. 71.

A complaint to vacate a judgment and restrain its enforcement at law alleged that without the knowledge or fault of plaintiff, and for no cause whatever, except the fraud of his counsel, an appeal from said judgment

was dismissed for not filing the printed record on appeal; that plaintiff's counsel, keeping him in ignorance, afterward ineffectually sought to reinstate said appeal; that as soon as plaintiff ascertained these facts, he procured other counsel, who likewise failed in an effort to have said appeal reinstated; that on account of said fraud of counsel and the further fact that said counsel is entirely financially irresponsible, plaintiff is without other remedy and has been deprived of his day in court; that there were fatal errors in the rulings of the trial court in the original suit, and that the judgment was erroneous for numerous reasons specified. Held, that the allegations of fraud were insufficient to warrant equitable interference.—*Jones v. Vane*, 11 Idaho, 353, 82 Pac. 110.

Equity will not lend its aid in an original proceeding in the district court to set aside an order or judgment of the probate court of which the latter court had jurisdiction, unless it is shown that fraud has been perpetrated in the probate court.—*Abrams v. White*, 11 Idaho, 497, 83 Pac. 602.

Under our constitution and statutes equitable jurisdiction exists and will be exercised in all cases and under all circumstances where the remedy at law is not adequate, complete and certain so as to meet all the requirements of justice.—*Coleman v. Jaggars*, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894.

Courts of equity can no more disregard statutory requirements and provisions than can courts of law, and whenever the rights or the situation of parties are clearly defined and established by the provisions of the statute, equity has no power or jurisdiction to change or unsettle those rights or that situation; but in all such cases the maxim, "*Equitas sequitur legem*," is applicable.—*Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052.

The maxim, "He who seeks equity must do equity," will be applied in an action to quiet title and secure a cancellation of the sheriff's deed under foreclosure where the plaintiff relied on a tender of the amount due under the foreclosure sale and an extinguishment of the mortgage lien by refusal to accept such tender.—*Kelley v. Clark*, 23 Idaho, 31, 129 Pac. 921.

Editorial Notes.

Ignorance of the law as a ground for relief: 10 Am. Dec. 323.

Ignorance of one's own rights as a ground of relief: 55 Am. St. Rep. 494.

Exceptions to the rule that court assuming jurisdiction for one purpose will retain it for all purposes: 116 Am. St. Rep. 877.

Rule that equity assuming jurisdiction for one purpose will retain it for all purposes: Ann. Cas. 1912A, 803.

Multiplicity of suits to quiet title and obtain possession of distinct tracts of land, preventing in equity: 126 Am. St. Rep. 991.

Relief from mistake of law as to effect of instrument: 28 L. R. A., N. S., 785.

Multiplicity of actions arising out of single tort: 20 L. R. A., N. S., 848; 35 L. R. A., N. S., 491; 40 L. R. A., N. S., 464.

II. LACHES AND STALE DEMANDS.

Laches on part of remainderman as against co-remainderman in failing to contribute to taxes. See Tenancy in Common, II.

Equity does not favor stale demands, and will not interfere where there has been gross laches in commencing a proper action or long acquiescence in the assertion of adverse rights. Ryan v. Woodin, 9 Idaho, 525, 75 Pac. 261.

The doctrine of laches in the prosecution of an action, when the delay does not amount to a bar by any statute of limitations, does not apply where the relative position of the parties has not been materially changed since the time when the cause of action accrued, and the delay has worked no wrong or serious inconvenience to the adverse party, so that substantial justice can still be done between the parties.—Just v. Idaho Canal etc. Co., 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Where laches is plead as a defense in an action to have a deed declared a mortgage and for a release of the same on payment of the amount due, the facts and circumstances of the case must govern the court in determining the sufficiency of such defense.—Bergen v. Johnson, 21 Idaho, 619, 123 Pac. 484.

Editorial Notes.

Laches, when equity will refuse relief because of: 54 Am. Dec. 130; 2 Am. St. Rep. 795; 23 Am. St. Rep. 148.

III. PARTIES AND PROCESS.

Parties. See Parties.

Process. See Process.

See, also, titles of particular equitable proceedings.

IV. PLEADING AND EVIDENCE.

See Pleading, Evidence, and titles of particular equitable proceedings.

The old rules of chancery pleading are abolished by the code.—Wa Ching v. Constantine, 1 Idaho, 266.

In the trial of equity cases, courts are very liberal in the admission of evidence, the theory being that in the final determination of the action, only such evidence as is competent and pertinent to the issues will be considered.—Small v. Harrington, 10 Idaho, 499, 79 Pac. 461.

A court of equity has inherent power to order bills of particulars in proper cases.—Nelson Bennet Co. v. Twin Falls L. etc. Co., 14 Idaho, 5, 93 Pac. 789.

V. HEARING AND SUBMISSION OF ISSUES TO JURY.

In particular equitable actions. See Creditor's Suit; Cancellation of Instruments; Divorce; Injunction; Mechanics' Liens; Mortgages; Partition; Quieting Title; Specific Performance, etc.

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Failure to object to trial of equity action by jury.

See Appeal and Error, V, (B).

Constitutional right to trial by jury. See Jury, II.

No suit in equity can proceed to a decree upon the verdict of a jury as the foundation thereof, but if a jury is called it must be to aid the judge in determining questions of fact which, when found, are the findings of the court, and the decree must be the result of the judgment of the court or judge.—Ramsay v. Hart, 1 Idaho, 423.

In equity it is within the discretion of the court to submit both legal and equitable issues to the jury, since their verdict is merely advisory.—Houser v. Austin, 2 Idaho, 204, 10 Pac. 37.

Where a demand is made for a jury to assess damages in an equity case, the trial court may submit the issue of damages to a jury.—Stocker v. Kirtley, 6 Idaho, 795, 59 Pac. 891; Lindstrom v. Hope Lbr. Co., 12 Idaho, 714, 88 Pac. 92.

In an equity case the court may submit questions of fact to a jury and adopt or reject their findings in his discretion.—Pritchard v. Butler, 4 Idaho, 518, 43 Pac. 73; Brady v. Yost, 6 Idaho, 273, 55 Pac. 542; Gordon v. Lemp, 7 Idaho, 677, 65 Pac. 444.

In an equity case the court has the right to reject or adopt any or all the findings of the jury or to prepare its findings independent of those of the jury.—Brady v. Yost, 6 Idaho, 273, 55 Pac. 542; Gordon v. Lemp, 7 Idaho, 677, 65 Pac. 444; Curtis v. Kirkpatrick, 9 Idaho, 629, 75 Pac. 760.

Where, in an equity suit, the jury fails to find on the issue of damages raised by the cross-complaint, the court should make findings thereon before entering judgment.—Sandstrom v. Smith, 12 Idaho, 446, 86 Pac. 416.

A court may adopt the findings of a jury in an equity case as the findings of the court and base its judgment thereon.—Sandstrom v. Smith, 12 Idaho, 446, 86 Pac. 416.

VI. MASTERS AND COMMISSIONERS.

Reference and referees. See Reference.

VII. DECREE AND ENFORCEMENT THEREOF.

See Judgment, and titles of particular equitable actions.

For the sake of harmonizing the practice in legal and equitable cases and to give effect to the spirit of our code, we incline to the opinion that the better practice is to proceed against a decree in order to annul or set it aside in the same manner as against a judgment rendered in the court of law.—Oro Fino Min. Co. v. Cullen, 1 Idaho, 113.

An action will not lie in a court of equity to enforce a decree against a party to such decree, where he remains within the jurisdiction, and is amenable to the process of the court which rendered the decree.—Ray v. Ray, 1 Idaho, 566.

VIII. BILL OF REVIEW.

Review by superior court of actions of inferior tribunals for causes not grounds of appeal or writ of error. See Certiorari.

After a defendant has demurred to a bill of review, he cannot raise an objection to the right of plaintiff to file it; such objection should be taken by motion to strike the bill from the files or to dismiss the suit.—Hyde v. Lamberson, 1 Idaho, 539.

Leave to file a bill of review which seeks to correct an error not apparent upon the decree, which it seeks to reverse, is within the discretion of the court.—Hyde v. Lamberson, 1 Idaho, 539.

A bill of review to reverse a decree erroneous upon its face, by analogy to the time for taking appeals, must be filed within one year after its enrollment, and the same rule applies to a bill brought for the same purpose where the decree itself shows no error, but the error is afterward discovered, when the same period of time has elapsed after the discovery of the error.—Hyde v. Lamberson, 1 Idaho, 539.

A bill of review must be prosecuted within the time allowed by law for the prosecution of an appeal or writ of error.—McMillan v. Wooley, 6 Idaho, 36, 51 Pac. 1029.

To secure relief from a judgment by bill of review, the plaintiff must show, by his complaint, a good cause or ground for granting him a new trial in the action; that time for applying for the relief under the provisions relating to new trials, or to have the judgment set aside on the ground of mistake, surprise or excusable neglect has expired; that he could not obtain the relief by appeal; that he has been guilty of no laches or blunders in protecting his rights; and that, by reason of fraud, mistake or surprise over which he had no control, he is entitled to a new trial, which, only by the interposition of equity, he can or could have obtained by the exercise of reasonable diligence.—McMillan v. Wooley, 6 Idaho, 36, 51 Pac. 1029.

Editorial Notes.

Bills of review, their nature and scope: 20 Am. Dec. 160.

ESCAPE.

Civil liabilities of officers for permitting escape. See Sheriffs and Constables, etc.

Statute providing punishment does not contravene former jeopardy rule. See Criminal Law, VII.

Under R. S. 6452, providing that every territorial prisoner confined in the territorial prison for a term less than for life, who escapes therefrom, is punishable by imprisonment for a term equal in length to that which he was serving, said term to commence from the time he would otherwise have been discharged, a prisoner who escapes while serving a term in the state prison may be tried for such escape before the expiration of his original sentence.—Hays v. Stewart, 7 Idaho, 193, 61 Pac. 591.

R. C. 6456, which provides that "every person who willfully assists any prisoner con-

fined in any prison or in the lawful custody of any officer or person to escape, or in an attempt to escape from such prison or custody is guilty of a felony," is not applicable to the prosecution of one who is charged with assisting a juvenile delinquent to escape from custody under the provisions of the juvenile delinquent law, Laws 1905, page 106.—In re Small, 19 Idaho, 1, 116 Pac. 118.

Editorial Notes.

Criminal liability for escape as depending on lawfulness of imprisonment: Ann. Cas. 1912C, 757.

ESCHEAT.

Right of succession by nonresident alien. See Aliens.

R. S. 5715, provides that no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of decedent under whom he claims. R. S. 5716 provides that the district court, on information, must direct the attorney general to reduce the property to his possession, when such succession is not claimed, or cause the same to be sold and the proceeds to be deposited in the state treasury for the benefit of such nonresident foreigner, to be paid to him or his representative whenever, within five years after such deposit he may adduce proof of his title thereto. Held, that where such succession is not claimed by a nonresident foreigner within five years after the death of a decedent, real estate of such decedent escheats to the state to be disposed of as provided by R. S. 5716. State v. Stevenson, 6 Idaho, 367, 55 Pac. 886.

Where title to land fails for want of heirs, it escheats to the state by operation of law, no proceedings being necessary to declare such escheat.—State v. Stevenson, 6 Idaho, 367, 55 Pac. 886.

Editorial Notes.

Escheat, what is and proceedings to perfect: 29 Am. Dec. 232.

Property subject to escheat to state: Ann. Cas. 1912D, 382.

Presumptions and burden of proof in proceeding to establish escheat: Ann. Cas. 1913E, 383.

Termination of right to declare escheat by death of alien or transfer in his lifetime: 9 L. R. A., N. S., 186.

ESCROWS.

Delivery of deed in escrow to grantees. See Deeds, I, (D).

Effect on question of delivery of holding consideration in escrow. See Deeds, I, (D).

Admissibility of deed to show transfer of title if delivery was made. See Deeds, IV.

Representation of bank by cashier in delivery of money or paper contrary to terms of escrow agreement. See Banks and Banking, III, (B).

On fulfillment of the conditions of an escrow agreement and the delivery of the deed to the grantee, the deed will relate back to the date of the escrow agreement so as to cut off any intervening rights or equities acquired

by a third party who had notice of the terms and conditions of the escrow.—Whitmer v. Schenk, 11 Idaho, 702, 83 Pac. 775.

A deed was placed in escrow to be delivered to "A" upon his paying the purchase price within a specified time. Prior to the expiration of such time the grantor conveyed the property to a third person who had notice of the escrow agreement and of the terms and conditions thereof. "A" failed and neglected to make the payment due on the escrow, made no demand for the escrow deed and no offer of payment either to the grantor or holder of the escrow and was not hindered or dissuaded from so doing by any of the parties. Held, that "A" forfeited all his rights under the escrow.—Whitmer v. Schenk, 11 Idaho, 702, 83 Pac. 775.

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Plaintiff agreed with interveners to pay \$7,100 for a certain mining claim, paid \$100 in cash, agreed to pay the balance on February 3, 1905, and to pay the expense of procuring a patent to the mining claim, time being expressly made of the essence of the contract. Thereafter on the date specified, plaintiff deposited \$7,000 with the bank, as provided by escrow agreement, with instructions to hold the same until the receiver's receipt for the patent of the mining claim should be issued, and thereafter such receipt was procured and filed by interveners and interveners refused to return the money to plaintiff on his claim that they had not fulfilled their agreement. Held, that plaintiff was entitled to his deed from interveners and their acceptance and retention of said amount legally relieved from payment of the cost of procuring patents.—Hunt v. Capital State Bank (on rehearing), 12 Idaho, 588, 87 Pac. 1129.

Plaintiff agreed with interveners to pay \$7,100 for a certain mining claim, paid \$100 in cash, agreed to pay the balance on February 3, 1905, and to pay the expense of procuring a patent to the mining claim, time being expressly made of the essence of the contract. Thereafter on the date specified, plaintiff deposited \$7,000 with the bank, as provided by escrow agreement, with instructions to hold the same until the receiver's receipt for the patent of the mining claim should be issued and thereafter such receipt was procured and filed by interveners. Held, that the bank was justified in paying the money to interveners after said receipt was

so procured.—Hunt v. Capital State Bank, 12 Idaho, 588, 87 Pac. 1129.

Where the purchaser tenders to the bank holding a deed in escrow a check for the balance of the purchase money due under the terms of the escrow agreement, and the bank offers to cash the check, the tender is sufficient.—Kessler v. Pruitt, 14 Idaho, 175, 93 Pac. 965.

An escrow contract provided that "upon payment of the balance of the purchase money aforesaid, parties of the first part will furnish second party an abstract of title of said premises." Held, that it was not error to refuse to permit one of the parties to the contract to testify as to the meaning of the word "upon" as used therein.—Kessler v. Pruitt, 14 Idaho, 175, 93 Pac. 965.

Where an escrow agreement provides that a certificate of stock is to be held by a bank as security for the payment of a promissory note to S., and upon failure to pay such note the bank is authorized and instructed to deliver such certificate to S., in whose name the same has been issued, the bank may deliver such certificate to S. on failure to pay the note at maturity.—Haynes v. Griffith, 16 Idaho, 280, 101 Pac. 728.

Evidence held to show that the escrow was deposited with the bank for delivery upon terms stated in escrow agreement, and that the bank delivered the same contrary to the provisions of such agreement, and is liable.—Brown v. Citizens' State Bank, Ltd., 17 Idaho, 716, 107 Pac. 405.

The settlers on an arid tract of land formed a corporation, which at the instigation of plaintiff company was incorporated for the purpose of procuring the settlers to purchase the stock of such settler's corporation. Plaintiff company then contracted with the corporation so formed to build at its own expense a complete power and pumping plant and irrigation system of size and capacity sufficient to irrigate said lands, in consideration of the building of which system plaintiff was to receive the entire authorized capital stock of the settler's company, the system to be completed May 1, 1910. The agreements of the settlers to purchase the stock of the corporation so formed were placed in escrow to be delivered to plaintiff on completion of its contract. The aggregate amount of money payable under the settler's agreement to purchase stock was \$230,000. Plaintiff company ceased work in April, 1910, after expending \$15,000 to \$17,000 on canals and the settlers were forced to lose their lands or make other arrangements for water. Held, that the settlers were justified in withdrawing their applications to purchase stock.—Crane Falls etc. Co. v. Snake River Irr. Co., 24 Idaho, 63, 133 Pac. 655.

Editorial Notes.

Deeds, when remaining in escrow and when deemed presently operative: 28 Am. Dec. 408.

Negotiable instruments deposited in escrow and put in circulation without authority: 11 Am. St. Rep. 314.

Escrow, deeds delivered in: 53 Am. St. Rep. 555.

Escrows: 130 Am. St. Rep. 910.

Necessity for actual contract between parties to constitute escrow: Ann. Cas. 1912B, 1343.

Proof of escrow agreement by parol: 18 L. R. A., N. S., 337.

Delivery of deed in escrow as change of title or interest: 38 L. R. A., N. S., 142.

ESTATES.

Creation and transfer of estates. See Deeds; Wills; Descent and Distribution, and other specific heads. Decedent's estate. See Descent and Distribution; Executors and Administrators.

Easement. See Easements.

Separate estate of married woman. See Husband and Wife.

The general and prevailing rule that, where legal and equitable titles both meet in the same person, the equitable title is merged in the legal title, is subject to the restriction that the merger takes place where the legal and equitable estates are coextensive and commensurate and where it will not be inequitable or to the disadvantage of the person who is honestly seeking to protect his rights.—*Wilson v. Linder*, 21 Idaho, 576, Ann. Cas. 1913E, 148, 42 L. R. A., N. S., 242, 123 Pac. 487.

Editorial Notes.

Merger of estates as dependent upon intention of parties: 7 Ann. Cas. 700.

ESTIMATES.

Of arbitrator. See Arbitration and Award.

ESTOPPEL.

I. BY RECORD.

II. BY DEED.

III. EQUITABLE ESTOPPEL.

Of particular classes or relations of persons. See Attorney and Client; Corporations; Husband and Wife; Infants; Landlord and Tenant; Master and Servant; Partnership; Principal and Agent; and other specific heads.

Estoppel to Deny or Assert Particular Facts, Rights, Property or Liabilities:

Agency. See Principal and Agent.

Authority of officers and agents of corporations. See Corporations.

To claim title to goods sold on execution. See Execution, VI.

Preventing plea of usury. See Usury, I.

Affecting right of appeal. See Appeal and Error, IV, (B).

Estoppel to allege error. See Appeal and Error, XVI, (C).

By election of remedies. See Election of Remedies. Estoppel to claim title by adverse possession. See Adverse Possession.

Of state to question act establishing county. See Counties, I, (B).

County not estopped to claim funds deposited by receipt of pro rata payment from insolvent bank. See Depositaries.

By acquiescence in irregularity in conduct of sale. See Judicial Sales.

Of contractor to make claim for extra work. See Highways, III.

Of railroad company to claim contract not signed by agent or officer. See Specific Performance, II.

Of married woman to resist specific performance of oral agreement to convey homestead, where purchaser has performed. See Specific Performance, II.

Estoppel to avoid insurance policy. See Insurance, XI.

Estoppel by stipulation. See Stipulations.

Bond staying foreclosure proceedings, right of action where foreclosure obtained. See Chattel Mortgages, IX, (C).

Of person dealing with corporation to deny incorporation. See Corporations, II.

Of corporations to plead ultra vires. See Corporations, VII, (A).

To question right of foreign corporations to contract. See Corporations, XII, (G).

To dispute boundary line. See Boundaries, II.

Estoppel to foreclose lien claim. See Mechanics' Liens, VI.

Estoppel of parent to claim custody of child. See Parent and Child.

I. BY RECORD.

A junior mortgagee sued his mortgagor and the senior mortgagee to have his mortgage adjudged a prior lien, alleging specific acts of fraud on the part of the senior mortgagee, by which he was induced to accept his junior mortgage. Judgment was rendered in favor of defendants and the plaintiff then commenced an action to annul a deed executed to the senior mortgagee as consideration for plaintiff's mortgage, on the ground of fraud in the procurement thereof, alleging the same facts as in the former action. Held, that he was estopped by the former judgment.—*King v. Co-op. Savings etc. Assn.*, 6 Idaho, 760, 59 Pac. 557.

Editorial Notes.

Estoppel by judgment: 13 Am. Dec. 393; 96 Am. Dec. 775.

II. BY DEED.

Purchaser of mortgaged property, when estopped to deny validity thereof. See Mortgages, VI.

The grantee named in a deed of conveyance does not hold in privity with his grantor, but rather holds adversely, and is not therefore estopped to deny the title of his grantor. *Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

Editorial Notes.

Estoppel of purchaser under executory contract of sale to deny his vendor's title: Ann. Cas. 1912C, 404.

Estoppel of grantee or his privies to allege that name in which grantee took title is not his true name: Ann. Cas. 1912C, 620.

III. EQUITABLE ESTOPPEL.

To claim title to goods being sold under execution. See Execution, VI.

Of stockholder to enjoin execution of note and mortgage by corporation. See Corporations, V, (A).

It is error for the court to submit the question of estoppel to a jury by instructions unless it has been pleaded.—*Leland v. Isenbeck*, 1 Idaho, 469.

A party to an action cannot avail himself of the benefits of an estoppel, unless he plead it.—*Leland v. Isenbeck*, 1 Idaho, 469.

In order to create an equitable estoppel there must be an admission, act or declaration intended to influence the conduct of another and actually leading him into a line of conduct which would be prejudicial to his interests, unless the party estopped be cut off from the power of retraction.—*Leland v. Isenbeck*, 1 Idaho, 469.

A party to be estopped must have had knowledge that his conduct or representations were false, and that the party claiming the benefit of the estoppel was ignorant of the truth, and honestly relied and acted upon the statement or act which is claimed to work the estoppel.—*Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37.

One corporation purchased all the property and assets of another corporation, agreeing to pay therefor a specified sum due from the selling corporation to a third corporation. The conveyance was made subject to two mortgages in favor of such third corporation, securing the amount due from the selling corporation and the purchase price was the amount of such indebtedness. The mortgagees had possession of the mortgaged property at the time of the sale and orally agreed to the transfer and that the mortgages should stand as security for the whole of the purchase price. Held, that the purchaser was estopped to deny that the mortgages secured the whole of the purchase price, though they were originally given to secure a less sum.—*Burke Land etc. Co. v. Wells, Fargo & Co.*, 7 Idaho, 42, 60 Pac. 87.

W., being found indebted to the county upon a settlement of his accounts as sheriff, compromised such indebtedness by giving his note for a certain sum, with the other defendants as joint makers. In an action upon such note by the county, defendant pleaded ultra vires, and that plaintiff had no authority to accept such compromise. Held, that the defendant, having accepted the benefit of the compromise, was estopped from pleading ultra vires.—*Fremont County v. Warner*, 7 Idaho, 367, 63 Pac. 106.

Where the purchaser of a promissory note permits the maker thereof to pay the same together with the interest coupons thereon to the payee and fails to notify the maker of his ownership thereof, and the maker makes such payments in good faith, the notes and interest coupons being marked paid and turned over to him on payment thereof, such purchaser is estopped to deny the agency of the payee to collect the notes.—*Morgan v. Neal*, 7 Idaho, 629, 97 Am. St. Rep. 264, 65 Pac. 66; *Pennypacker v. Latimer*, 10 Idaho, 618, 625, 81 Pac. 55.

Where a party to a contract acts upon it, and obtains all the benefits to be derived thereunder, he is estopped from objecting to the same on the ground that he did not sign

it.—*Lane v. Pacific & I. N. Ry. Co.*, 8 Idaho, 230, 67 Pac. 656.

The doctrine of estoppel in pais cannot be applied in favor of the public against the property owner, unless it can be shown that he has stood by, and by his action or silence concurred in allowing the public and individuals to so use and enjoy his property and the right thus initiated, that thereafter to deprive them of it would work an injustice or fraud upon them and invade the right founded on the presumption he has thus allowed to be raised.—*Village of Hailey v. Riley* (on rehearing), 14 Idaho, 499, 95 Pac. 692.

While the doctrine of equitable estoppel does not as a general rule apply to municipal corporations in their representation of public rights and interests, still there are special and peculiar cases in which the municipality will be estopped to assert a stale demand; and such an equitable estoppel in pais will be invoked against the city where its mayor, as trustee, acting under a void legislative act, deeded a portion of a street to an occupant, and the city has recognized private ownership therein for thirty-eight years and the occupant has placed valuable and permanent improvements on such portion of the street, and to allow him to be ejected would work effectual fraud.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

In an action for breach of a promise to marry defendant attacked the validity of several decrees of divorce previously obtained by plaintiff from former husbands. Plaintiff contended that defendant was estopped to urge such defense because he knew the exact status of the plaintiff so far as her divorces from her former husbands were concerned. Held, under the facts, that the law of estoppel does not apply.—*Harpold v. Doyle* (on rehearing), 16 Idaho, 671, 102 Pac. 158.

Where defendant company is engaged in the construction of a canal, and a contract has been let to one D. for the construction of a portion of said canal, and D. abandons such work, and the engineer of defendant in charge of the construction of said canal, authorizes N. to take charge of and continue such work, and promises that the labor performed would be paid, and the general manager of the defendant also agrees that the labor will be paid, and there is no evidence to show that such persons had no authority to make such statements and agreements, or that they acted outside of their authority, and the company in no way repudiates the acts of such persons, but accepts the labor and work done under such employment, and the plaintiff bank purchases time checks issued by N. as evidences of the work done and the amount due, and such purchases are made by the bank in good faith and in the ordinary course of business and in the same manner as other time checks had previously been issued, the defendant is estopped from denying the authority of the engineer, general manager, and bookkeeper in authorizing the employment of labor and agreeing to pay for the same.—*First Nat. Bank v. American Falls etc. Co.*, 20 Idaho, 368, 118 Pac. 668.

A construction company organized to reclaim desert lands under the Carey act was authorized by contract with the state to operate its irrigation system prior to its being turned over to the operating company, required to be organized under said state contract. Held, that if it undertook to furnish water as required by said contract and failed to do so, it would be estopped to claim that it was not liable for the consequent damages because it had no authority to make such agreement.—*Hanes v. Idaho Irr. Co.*, 21 Idaho, 512, 122 Pac. 859.

In order to bind or estop a party under the doctrine of ratification, he must have accepted some benefit under or shared in the fruits of a judgment or other action or proceeding which he is supposed to have ratified. *Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Editorial Notes.

Estoppel by conduct: 13 Am. Dec. 237.

Estoppel arising from admissions or representations: 38 Am. Dec. 631.

Estoppel by acquiescence or silence: 57 Am. Rep. 429; 10 Am. Rep. 22; 28 L. R. A., N. S., 891.

Estoppel in pais as question of law or fact: *Ann. Cas.* 1913A, 1072.

Estoppel of land owner by allowing record title to remain in another: 22 L. R. A. 256.

EVICTION.

Eviction not necessary for breach of covenant. See *Covenants*, III.

EVIDENCE.

I. JUDICIAL NOTICE.

II. PRESUMPTIONS.

III. BURDEN OF PROOF.

IV. RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

(B) *Res Gestae*.

(C) Similar Facts and Transactions.

(D) Materiality.

(E) Competency.

V. BEST AND SECONDARY EVIDENCE.

VI. DEMONSTRATIVE EVIDENCE.

VII. ADMISSIONS.

VIII. DECLARATIONS.

IX. HEARSAY.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records and Certificates.

(B) Exemplifications, Transcripts and Certified Copies.

(C) Private Writings and Publications.

(D) Production, Authentication and Effect.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying or Adding to Terms of Written Instrument.

(B) Invalidating Written Instrument.

(C) Separate or Subsequent Oral Agreement.

(D) Construction or Application of Language of Written Instrument.

(E) Showing Discharge or Performance of Obligation.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

(B) Subjects of Expert Testimony.

(C) Competency of Experts.

(D) Examination of Experts.

(E) Comparison of Handwriting.

(F) Effect of Opinion Evidence.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDINGS.

XIV. WEIGHT AND SUFFICIENCY.

Acknowledgment and record of written instruments.

See *Acknowledgment*; *Records*.

Admissibility of evidence as dependent on pleadings, and what constitutes variance and its effect. See *Pleading*.

Competency of witnesses, attendance and production of documents by witnesses, and examination and credibility of witnesses. See *Witnesses*.

Depositions. See *Depositions*.

Practice in reception of evidence. See *Trial*.

Correction of errors and review of decisions as to admission or rejection of evidence or involving its weight or sufficiency. See *Exceptions*, *Bill of*; *New Trial*; *Appeal and Error*.

Province of court and jury as to questions of fact, and instructions to jury on weight and sufficiency of evidence. See *Trial*.

Evidence in criminal prosecutions. See *Criminal Law*; and titles of particular crimes.

Evidence in actions for particular forms of relief. See *Divorce*; *Ejectment*; *Partition*; *Specific Performance*; and other specific heads.

Evidence to sustain particular causes of action or defenses thereto. See *Contracts*; *Torts*; and specific heads.

Evidence in civil proceedings other than actions. See *Habeas Corpus*; *Mandamus*; and other titles.

Exclusion of evidence for failure to furnish copy of account. See *Pleading*, IX.

Leading questions. See *Witnesses*, III, (A).

Nature, scope and limits of cross-examination. See *Witnesses*, III, (B).

Credibility and impeachment of witnesses. See *Witnesses*, IV.

Damages in general. See *Damages*, VIII.

Legislative authority to prescribe what shall be considered as evidence. See *Constitutional Law*, VI.

I. JUDICIAL NOTICE.

In criminal prosecution. See *Criminal Law*, X, (A). Court not required to take judicial notice of presence of witnesses. See *Costs*, VI.

Courts will take judicial cognizance of their own officers.—*People v. Butler*, 1 Idaho, 231.

Courts will not take judicial notice of city ordinances; they must be proved either by the record or by a certified copy thereof.—*People v. Buchanan*, 1 Idaho, 681.

The supreme court cannot take judicial notice of the adjournment of the terms of the district court and such matter will not be considered on appeal unless shown by bill of exceptions or in some other legal manner.—*Baker v. Knott*, 3 Idaho, 700, 35 Pac. 172; *State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

Though the court must take judicial notice of the constitutional methods provided for raising revenue, it cannot take notice of the amount so raised and received until it is shown that the income for the two years for which the legislative appropriations are made is not sufficient to meet such appropriations, but will assume that the legislature kept within the constitutional limits.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

The court will take judicial knowledge of the number of votes cast in a county at the last general election.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

The supreme court will not take judicial notice of the rules adopted by the district courts.—*Powell v. Springston Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

The courts of this state will not take judicial notice of the laws of a sister state.—*Maloney v. Winston Bros. Co.* (on rehearing), 18 Idaho, 740, 111 Pac. 1080.

The court will not take judicial notice of the fact that, in a given year, the county commissioners of a specified county must have levied school taxes and special road taxes.—*White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 113 Pac. 674.

In determining the sufficiency of the description of property in a lien claim the court will take judicial notice that Boise City is in Ada county, state of Idaho.—*Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

The court will take judicial notice that all townships in Nez Perce county are situated north of the base line.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

Judicial notice may be taken of the size and location of the city of Lewiston.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069.

The court will take judicial notice that the public surveys in this state are computed from the Boise meridian.—*Wilson v. Jarron*, 23 Idaho, 563, 131 Pac. 12.

Editorial Notes.

Judicial notice: 89 Am. Dec. 663.

Judicial notice, laws, proof of, when necessary and how to be made: 11 Am. Dec. 780.

Judicial notice of what liquors are intoxicating: 12 Am. St. Rep. 353; 20 L. R. A. 648; 19 L. R. A., N. S., 848.

Judicial notice of boundaries and localities: 82 Am. St. Rep. 439.

Judicial notice of usage or custom: Ann. Cas. 1912A, 397; 12 Ann. Cas. 430.

Judicial notice of proceedings in other causes: Ann. Cas. 1913A, 140; 12 Ann. Cas. 537.

Judicial notice of geographical facts: 12 Ann. Cas. 927.

Judicial notice of foreign laws: 67 L. R. A. 33.

II. PRESUMPTIONS.

In criminal proceedings. See Criminal Law, X, (A), and titles of particular crimes.

On appeal. See Appeal and Error, XVI, (E).

Presumption that common law prevails in other state.

See Common Law.

Where a party is proved to have caused a witness to have absented himself from the trial, the presumption arises that the evidence of such witness, if given, would be against such party's interest.—*Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37.

In the absence of pleadings and proof as to what the laws are in another state, the courts of this state will assume that the laws prevailing in a foreign state are the same as the laws of this state.—*Maloney v. Winston Bros. Co.* (on rehearing), 18 Idaho, 740, 111 Pac. 1080.

H. was married in August, 1857, and on April 1, 1871, he abandoned his wife and did not live with her nor support her thereafter. On March 14, 1880, he married B. and continuously lived with her as her husband until he died in 1908. Six children were born of the second marriage. At the time of the marriage B. did not know that H. had not obtained a divorce from his former wife and entered into such marriage in good faith. There was some evidence to show that H. had under consideration and had taken some steps toward securing a divorce before he married B. Held, to raise a presumption of fact that a divorce had been obtained by H. before he married B.—*Huff v. Huff*, 20 Idaho, 450, 118 Pac. 1080.

Where application is made for a ferry license and a license is authorized and granted by the board of county commissioners, it will be presumed that the board performed their duties as required by law and that such license was issued according to law and is valid upon its face, and in the absence of evidence to the contrary is prima facie sufficient to show the right of the party to whom the license was issued to construct and operate such ferry.—*Sims v. Milwaukee Land Co.*, 20 Idaho, 513, 119 Pac. 37.

The presumption is that the officers of a city act according to law in matters pertaining to their office, until the contrary is shown. *Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 201.

Where no proof is shown to the contrary, the presumption arises in the courts of this state that the community property law prevails in a sister state, the same as it prevails in this state.—*Douglas v. Douglas*, 22 Idaho, 336, 125 Pac. 796.

When an accountant is employed by the board of commissioners and audits the accounts of the county officers, the presumption is that a necessity therefor existed and a showing to that effect makes a prima facie case that a necessity existed therefor; but such prima facie case may be rebutted by evidence showing that there was no necessity therefor.—*Prothero v. Board of Commrs.*, 22 Idaho, 598, 127 Pac. 175.

The board of county commissioners under R. C. 1962, 1963, is given a large discretion in the matter of building roads, but the presumption is that they will do their duty and construct and repair roads and bridges in

the county where they are most needed and beneficial to the people of the county.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

It will not be presumed that the board will use the funds arising from the sale of bonds authorized by an election under R. C. 1962, 1968, for the improvement and repair of bridges, for any other purpose than for constructing and repairing roads and bridges in said county.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

Editorial Notes.

Presumption that subsequent purchaser is a purchaser bona fide: 17 Am. St. Rep. 288.

Presumption, validity of statutes creating: 36 Am. St. Rep. 682.

Presumption with respect to alteration in writing: 86 Am. St. Rep. 129; 39 L. R. A., N. S., 100.

Validity of statute making certain facts prima facie evidence: Ann. Cas. 1912A, 465.

Distinction between presumption of law and presumption of fact: 1913B, 897.

Rebuttable presumptions as evidence: Ann. Cas. 1913E, 977; 3 Ann. Cas. 72.

Presumption as basis of presumption: 10 Ann. Cas. 1096.

Presumptions as to law of other state or county: 21 L. R. A. 471; 67 L. R. A. 33.

Presumption from marriage ceremony: 14 L. R. A. 540; 16 L. R. A., N. S., 98; 34 L. R. A., N. S., 940.

III. BURDEN OF PROOF.

In criminal prosecutions. See Criminal Law, X, (A).

Instructions as to burden of proof. See Trial.

The burden of proving unlawful or irregular conduct of officers rests on him who asserts it, since there is no presumption of official irregularity.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

A complaint alleged that there came into the hands of defendant the sum of \$10,000, belonging to plaintiff, that he expended \$6,000 thereof and still has \$4,000, for which judgment was asked. The answer admitted that defendant received \$10,000 and expended \$6,000, alleged that he had expended all of the \$10,000 and \$1,000 in addition thereto and denied that he had in his hands \$4,000 or any other sum or that there was due to plaintiff that amount or any amount. Held, that the burden of proof and affirmative was on the plaintiff.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

Editorial Notes.

Burden of proof, on whom rests: 28 Am. Rep. 308; 33 Am. Rep. 736; 37 Am. Rep. 148.

Burden of proof in fraudulent conveyances: 11 Am. St. Rep. 758.

Burden of proving fairness of transaction: Ann. Cas. 1912A, 704.

Burden of proving husband's debts on account of property received from wife: 56 L. R. A. 817.

Burden of proof as to undue influence respecting gifts inter vivos from parent to child: 35 L. R. A., N. S., 944.

Burden of proof as to bona fides of purchaser claiming against prior unrecorded conveyance or encumbrance: 36 L. R. A., N. S., 1124.

IV. RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL.

In criminal prosecutions. See Criminal Law.

(A) FACTS IN ISSUE AND RELEVANT TO ISSUES.

Rebuttal evidence as to custom of bank. See Banks and Banking, III, (C).

In criminal prosecutions. See Criminal Law, X, (B).

The value of goods alleged to have been sold and delivered may be proved by any competent evidence, oral or written.—*Idaho Mercantile Co. v. Kalkanquin*, 8 Idaho, 101, 66 Pac. 933.

It is not error to admit evidence tending to establish a material issue made by the pleadings.—*Stuart v. Noble Ditch Co.*, 9 Idaho, 765, 76 Pac. 255.

In an action for damages based on negligence, it is irrelevant to prove that the plaintiff or defendant has the reputation of being careful or negligent.—*Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Idaho, 663, 132 Pac. 112.

(B) RES GESTAE.

In criminal prosecutions. See Criminal Law, X, (B).

In order to entitle declarations to be received in evidence as part of the res gestae, they must be a part of an act, and such as may serve to explain or qualify it, and must have been made while such act was being performed.—*Kramer v. Settle*, 1 Idaho, 485.

Whether declarations made after the occurrence of the litigated issue should be admitted as evidence in behalf of the party making them as part of the res gestae rests in the sound judicial discretion of the court. *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

Time is not necessarily a controlling element or principle in the matter of res gestae, and declarations made under circumstances to warrant the court in presuming that they grew out of the litigated issue and illustrate the true character of the transaction and were dependent upon it, and were not designedly made or devised for a self-serving purpose, are evidentiary facts, and are not within the general rule applicable to hearsay testimony. *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

Where a child was struck and killed by a moving train, and the engineer upon stopping the train went back to where the body lay and there made a statement as to having seen the child and what he thought with reference to its actions or movements, and such

statement was made within two or three minutes after the injury was inflicted, such statement is a part of the *res gestae* and is properly admitted in evidence.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

Where a witness, who is not a party to a suit for damages, makes a statement soon after the injury that "the accident was her fault," such evidence is hearsay and opinion evidence and not a statement of facts against interest or part of the *res gestae*, and should be stricken out on motion.—*Wheeler v. Oregon R. R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

Editorial Notes.

Res gestae, what included within: 95 Am. Dec. 51; 58 Am. Rep. 184; 16 Am. St. Rep. 407.

Res gestae, statement of injured persons, when constitutes parts of: 34 Am. Rep. 479.

Res gestae, declarations made immediately after an accident: 36 Am. Rep. 899.

Declaration of bystander at time of accident as part of *res gestae*: Ann. Cas. 1912C, 319.

How near main transaction must declaration be made in order to constitute part of the *res gestae*: 19 L. R. A. 733.

Admissibility as *res gestae* of statements or declarations made by injured person to physician while latter was examining him in order to qualify as a witness: 21 L. R. A., N. S., 826.

Statements made some time after accident as *res gestae*: 42 L. R. A., N. S., 917.

(C) SIMILAR FACTS AND TRANSACTIONS.

Judgment-roll in similar action, admissibility. See Embarrassment.

In an action to recover damages for personal injuries alleged to have been sustained by reason of an assault and battery by the defendant upon the plaintiff, it was not error for the court to admit evidence of the intoxication of the defendant at the time of the assault, and that he had assaulted another person shortly before he committed the battery upon the defendant, and also had assaulted another person shortly thereafter.—*Harshbarger v. Murphy*, 22 Idaho, 261, Ann. Cas. 1914A, 953, 125 Pac. 180.

In an action for damages based on negligence, it is irrelevant to prove that the plaintiff or defendant has, on similar occasions, been careful or negligent.—*Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Idaho, 663, 132 Pac. 112.

Editorial Notes.

Admissibility of evidence of general conduct under proven circumstances to show conduct of same kind under similar circumstances on particular occasion: Ann. Cas. 1913D, 1256.

Admissibility of evidence of condition before and after accident of property whose defects are alleged to have caused injury: 32 L. R. A., N. S., 1084.

(D) MATERIALITY.

In criminal prosecutions. See Criminal Law, X, (D).

All acts and declarations of the parties offered and tending to prove or establish the oral contract alleged in the complaint are admissible in evidence.—*Idaho Mercantile Co. v. Kalanquin*, 7 Idaho, 295, 62 Pac. 925.

In an action against the indorsee of a promissory note indorsed after maturity, evidence of what transpired at the time of the indorsement is admissible.—*Sheffield v. Cleland*, 19 Idaho, 612, 115 Pac. 20.

(E) COMPETENCY.

In criminal prosecutions. See Criminal Law, X, (D).

Competency of experts. See post, XII.

A memorandum kept by a yardman in the employ of plaintiff lumber company giving a description of lumber, the name of the owner of the building to which it was sent, and the name of the teamster to whom the lumber was delivered, is not competent evidence to prove a delivery of the material to the contractor or at the building for which it was furnished, where the teamster was in the employ of plaintiff and not the agent of or in the employ of the contractor.—*Valley Lumber etc. Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24.

The fact that evidence is positive and the pleading under which it is offered is made on information and belief is no reason for striking out such evidence.—*Valentine v. Rosenhaupt*, 19 Idaho, 130, 112 Pac. 685.

A party to a contract may testify as a witness to the fact that he would not have entered into the transaction had he known the truth, or had not the representations been made, where such facts and statements are peculiarly within the knowledge of the witness.—*Broshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Evidence as to a telephone conversation held inadmissible for failure to identify the person carrying on such conversation.—*Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho, 304, 133 Pac. 669.

V. BEST AND SECONDARY EVIDENCE.

Admissibility of original files of probate or justice court. See post, X, (A).

In criminal prosecutions. See Criminal Law, X, (E).

Parol evidence to establish mining partnership. See Mines and Minerals, XII, (E).

Parol evidence of stock brands. See Animals, I.

Parol evidence affecting writings. See post, XI.

Copies of original account-books with parol testimony as to the items thereof are admissible in evidence, where it is shown that the original books have been accidentally de-

stroyed by fire.—*Mills v. Glennon*, 2 Idaho, 105, 6 Pac. 116.

A copy of a letter is properly excluded from evidence where there is no proof that any such letter was ever written or mailed.—*Robinson v. Kinney*, 3 Idaho, 479, 31 Pac. 815.

Evidence as to the contents of a bill of particulars cannot be introduced without first showing that it was lost or destroyed without fault of the party offering such evidence and that he is unable to procure a copy thereof. *Idaho Merc. Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

In a suit brought to set aside a sale of stock of a stockholder for nonpayment of assessments, oral evidence is inadmissible to prove the records of the corporation.—*Corcoran v. Sonora Min. & Mill. Co.*, 8 Idaho, 651, 71 Pac. 127.

The absence of a book of original entries should be accounted for before admitting a memorandum which plaintiff testifies to be a copy from the book made by himself.—*Marchand v. Ronaghan*, 9 Idaho, 95, 72 Pac. 731.

Where a plat of a road district is in evidence, showing the lands included therein, it is not error to permit a witness to state in what road district certain lands are situated. *Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

Where certain facts appear of record or in written instruments, it is error for the court to admit oral testimony of the contents of such records or instruments without first showing their loss or disappearance and the inability to produce the same.—*Keane v. Pittsburg Lead Min. Co.*, 17 Idaho, 179, 105 Pac. 60.

It was not error to sustain a motion to strike out evidence of the contents, character and nature of a written contract, where the contract itself was not produced, and it appeared that it was in existence and could have been produced.—*Idaho Fruit Land Co. v. Great Western B. S. Co.*, 18 Idaho, 1, 107 Pac. 989.

Where the board of county commissioners, upon an application for a ferry license, takes all the steps required by statute, but mislays or loses the papers and documents filed by the applicant, and such papers and documents cannot be produced, and the board has failed to make a record of such proceedings, then and in such case it is proper for the applicant to show by oral testimony what the board in fact did do, and the board's entire proceedings. This would in no way contradict the record of the board, and was the only way to prove the acts of the board, and was the best evidence obtainable for the purpose of proving such matter.—*Sims v. Milwaukee Land Co.*, 20 Idaho, 513, 119 Pac. 37.

Editorial Notes.

Competency of testimony as to contents of document where witness' knowledge is based merely on hearing it read: *Ann. Cas.* 1912D, 790.

Secondary evidence of contents of absent books of account: 52 L. R. A. 604.

VI. DEMONSTRATIVE EVIDENCE.

In criminal cases. See *Criminal Law*, I, (E).

Papers admissible for comparison of handwriting.

See post, XII, (E).

On the trial of an issue as to whether the hay alleged to have been sold was good merchantable hay as provided by the contract of sale, it was error to admit as an exhibit a bundle of such hay for the inspection of the jury, as the jurors had not qualified on the question of whether they knew what good merchantable hay was in the market where this hay was sold; and especially is that true in this case as the sample introduced was not proven to be a fair sample of the hay alleged to have been sold.—*Trego v. Arave*, 20 Idaho, 38, 116 Pac. 119.

Editorial Notes.

Experiments as evidence: 53 Am. St. Rep. 375; 15 L. R. A. 221.

Admissibility in evidence of experiments made in presence of jury: *Ann. Cas.* 1912B, 296.

Admissibility in evidence of experiments tending to show that occurrence could not have happened as alleged: *Ann. Cas.* 1912D, 1264.

Exhibition of article or sample to jury on issue of quality of goods: 35 L. R. A., N. S., 1021.

VII. ADMISSIONS.

Admissions in pleadings. See *Pleading*, III, (C).

As part of the *res gestae*. See ante, IV, (E).

Declarations. See post, VIII.

Hearsay. See post, IX.

In criminal cases. See *Criminal Law*, X, (F).

Offers of settlement not accepted are not admissible against the party making them on the trial of the action.—*Sebree v. Smith*, 2 Idaho, 359, 16 Pac. 915; *Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868; *Moore v. Evans*, 24 Idaho, 153, 132 Pac. 971.

Testimony of an engineer who surveyed defendant's mining claim that a certain "compromise" monument was pointed out to him by the parties who then claimed the ground, established by them for the mere purpose of showing where they understood the location to be, and that he referred to such monument only to show how and in what manner he had made the survey, is admissible in an action to ascertain the ownership of the claims, no attempt being made to establish the boundary by means of such parcel compromise.—*Stemwinder Min. Co. v. Emma & Last Chance Consol. Min. Co.*, 2 Idaho, 456, 21 Pac. 1040.

The admissions or statements of the assignor of chattels, in derogation of his title thereto, made prior to his transfer of the same, cannot be introduced in evidence against the title of his assignee who purchased the same in good faith, without knowledge of such statements or admissions.—*Deasey v. Thurman*, 1 Idaho, 775.

Where a complaint charges a conspiracy between defendants to defraud plaintiffs and plaintiffs make a *prima facie* case, they are

entitled to prove the several or individual acts or statements of any one of the conspirators made or done in furtherance of the object of the conspiracy.—*Shields v. Buddy*, 3 Idaho, 148, 28 Pac. 405.

A paper in the form of an answer, verified by the defendants, admitting the allegations of the complaint and consenting to judgment as prayed for in the complaint, is a sworn admission of the defendants and admissible in evidence, though such sworn statement was made without the knowledge or consent of defendant's attorneys.—*Pence v. Sweeney*, 3 Idaho, 181, 28 Pac. 413.

A receipt and relinquishment signed by the defendants, though made without the knowledge or consent of the attorneys of record, are competent evidence in favor of plaintiffs.—*Pence v. Sweeney*, 3 Idaho, 181, 28 Pac. 413.

Where a writing is introduced as an admission, and not as a part of the contract between the parties, it is always permissible for the party who wrote it and against whom it was introduced to explain the meaning that he intended to convey.—*Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

Statements and admissions made by a party to a suit may be put in evidence by the opposing party without calling the party's attention to them or laying any foundation for impeachment.—*Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

Where plaintiff offers in evidence a mortgage wherein the indebtedness claimed is acknowledged by the mortgagor and defendant offers no evidence to disprove the same, a verdict for defendant is error.—*Montandon v. Wingert*, 5 Idaho, 185, 47 Pac. 814.

Declarations of a grantor made long prior to his deed, and inconsistent therewith are not admissible to impeach such deed.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

Declarations made by the owner, while in possession, adversely to his title, are admissible in evidence against himself and those claiming under him.—*Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442.

The acts and declarations of a party against his own interest, whether made in or out of court, are admissible against him, but not if self-serving.—*Work Bros. v. Kinney*, 8 Idaho, 771, 71 Pac. 477.

Declarations of a chattel mortgagor, after the execution of the mortgage, as to his purpose, or any other statement touching the bona fides of the mortgage, are inadmissible, unless the mortgagee was a party to the unlawful purpose of the mortgagor.—*Myer v. Munro*, 9 Idaho, 46, 71 Pac. 969.

Statements by a person not shown to be an agent or employee of the party against whom such statements are sought to be introduced are incompetent.—*Axtell v. Northern Pac. R. Co.*, 9 Idaho, 392, 74 Pac. 1075.

The question whether in an offer of compromise an extrinsic or independent fact has been admitted by one of the parties is a question to be determined by the court and not

left to the jury.—*Whitney v. Cleveland*, 13 Idaho, 558, 91 Pac. 176.

An offer to compromise a cause of action is not admissible in evidence over the objection of the opposing party.—*Whitney v. Cleveland*, 13 Idaho, 558, 91 Pac. 176.

Though an offer of compromise is inadmissible, an independent admission of an extrinsic fact made in such offer is admissible.—*Whitney v. Cleveland*, 13 Idaho, 558, 91 Pac. 176.

Where a writing of a witness is offered in evidence which seems to impeach or contradict such witness, it is the privilege of the witness to explain such writing if he can and to detail the circumstances under which the same were made.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 249, 93 Pac. 954.

Where a prior affidavit of one of the parties to an action is introduced by his opponent, it is error to refuse to permit the party who made the affidavit to explain the statements therein contained and the circumstances and conditions under which it was made.—*Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441.

Where an amended complaint is filed, it is error to reject the original complaint when it is offered in evidence to show that some statements or allegations in it contradict the allegations made in the amended complaint, though the original complaint was verified by plaintiff's attorney.—*Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574.

The declarations of a grantor of real estate, in regard thereto and to mining claims adjoining, are admissible in an action concerning the title of such claims, provided the declarations were made prior to the time such declarant sold his interest therein, but declarations made thereafter are not admissible.—*Bismark etc. Min. Co. v. North Sunbeam Gold Co.*, 14 Idaho, 516, 95 Pac. 14.

Statements and admissions by deed, mortgage or otherwise derogatory to his title or the interest previously conveyed, made by a grantor, subsequent to parting with title, are not admissible against or binding upon the grantee, who had previously acquired the title to the property.—*Josslyn v. Daly*, 15 Idaho, 137, 96 Pac. 568.

In an action for recovery on a life insurance certificate, it is error for the trial court to exclude the proofs of death which have been furnished by the beneficiary, where the same are offered in evidence on the trial by the insurance society.—*Rasicot v. Royal Neighbors of America*, 18 Idaho, 85, 138 Am. St. Rep. 180, 108 Pac. 1048.

An admission made by the contractor in the course of the performance of his contract or upon the completion thereof as to having no claims for extras against the owner of the building is admissible against the surety in an action where the surety seeks to foreclose a materialman's lien for materials furnished in the construction of the building.—*Sanders v. Keller*, 18 Idaho, 590, 111 Pac. 350.

Where a section foreman for a railroad company is charged with the duty of making

written reports to his employer as to fires occurring along the track or line of road within his section, and as to the cause of such fires, in an action against the railroad company for carelessly and negligently setting a fire whereby plaintiff was damaged, it is not error for the court to admit a report made by the section foreman as to the time, place and circumstances of such fire.—*Hilbert v. Spokane International Ry. Co.*, 20 Idaho, 54, 116 Pac. 1116.

Statements made by a station agent as to the cause of fire which started in timber along the railroad track or right of way, and as to the particular engine which probably set the fire, are not admissible against the company in an action prosecuted against the company for the recovery of damages caused by a fire set along or near the company's road and right of way.—*Hilbert v. Spokane Int. Ry. Co.*, 20 Idaho, 54, 116 Pac. 1116.

Where demand is shown to have been made for the amount claimed under the contract, it is error to exclude testimony showing the conversation between the parties at the time the demand is made.—*Culver v. Kehl*, 21 Idaho, 595, 123 Pac. 301.

Where a cause of action is based upon an oral contract, it is proper for the respective parties to prove the conversations had between the parties subsequent to the time the contract is made for the purpose of showing whether there has been a breach of the provisions of such contract.—*Culver v. Kehl*, 21 Idaho, 595, 123 Pac. 301.

In an action by a purchaser of stock in a corporation to restrain an assessment on the ground that such assessment was in violation of a promoters' contract, ratified by the corporation, questions propounded to the president of the corporation on cross-examination, tending to show the representations made by him to plaintiff, as to the promoters' agreement, and to his acts thereunder, held properly admitted.—*Mantle v. Jack Waite Min. Co.*, 24 Idaho, 613, 135 Pac. 854.

Statements made by an officer and director of a corporation relative to a stockholders' meeting were admissible as against the corporation.—*Mantle v. Jack Waite Min. Co.*, 24 Idaho, 613, 135 Pac. 854.

Editorial Notes.

Admissions and declarations of agents, when evidence against principal: 53 Am. Dec. 773.

Probative force of admission by party of fault or responsibility for accident: 15 L. R. A., N. S., 1096.

VIII. DECLARATIONS.

Admissibility of acts or declarations of a party to fraudulent transfer. See *Fraudulent Conveyances*, III.

In criminal prosecutions. See *Criminal Law*, X, (F).

Admissions. See ante, VII.

Part of res gestae. See ante, IV, (B).

Hearsay. See post, IX.

In an action by the indorsee of a promissory note delivered to the agent of the payee,

it was not error to permit a witness to testify to declarations made to him by one of the defendants.—*Rosnagle v. Armstrong*, 17 Idaho, 246, 105 Pac. 216.

Editorial Notes.

Declarations of former owner of chattel or chose in action, when admissible against party claiming under him: 42 Am. Dec. 80.

Declarations of agents of corporations: 14 Am. Dec. 632.

Competency of admission or declaration of officer of corporation as evidence against corporation: Ann. Cas. 1912C, 109.

Declarations of vendor, when evidence against his vendee to show fraud: 42 Am. Dec. 631.

Declarations of a party, when admissible in his favor: 93 Am. Dec. 279.

Declarations of former owner of land as evidence against their successors in title: 134 Am. St. Rep. 610.

Declaration or admission of grantor of personalty made while owner thereof as evidence against grantee: Ann. Cas. 1912C, 1210.

Declarations by vendor made out of court as to his purpose in making a conveyance or transfer attacked as fraudulent against creditors: 41 L. R. A., N. S., 1.

IX. HEARSAY.

In criminal prosecutions. See *Criminal Law*, X, (F). Common report to prove partnership. See *Partnership*, I.

In an action against a railroad company for killing cattle, a statement of what other parties told the witness in regard to the running of trains on the railroad should have been reached by motion to strike out the answer.—*McDonald v. Great Northern Ry. Co.*, 5 Idaho, 8, 46 Pac. 766.

In an action to recover on a debt secured by a mortgage, the declaration of a purchaser of the mortgaged property to the effect that the mortgage debt had been paid is incompetent as hearsay, the declaration being made in the absence of plaintiff.—*Kier v. Hill*, 8 Idaho, 111, 66 Pac. 931.

Where, in a suit on a contract, plaintiff claims that defendant gave his agent authority to make the contract by a telephone communication to such agent evidence of the telephone operator as to part of such conversation which he overheard by "cutting in on the line" is competent.—*Wilson v. Vogeler*, 10 Idaho, 599, 79 Pac. 508.

In a suit on a contract for failure to deliver a quantity of seed, evidence as to a conversation between plaintiff and a third person as to whether the latter could handle the seed at a certain price was hearsay and incompetent.—*Wilson v. Vogeler*, 10 Idaho, 599, 79 Pac. 508.

Where hearsay evidence is admitted, the fact that the witness is cross-examined as to

such testimony does not cure the error.—*Wilson v. Vogeler*, 10 Idaho, 599, 79 Pac. 508.

In ejectment, evidence of conversations between the defendant and another relative to such other allowing defendant to take possession of the property in question, where the conversation was not in the presence of plaintiff, was improperly admitted.—*Whitman v. McComas*, 11 Idaho, 564, 83 Pac. 604.

Where the ownership and value of personal property is the only issue for trial, and there is no conflict in the evidence as to the ownership, statements made by a third party to the defendant as to the ownership cannot bind the plaintiff without showing in some way that the plaintiff had knowledge of the acts of the third party or consented thereto, or in some way ratified his acts in relation to such property, and upon proper motion, such evidence improperly admitted will be stricken out.—*Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108.

Where a witness, who is not a party to a suit for damages, makes a statement soon after the injury that "the accident was her fault," such evidence is hearsay and not a statement of facts against interest, and should be stricken on motion.—*Wheeler v. Oregon R. R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

In an action prosecuted against a railroad company for carelessly and negligently setting fire along the line of its track and right of way, whereby the plaintiff was damaged by the destruction of his growing timber, it is not admissible to prove the statements of a third party made at the time the fire was raging, which statements tended to show that some one else had set the fire, and that it was not started by the railroad company.—*Hilbert v. Spokane Int. Ry. Co.*, 20 Idaho, 54, 116 Pac. 1116.

Where a deed to real estate, absolute on its face, has been executed as security for the payment of a debt, and an action is thereafter instituted by the grantor to have the same declared a mortgage, a memorandum made by a third party as to the terms of a conversation had between the grantor and grantee subsequent to the maturity of the debt, whereby it is claimed that they mutually agreed that the debt should be canceled and that the conveyance should be held to pass the title to the property, is inadmissible to prove the passing of title.—*Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115.

Evidence of rumors as to the condition of a sidewalk or street crossing is not admissible, in an action against a city or village for damages sustained on account of a defective walk.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

A witness will not be permitted to testify to ante-mortem statements made by a deceased person to said witness about a transaction that transpired between the deceased and a second party, where the second party is claiming an appropriation of water from a stream as against a third party, who is also claiming an appropriation from the same stream, which was made prior to the

time the second party claims to have made his appropriation, for two reasons: First, that it is hearsay; second, for the reason that the statement relates to a matter which is not involved in the controversy submitted to this court under the finding made by the trial court.—*Brown v. Grubb*, 23 Idaho, 537, 130 Pac. 1073.

The admission in evidence of a letter between persons who were not parties to the action held error.—*De Puy v. Peebles*, 24 Idaho, 550, 135 Pac. 264.

Editorial Notes:

Boundaries, hearsay to prove: 15 Am. Dec. 628; 36 Am. Rep. 729; 60 Am. Rep. 589; 94 Am. St. Rep. 678.

X. DOCUMENTARY EVIDENCE.

Best and secondary evidence. See ante, V.
In criminal prosecutions. See Criminal Law.
Admissibility of note showing alteration. See Alteration of Instruments.

(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS AND CERTIFICATES.

Constitutionality of law authorizing maps and surveys of state engineer to be received in evidence. See *Waters and Watercourses*, VI, (B).

The original records and files of probate and justice courts are admissible in evidence and need not be proved by copies thereof.—*Keenan v. Washington Liquor Co.*, 8 Idaho, 383, 69 Pac. 112.

The opinion of the supreme court on an appeal in a former action between the same parties on the same cause of action is not admissible in evidence.—*Work Bros. v. Kinney*, 8 Idaho, 771, 71 Pac. 477.

Under R. C. 5969, books printed or published under the authority of a state or territory or foreign country, and purporting to contain the statutes or other written laws of such state, territory or country, or proved to be commonly admitted in the tribunals of such state or territory as evidence of the written law thereof, are admissible in this state as evidence of such law.—*Moore v. Pooley*, 17 Idaho, 57, 104 Pac. 898.

The clerk of the board, under R. C. 1915, is required to enter the order calling a special meeting upon the records of said board, and under the provisions of R. C. 5879 the record copy becomes prima facie evidence of the facts stated in such order.—*Black Canyon Irr. Dist. v. Marple*, 19 Idaho, 176, 112 Pac. 766.

Editorial Notes.

Admissibility of copies of records of other states: 5 L. R. A., N. S., 938.

(B) EXEMPLIFICATIONS, TRANSCRIPTS AND CERTIFIED COPIES.

The statute which provides that copies of papers duly filed in the recorder's office, certified to by the recorder, shall be received with like effect in courts, in actions and proceedings, as the original instruments, papers

and notices filed or recorded, gives the same effect to such copies as courts would give to the originals when produced and their execution proved.—*Kramer v. Settle*, 1 Idaho, 485.

A certified copy of the names of all the taxpayers of a county, as shown by the assessment-roll and subsequent roll of the year, is admissible to show the number of taxpayers within the county for that year.—*McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054.

The judgment of the supreme court of the state of Utah, adjudging and decreeing a marriage performed in that state to be a common-law marriage is admissible in an action in this state involving the marriage status of the same parties.—*Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

The certification of a foreign judgment examined and held to be in substantial conformity to R. C. 5980, 5981, and U. S. Rev. Stats. 906, so as to entitle the judgment to be admitted in evidence.—*Nadel v. Campbell*, 18 Idaho, 335, 110 Pac. 262.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

A bill of sale of livestock made and executed June 23, 1890, cannot be introduced in evidence unless it complies with act of February 7, 1889 (15 Sess. Laws, p. 49), in that it must be acknowledged before a notary public, or other officer authorized to take acknowledgments, and must be recorded in the office of the county recorder in the same manner as a deed.—*Ferbrache v. Martin*, 3 Idaho, 573, 32 Pac. 252.

Under R. S. 5996 books of account are properly excluded from evidence where it is not shown that the entries therein were made against the interests of the persons making them, or in a professional capacity in the ordinary course of professional conduct, or in performance of a duty specially enjoined by law.—*Kent v. Richardson*, 8 Idaho, 750, 71 Pac. 117.

A photograph was offered for the purpose of showing the location of certain objects at the time the accident occurred, though it was not a photograph of the incident at the time. Held, admissible for the purpose stated.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 25 L. R. A., N. S., 691, 104 Pac. 1015.

Editorial Notes: ●

Account-books, when admissible as books of original entry: 11 Am. Dec. 732.

Evidence, account-books as, 15 Am. Dec. 191; 138 Am. St. Rep. 441; 52 L. R. A. 546; 53 L. R. A. 513; 36 L. R. A., N. S., 899.

Scientific and medical books, whether may be read as evidence: 59 Am. Dec. 180; 51 Am. Rep. 680; 19 Ann. Cas. 1002; 40 L. R. A. 553.

Photographs as evidence: 75 Am. St. Rep. 468; 114 Am. St. Rep. 437.

Telegrams, when admissible: 110 Am. St. Rep. 742.

Admissibility in evidence against third persons of books, reports and the like, other than books of account: 125 Am. St. Rep. 841.

Railroad train sheet as evidence: Ann. Cas. 1912B, 372.

Necessity that books of accounts offered in evidence be books of original entry: 2 Ann. Cas. 842.

(D) PRODUCTION, AUTHENTICATION AND EFFECT.

In an action on a county treasurer's bond the plaintiff was permitted, over objection, to introduce the ledger of a bank and to read in evidence certain entries therefrom, there being no proof to show who made the entries or when they were made, or that the defendant treasurer had any knowledge of, or ever consented to, such entries. Held, error.—*Bingham Co. v. Woodin*, 6 Idaho, 284, 55 Pac. 662.

Under R. S. 3395, providing that the sheriff, after making sale under foreclosure proceedings, must make a return of his doings thereon on the affidavit, and file it with the district court of the county in which the foreclosure is made, in an action to contest defendant's rights to foreclose a chattel mortgage, a motion to compel defendant to file the original affidavit in the foreclosure proceeding is properly overruled, it not appearing that defendant had the affidavit in his possession or failed to produce it on demand made therefor.—*Murphy v. Russell*, 8 Idaho, 133, 67 Pac. 421.

After a deed was improperly rejected by the court in the presence of the jury as incompetent, irrelevant and immaterial and thus discredited, the introduction of it by the adverse party would not cure the error.—*Whitman v. McComas*, 11 Idaho, 564, 83 Pac. 604.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

To show consent to alteration of bail bond. See Bail and Recognizance.

Admissibility of altered bail bond where alterations explained. See Bail and Recognizance.

To show absolute or conditional delivery of deed. See Deeds, IV.

Of stock brand. See Animals, I.

To show deed to be mortgage. See Mortgages, I.

Of mining custom. See Mines and Minerals, III, (C).

(A) CONTRADICTING, VARYING OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

Oral evidence not admissible to contradict stipulated facts. See Stipulations.

A judicial record cannot be contradicted by parol evidence.—*Havird v. County Commrs. Boise County*, 2 Idaho, 687, 24 Pac. 542.

A contract, having been reduced to writing and signed by the parties, concluded all the parties thereto at the date thereof, and any contracts made between the same parties prior thereto relating to the same subject matter, and all conversations and agreements of whatever kind had between them prior to that

date, are conclusively presumed to be merged in the final contract.—*Jacobs v. Shenon*, 3 Idaho, 274, 29 Pac. 44.

Where a contract has been signed and reduced to writing, no conversations or agreements had or made prior to the signing thereof, tending to vary or dispute the provisions of the written contract, are admissible in evidence.—*Jacobs v. Shenon*, 3 Idaho, 274, 29 Pac. 44.

In the absence of fraud, accident or mistake, parol evidence of an oral contemporaneous agreement cannot be admitted to show that a note, payable in money, was by such agreement to be paid in work and labor.—*Stein v. Fogarty*, 4 Idaho, 702, 43 Pac. 681.

An agreement between mortgagors and mortgagees was evidenced by two instruments, one signed by the mortgagors, and the other by the mortgagees, bearing even date. That signed by the mortgagors provided that said mortgagors did thereby turn over to the mortgagees the possession of the mortgaged premises upon the condition the said mortgagees should "apply all rents and profits in leasing or using it on actual expenses, taxes, insurance, and interest, and principal of their mortgage note," there being at the time some \$8,000 of insurance on the property for the benefit of prior mortgagees. No mention of insurance was made in the instrument signed by the mortgagees. Held, that parol evidence was not admissible to show that the mortgagees agreed to keep said property insured for the sum of \$25,000, their mortgage being for the sum of \$10,000.—*First Nat. Bank v. Bawa*, 5 Idaho, 678, 51 Pac. 777.

Evidence to prove an oral contract is admissible though it contradicts recitals in a receipt connected with the transaction.—*Barghoorn v. Moore*, 6 Idaho, 531, 57 Pac. 265.

Oral evidence is not admissible to add to or vary the corporate records in an action brought to set aside a sale of stock for non-payment of assessments thereon.—*Coreoran v. Sonora Min. etc. Co.*, 8 Idaho, 651, 71 Pac. 127.

Where the plaintiff alleges the execution of a certain contract between himself and the defendant, and that he paid a certain sum as a part of the consideration concurrently with the execution of the contract, and the defendant denies the payment as part of the purchase price, it is error for the court to exclude evidence offered by the defendant to show that the sum claimed to have been paid was in fact paid for and in consideration of another contract and was a part of another transaction, and constituted no part of the purchase price on the contract involved in the action.—*Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965.

A contract acknowledging receipt of a certain sum of money is not conclusive as to such payment and may be contradicted.—*Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965.

In actions for the specific performance of executory contracts for the sale of real estate, the distinction should always be clearly drawn between the admission of oral and extrinsic evidence for the purpose of identifying

the land described in the writing, and applying the description therein contained, and that of supplying and adding to a description insufficient and void on its face.—*Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052.

In an action for the specific performance of an executory contract for the sale of real estate, parol evidence is admissible for the purpose of applying the description contained in the writing, in order to show that there are lands of the same description contained in the writing; but such evidence is not admissible for the purpose of supplying or adding to the description in order to make it comply with the requirements of the statute of frauds.—*Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052.

Where the verity of the records of a corporation is attached by minority stockholders, who deny that the transaction therein purporting to be recorded ever occurred, and they contend that the true minutes of a given meeting show the very contrary of that shown by the official record, parol evidence is admissible to show what actually occurred at such meeting.—*Just v. Idaho Canal etc. Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Where a contract provides that a specific sum shall be paid at a certain time and the consideration named is "one dollar and other considerations," parol evidence is admissible to show what was meant by "other considerations" but not to vary the specific terms as to the time when the obligation becomes due. *Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

Where a vendor agrees to convey land free from encumbrances, oral testimony of prior contracts or understandings will not be admissible to contradict the contract of sale, in which it is provided that the title shall be clear and free of encumbrances.—*Newmyer v. Roush*, 21 Idaho, 106, Ann. Cas. 1913D, 433, 120 Pac. 464.

Where parties have entered into a contract or agreement which has been reduced to writing, in the absence of fraud or mistake, if the writing is complete upon its face and unambiguous, parol evidence is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract; but this rule does not apply where it appears from the evidence that the agreement was a mere informal memorandum, incomplete on its fact and not intended by the parties to exhibit the whole agreement, but merely to define some of its terms. The writing is conclusive as far as it goes; but such parts of the actual agreement as are not embraced within its scope may be established by parol.—*Jarrett v. Prosser*, 23 Idaho, 382, 130 Pac. 376.

It was not error to permit parol evidence, to show that a receipt was only part of the contract between the parties.—*Wheeler v. Gilmore etc. R. R. Co.*, 23 Idaho, 479, 130 Pac. 801.

More strictness is required in the description in an assessment, where the property is to be sold for delinquent taxes, than is re-

quired in a deed of conveyance from the grantor to the grantee. In the former case parol or extraneous evidence is not admissible, while in the latter case it may become admissible.—*Wilson v. Jarron*, 23 Idaho, 563, 131 Pac. 12.

Editorial Notes.

Parol to ingraft condition, limitation, or reservation on a deed: 1 Am. Dec. 44.

Parol to show warranty outside of contract: 5 Am. St. Rep. 197; 19 L. R. A., N. S., 1183.

Parol to add to or vary a writing: 56 Am. St. Rep. 659; 17 L. R. A. 270.

Admissibility of parol evidence to affect terms of contract of guaranty: Ann. Cas. 1912A, 781.

(B) INVALIDATING WRITTEN INSTRUMENT.

(No paragraphs.)

(C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

See, also, ante, XI, (A).

Plaintiff purchased mining property and deeded a one-sixth interest therein to defendant. Defendant gave plaintiff his note for his share of the purchase price. At the same time plaintiff orally agreed that at any time before the maturity of the note, he would accept from defendant a reconveyance of his interest and cancel the note. In a suit for the collection of the note defendant set up the oral agreement as a defense. Held, that as such oral agreement tended to establish a contract different in form, purpose and effect from the written contract and no failure of consideration, fraud or mistake was alleged or proved, the oral agreement was inadmissible.—*Dulaney v. Burke*, 2 Idaho, 719, 23 Pac. 915.

Where a contract is reduced to writing and there is no allegation of fraud or mistake in the procurement or execution thereof, evidence to show a contemporaneous oral agreement varying the terms of the written contract, is inadmissible.—*Tyson v. Neill*, 8 Idaho, 603, 70 Pac. 790.

Where an action is based on a written contract entered into in pursuance of the statements contained in a prospectus issued by the contracting company, the presumption is that the entire contract was embodied in the written contract.—*Idaho Fruit Land Co. v. Great Western B. S. Co.*, 18 Idaho, 1, 107 Pac. 989.

(D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

See, also, ante, XI, (A).

Parol testimony to prove identity of sum in written promise to pay debt barred by limitation. See Limitation of Actions, III.

Parol evidence is not admissible to help out a defective description in the notice of levy of an attachment.—*First Nat. Bank v. Sonnelitner*, 6 Idaho, 21, 51 Pac. 993.

A contract provided that "upon payment of the balance of the purchase price," first parties will furnish an abstract. Held, not error to refuse to permit one of the parties to testify as to the meaning of the word "upon" as used therein.—*Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965.

Where a contract to lease real property described the property as "the side room in our bank," oral evidence may be received for the purpose of identifying the property with reference to which the contract was made.—*Spongberg v. First National Bank*, 15 Idaho, 671, 99 Pac. 712.

In an action to enforce the specific performance of a contract to lease real property, which contract describes the property as "the side room in our bank," it is error for the trial court to sustain an objection to a question propounded to the plaintiff which sought to identify the property with reference to which the contract was made.—*Spongberg v. First National Bank*, 15 Idaho, 671, 99 Pac. 712.

Where a contract to lease real property is indefinite and uncertain, but not wholly void for uncertainty, oral evidence is admissible for the purpose of showing the circumstances surrounding the transaction, and to identify the property with reference to which the contract is made.—*Spongberg v. First National Bank*, 15 Idaho, 671, 99 Pac. 712.

Where in an action for the purchase price of a safe described in the contract as a "No. 8 F. & B. Victor safe," a defense is made upon the ground of breach of warranty, parol evidence may be received showing the statements and representations of the seller to the purchaser at the time and prior to the execution of said contract as to what a "No. 8 F. & B. Victor safe," as designated in said contract meant, and its character and description.—*Barnett v. Hagan*, 18 Idaho, 104, 108 Pac. 743.

Oral testimony regarding the contents of bank-books is not properly admissible in evidence before the portions of such books connected with the subject of inquiry are identified and admitted in evidence.—*State v. Cutts*, 24 Idaho, 329, 133 Pac. 115.

Editorial Notes.

Parol to explain mercantile and other contracts: 6 Am. Rep. 678; 28 Am. Rep. 210.

(E) SHOWING DISCHARGE OR PERFORMANCE OF OBLIGATION.

In an action to recover the balance of the purchase price of hay sold by plaintiff the evidence showed that defendant examined plaintiff's hay, expressed himself satisfied with its quality and condition and offered plaintiff a specified price per ton for the hay examined, which proposition plaintiff accepted. The parties estimated the quantity at four hundred tons. Subsequently defendant asked plaintiff to sign a memorandum or receipt, which receipt was in the form of a contract, whereby plaintiff agreed to sell defendant four hundred tons of "good merchantable hay" and acknowledged receipt of part pay-

ment. Plaintiff understood the writing to be a mere receipt. Defendant refused payment on the ground that the hay was not "good, merchantable hay." Held, that parol evidence was admissible to show that the requirement of "good, merchantable hay" had been fully complied with prior to signing the instrument, the contract having been made with reference to the particular hay examined and accepted by defendant, and such evidence not being a contradiction of the terms of any written contract.—*Henry v. Herschey*, 9 Idaho, 548, 75 Pac. 266.

Oral testimony may be introduced to prove a waiver of a condition in an insurance policy.—*Allen v. Phoenix Assur. Co.*, 14 Idaho, 728, 95 Pac. 829.

XII. OPINION EVIDENCE.

In criminal prosecutions. See Criminal Law, X, (I).

(A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

In an action to recover for damages to plaintiff's house, the question, "What estimate do you place upon the damages that were caused you by being thrown out of a home—that is, apart from the value of your property?" was improperly admitted to prove damages.—*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.

In a road case a witness was asked whether there was a well-established road there at the time. Held, to call for a conclusion of the witness.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

Where one of the issues in a case is the value of personal property, the owner of such property is qualified, and may be permitted to state the value of such property, as the owner is presumed in some way to be familiar with the value of such property.—*Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108.

In an action for damages for personal injury, it is competent to ask the plaintiff to tell the jury how he suffered and the extent of the suffering.—*McClain v. Lewiston etc. Assn., Ltd.*, 17 Idaho, 63, 25 L. R. A., N. S., 691, 104 Pac. 1015.

Where the relationship between K. and V. is fixed by contract, it is error to permit V. to testify as to what his understanding of the matter was, as the question is one of contract and is to be determined by the contract, and not by V.'s understanding of the relationship.—*Keane v. Pittsburg Lead Min. Co.*, 17 Idaho, 179, 105 Pac. 60.

Where the authority of an agent is called in question, it is error to permit the agent to testify as to his opinion of his authority.—*Keane v. Pittsburg Lead Min. Co.*, 17 Idaho, 179, 105 Pac. 60.

In an action for damages it is error for the trial court to permit such questions to be asked a plaintiff as: "In what way were you damaged by reason of your horses being taken, by reason of the foreclosure of this mortgage?" "Tell us how you were damaged." "State to the jury what damages you

sustained by reason of the foreclosure of this mortgage." "Could you give an idea?" "State how you were damaged by reason of the foreclosure of this mortgage."—*Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463.

In an action on a note, a question to a witness whether the reputation of the payee would affect the validity of notes it took for certain deeds of water rights was objectionable, as calling for a conclusion of the witness.—*Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508.

It is not necessary to qualify a witness as an expert before allowing him to testify as to the value of property sought to be taken under condemnation proceedings or the damage that will be sustained to the remaining property by reason of the severance of the part taken. He must necessarily claim to have some knowledge on the subject before testifying as to values, and such knowledge and information may be tested on cross-examination by the condemnor, and his means of knowing values and the reasons which lead him to make his estimate as to the value of the property and the damages which will be sustained may be disclosed on cross-examination and the weight to be given to his evidence is a proper subject for the consideration of the jury.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Where a witness in a condemnation proceeding testifies on behalf of the land owner that the land sought to be taken is of a certain value, it is not error for the witness to be allowed to thereafter explain that he bases his estimate upon the fact that the land could be subdivided into town lots, and would for such purpose sell for the amount fixed by him as the value of the property.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Opinions of ordinary witnesses may be given upon matters of which they have personal knowledge in all cases in which, from the very nature of the subject, the facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge; and where opinions are asked of expert witnesses on a matter of common knowledge, and such opinions are given, and it does not appear that the parties against whom such evidence is given will be injured, it is not reversible error.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

In an action for damages on account of injuries to property, witnesses should not ordinarily be allowed to testify to the gross amount of the damage sustained without first detailing the injuries to the property and the damage to each part, piece or parcel or the value of the same at the time of the injury or destruction. The witnesses should be required to give to the jury the detailed items and incidents of damage so as to enable the jury to make their own calculation and form their own conclusions as to the aggregate damage sustained.—*McGuire v. Post Falls Lumber Mfg. Co.*, 23 Idaho, 608, 131 Pac. 654.

Editorial Notes.

Opinions of nonexperts: 19 Am. Rep. 410; 30 Am. St. Rep. 38.

Opinion as to probable effect if the parties had acted in a different manner: 71 Am. Dec. 538.

Admissibility of opinion of witness as to amount of damages to realty: Ann. Cas. 1912A, 191.

Admissibility in evidence of calculations by witness from figures in evidence: Ann. Cas. 1912D, 1363.

Admissibility of opinion of witness as to whether conduct of certain person was "careless," "reckless" or "negligent": Ann. Cas. 1913C, 1077.

(B) SUBJECTS OF EXPERT TESTIMONY.

(No paragraphs.)

(C) COMPETENCY OF EXPERTS.

A witness who has been engaged in the hardware and plumbing business for more than five years may testify as to the difference in cost of materials used in a building and the kind the contract calls for, even though he fixes the difference in prices from a catalogue sent out by a wholesale dealer in such articles, especially where he testifies that he has compared catalogue prices of various wholesale dealers and that they are all alike in prices.—*American Bonding Co. v. Regents of University*, 11 Idaho, 163, 81 Pac. 604.

There is no fixed rule by which a trial judge shall determine the exact amount of knowledge, experience and skill a so-called expert shall have before permitting him to testify, his competency to so testify being entirely a matter for the court to determine.—*Carecallen v. Coeur d'Alene etc. Transp. Co.*, 15 Idaho, 444, 98 Pac. 622.

A witness, in order to be competent and qualified to testify as to the number of inches of water necessary for the successful irrigation of lands, must have had some observation or experience in the measurement of water and its application to land.—*Farmers' etc. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481.

The duty of water for the successful irrigation of lands cannot be established by guesswork and hearsay evidence, or by witnesses who have never measured water applied to lands and have never seen water measured, and have made no tests in reference thereto, and do not know the size of a stream and the grade or pressure necessary to carry a given number of inches of water as measured under the irrigation law.—*Farmers' etc. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481.

Editorial Notes.

Qualification of witness to testify as expert as resting in discretion of trial court: Ann. Cas. 1912D, 817.

(D) EXAMINATION OF EXPERTS.

Expert evidence as to custom, limitation of rebuttal evidence. See *Banks and Banking*, III, (O).

Hypothetical questions, propounded to an expert witness, should be predicated upon facts proven, or which the evidence in the particular case tends to prove.—*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

Hypothetical questions must be based on the facts shown by the evidence.—*McLean v. Lewiston*, 8 Idaho, 472, 69 Pac. 478.

A hypothetical question already answered by several of plaintiff's expert witnesses may be put to defendant's witness on cross-examination over the objection that plaintiff is attempting to make out his case by such cross-examination.—*McLean v. Lewiston*, 8 Idaho, 472, 69 Pac. 478.

In an action to have a deed declared to be a mortgage, plaintiff was asked: "From such information as you have been able to gather concerning the value of this property, what, in your opinion, was the value of the property at the time of the execution of the deed?" Held, that the question was objectionable for the reason that it did not confine the witness to information received prior to the execution of the deed.—*Stuart v. Hauser*, 9 Idaho, 53, 72 Pac. 719.

The rule as to allowing a broad range of inquiry on cross-examination is especially applicable in the cross-examination of expert witnesses.—*Trull v. Modern Woodmen etc.*, 12 Idaho, 318, 10 Ann. Cas. 53, 85 Pac. 1081.

A hypothetical question, which contains facts that are proved or claimed to be proved by either party, may be put to an expert for the purpose of obtaining his opinion upon such facts, and by so doing such expert witness does not usurp the province of the jury, as the jury is not compelled to accept the opinions of such expert witness against their will, but will weigh such expert opinions as other evidence is weighed by them.—*Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 110.

Editorial Notes.

Expert, hypothetical questions which may be put to: 53 Am. Rep. 307; 39 L. R. A. 313; 29 L. R. A., N. S., 537.

Necessity that expert witness state facts upon which his opinion is based: 20 Ann. Cas. 883.

Competency of abstract question in examination of expert witness: 20 Ann. Cas. 207.

(E) COMPARISON OF HANDWRITING.

Where the genuineness of a signature to a written instrument is disputed, the general rule is that only such papers purporting to bear the true signature as are in evidence for other purposes or are conceded to be genuine are admissible.—*Bane v. Gwinn*, 7 Idaho, 439, 63 Pac. 634.

Editorial Notes.

Handwriting, comparison of: 6 Am. Dec. 171.

Proof of fac-simile signatures by comparison: Ann. Cas. 1912B, 417.

Competency of handwriting as standard for comparison: 63 L. R. A. 428.

Necessity for calling subscribing witness to prove attested writing: 35 L. R. A. 321.

(F) EFFECT OF OPINION EVIDENCE.

See, also, *Deeds*, IV.

The opinion of an expert as to the competency of a grantor in a deed is not entitled to much weight, as against the testimony of persons who are familiar with the grantor and the transaction and who testify as to the facts from which the competency of the grantor is to be determined.—*Kelly v. Per-rault*, 5 Idaho, 221, 48 Pac. 45.

The weight and credibility of the evidence of an expert witness given to the jury is to be judged solely by them, and such weight and credence will be given it by the jury as they think it justly entitled to and if it runs counter to their convictions as to the truth of the matter in the exercise of their own judgment, they may disregard it entirely.—*Carscallen v. Coeur d'Alene etc. Transp. Co.*, 15 Idaho, 444, 98 Pac. 622.

Where a physician is called as an expert witness to give his opinion based upon assumed facts and the "history of the case," which history was material to such opinion and was not within the personal knowledge of the expert witness, but had been obtained from conversation with others, such opinion has no value as proof.—*Osborn v. Carey*, 24 Idaho, 158, 132 Pac. 967.

The jury should determine whether or not the facts upon which the hypothetical question is based have been proved to their satisfaction, and, if the witness states that the history of the case was given him by other persons and does not state what that history was, and such history is not otherwise shown in evidence, such expert opinion is not entitled to any weight or value as evidence.—*Osborn v. Carey*, 24 Idaho, 158, 132 Pac. 967.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

In criminal prosecutions. See *Criminal Law*, X, (L).

In an action for an injunction and for damages to plaintiff's water right, the judgment-roll in a previous action to which defendant was neither a party nor privy is inadmissible. *Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891.

The record in a former action between the same parties on the same cause of action is admissible in evidence.—*Work Bros. v. Kinney*, 8 Idaho, 771, 71 Pac. 477.

Editorial Notes.

Evidence at former trial, admissibility of in civil cases: 91 Am. St. Rep. 192.

Proof, by person who heard testimony, of admissions or contradictory statements by witness on former trial: Ann. Cas. 1913B, 97.

XIV. WEIGHT AND SUFFICIENCY.

In criminal prosecutions. See *Criminal Law*, X, (M).

Positive testimony of several against negative testimony of one or more as presenting question for jury. See *Trial*, VI, (A).

In an ordinary equity suit the allegations of the complaint may be established by a preponderance of the evidence.—*Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290, 20 Morr. Min. Rep. 553.

Where witnesses are otherwise equally credible, and their testimony entitled to equal weight, greater weight and credit should be given to those who swear affirmatively or positively to a fact, rather than those who swear negatively or to a want of recollection. *Idaho Mercantile Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

Editorial Notes.

Circumstantial evidence: 62 Am. Dec. 179; 97 Am. St. Rep. 771; 41 L. R. A., N. S., 749.

Want of similarity between statements of witnesses as to transaction occurring long previous thereto as affecting weight of testimony: Ann. Cas. 1913A, 793.

Preponderance of evidence, as determined by mere number of witnesses: Ann. Cas. 1913D, 676.

Degree of certainty necessary to establish fraud in a civil action: 33 L. R. A., N. S., 836.

EXCEPTIONS, BILL OF.

I. NATURE, FORM AND CONTENTS IN GENERAL.

II. SETTLEMENT, SIGNING AND FILING.

In criminal prosecutions. See *Criminal Law*.

Contents, making and settling of case or statement of facts. See *Appeal and Error*.

Incorporation in transcript on appeal. See *Appeal and Error*.

Necessity of bill of exceptions on appeal. See *Appeal and Error*.

Necessity of showing as to making and filing. See *Appeal and Error*, V, (O).

For purpose of motion for new trial. See *New Trial*.

Part of record on appeal in civil actions. See *Appeal and Error*.

Presumptions as to making and contents of bill. See *Appeal and Error*.

Scope and extent of review of actions brought up on exceptions. See *Appeal and Error*.

Taking and noting exceptions at trial, and sufficiency thereof. See *Trial*.

Sufficiency of exceptions for purpose of review. See *Appeal and Error*.

I. NATURE, FORM AND CONTENTS IN GENERAL.

The proper method of bringing before the appellate court, for review, the instructions given by the court on its own motion is to embody them in a bill of exceptions.—*People v. Walter*, 1 Idaho, 386.

A bill of exceptions, settled and signed by the trial judge will be treated as such though it is denominated a statement.—*Schultz v.*

Keeler, 2 Idaho, 333, 13 Pac. 481; United States v. Alexander, 2 Idaho, 386, 17 Pac. 746.

A bill of exceptions must state the evidence admitted over objection, to which exceptions were taken, and will not be sufficient where it merely refers to other parts of the record compelling the court to frequently turn from one part of the record to another to ascertain to what the exceptions relate.—Naylor v. Vermont Loan etc. Co., 6 Idaho, 251, 55 Pac. 297.

Under R. S. 4426 to 4433, which treat of exceptions and bills of exceptions, there is no requirement that a bill of exceptions shall contain a specification of errors relied on, except when the exception is to the verdict or decision upon the grounds of the insufficiency of the evidence to sustain it, in which case the bill must contain a specification of the particulars in which the evidence is alleged to be insufficient.—Warren v. Stoddart, 6 Idaho, 692, 59 Pac. 540.

Where a bill of exceptions plainly shows the evidence offered, the objections thereto and the exceptions taken, it will be sufficient though it contains many questions and answers that might properly have been omitted. Gray v. Pierce, 7 Idaho, 540, 64 Pac. 233.

Under R. S. 4428, a bill of exceptions need not contain a specification of errors relied on, unless the exceptions are to the verdict or judgment on the ground of insufficiency of the evidence, in which case the bill must specify the particulars in which the evidence is insufficient, or a motion to strike will be sustained.—Hole v. Van Duzer, 11 Idaho, 79, 81 Pac. 109.

Where a bill of exceptions makes the original complaint and the demurrer thereto parts of said bill by reference, which identifies such papers so as to exclude all doubt as to what papers are referred to, it is not necessary that such complaint and demurrer be copied in the bill before the same is settled.—Shurtliff v. Extension Ditch Co., 14 Idaho, 416, 94 Pac. 574.

II. SETTLEMENT, SIGNING AND FILING.

Record on appeal showing no excuse for delay in filing. See Appeal and Error, X, (D), 3.

Settlement of transcript of evidence prepared by court reporter. See Appeal and Error, X, (C), 6.

An agreement of parties to an action, appearing in the record, that exceptions taken at the trial may be settled at another time, is sufficient to authorize the trial judge to settle a bill of exceptions or statement after the trial within the time specified in the stipulation.—Sebree v. Smith, 2 Idaho, 359, 16 Pac. 915.

Where exceptions to evidence are taken during the trial, but not settled until two months thereafter, and then without objection in the presence of the attorneys for the respective parties, the respondent by failure to object is deemed to have agreed to the extension of time under R. S. 2426.—Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413.

To entitle a bill of exceptions to be considered in the supreme court, it must be settled and signed by the district judge.—Meinert v. Snow, 3 Idaho, 112, 27 Pac. 677.

Exceptions taken during the trial to the rulings of the trial court may be settled and saved in accordance with R. S. 4426, providing that exceptions must be taken and settled at the time the decision is made and that sufficient time must be allowed for the reduction to writing, and settlement of the exception, or they may be settled after trial in accordance with R. S. 4430, prescribing the time and manner of preparing bills of exceptions, or in a statement on motion for new trial, and when so settled and saved will be reviewed on appeal.—Rumpel v. Oregon Short Line etc. Ry. Co., 4 Idaho, 13, 22 L. R. A. 725, 35 Pac. 700.

Where an omission or mistake has occurred in the settlement of a bill of exceptions, the judge may, upon proper application, allow a resettlement thereof, provided that is asked before the transcript is sent to the supreme court, and the mistake or omission claimed is shown by documentary evidence, or is not denied by the adverse party; but, if such omission or mistake rests in the recollection of judge or counsel and is not admitted by the adverse party, a correction or resettlement should be denied.—Griffiths v. Montandon, 4 Idaho, 329, 39 Pac. 195.

Where an application is made to settle exceptions under R. S. 4432, and supreme court rule 12, paragraph 1, and the applicant prays to have such exceptions as are set out in his Exhibit No. 7, and fails to submit such exhibit, the application will be denied.—Dernham v. Lieuallen, 4 Idaho, 528, 43 Pac. 74.

Where parties stipulate that either party may "have sixty days after the rendition of the decision" in which to prepare and serve a bill of exceptions, such stipulation is a waiver by both parties of notice of rendition of judgment, and the bill of exceptions must be proposed and served within sixty days from the date of entering the judgment, unless the time therefor be properly extended. Lydon v. Piper, 5 Idaho, 541, 51 Pac. 101.

On proper application made prior to filing a transcript on appeal, the trial court may strike from the files a bill of exceptions, settled on ex parte application without notice after the expiration of the time in which such bill of exceptions could be legally proposed and settled.—Lydon v. Piper, 5 Idaho, 541, 51 Pac. 101.

Plaintiff's bill of exceptions cannot be amended by a proposed amendment presented by the defendants six months after the trial into which are incorporated specifications of error on the part of the defendants upon the ground that the evidence was insufficient to establish certain facts found by the court.—Stickney v. Hanrahan, 7 Idaho, 424, 63 Pac. 189.

After the time has expired for serving and filing a proposed statement or bill of exceptions, the judge or court has no power to further extend the time.—Swartz v. Davis, 9 Idaho, 238, 74 Pac. 800.

Where the time allowed by statute or order of the trial judge, under R. S. 4430, for the preparation, service and presentation of a statement or bill of exceptions, has expired, the court is without jurisdiction or authority to grant a further extension of time for such purpose.—*Sandstrom v. Smith*, 11 Idaho, 779, 84 Pac. 1060.

Where application is made to the court to settle a bill of exceptions after the time has expired for serving the same, on the ground of mistake, inadvertence or excusable neglect, and the court finds that the bill was not served in time by reason of mistake, inadvertence, surprise or excusable neglect, it is the duty of the court to grant relief from such default.—*Richardson v. Bohnney*, 18 Idaho, 328, 109 Pac. 727.

The preparation and settlement of a statement or bill of exceptions is a proceeding within the meaning of the term "proceeding" as used in R. C. 4229, authorizing the court to permit amendments, relieve from defaults, etc.—*Richardson v. Bohnney*, 18 Idaho, 328, 109 Pac. 727.

EXCHANGE OF PROPERTY.

Operation of statute of frauds. See *Frauds*, Statute of, VI, VIII.

Where a contract in writing is entered into between N. and R., whereby N. agrees to convey to R. a tract of land in the state of California in exchange for lands in Idaho to be conveyed by R. to N., and the contract specifies that the titles to the respective pieces of property are to be clear and free from encumbrances, and deeds are to be exchanged between the parties thereafter in accordance with the terms of said contract, and thereafter R. goes into possession of the property agreed to be conveyed to him by N., and after he takes possession of said property N. tenders to R. a deed for such property which contains a reservation of a private way across said land, and R. refuses to accept said deed and rescinds said contract of exchange, and vacates said property and takes possession of the property he contracted to exchange, the mere fact that R. took possession of the property before the deeds or conveyance were executed does not preclude R. from relying upon the contract of exchange, or preclude him from requiring a deed in accordance with such contract, conveying a clear title and free from encumbrance.—*Newmyer v. Roush*, 21 Idaho, 106, Ann. Cas. 1913D, 433, 120 Pac. 464.

Where an action is brought to rescind a contract and recover what the party suing parted with or its value and to restore what was received, and the complaint alleges that the rescission of the contract resulted from the fact that the defendant had made statements at the time the contract of exchange was made that were false and fraudulent and known to the defendant to be false and fraudulent, and that such statements were relied upon by the plaintiff, and by reason of fraud and deceit the plaintiff was induced to make the contract which resulted in the exchange of the property from one to the other,

the complaint is sufficient to state a cause of action.—*Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

In an action to rescind a contract for fraud, the evidence held to show that the plaintiffs were induced to make said contract by the examination made by them before the contract was entered into, that the plaintiffs relied wholly upon the representations alleged to have been made by defendant, and that the plaintiffs were in no way misled or deceived by any statements of the defendant. *Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Editorial Notes.

Exchange of property, difference between and a sale: 94 Am. St. Rep. 227.

EXECUTION.

- I. NATURE AND ESSENTIALS IN GENERAL.
- II. PROPERTY SUBJECT TO EXECUTION.
- III. ISSUANCE, FORM AND REQUISITES OF WRIT.
- IV. LIEN, LEVY OR EXTENT AND CUSTODY OF PROPERTY.
- V. STAY, QUASHING, VACATING AND RELIEF AGAINST EXECUTION.
- VI. CLAIMS BY THIRD PERSONS.
- VII. SALE.
- VIII. RETURN.
- IX. PAYMENT, SATISFACTION AND DISCHARGE.
- X. SUPPLEMENTARY PROCEEDINGS.
- XI. EXECUTION AGAINST THE PERSON.
- XII. WRONGFUL EXECUTION.

See Attachment; Garnishment; Judicial Sales; Assistance, Writ of; Creditor's Suit.

Appealability of orders relating to executions in general. See Appeal and Error.

Execution from justice's court. See Justices of the Peace.

Protection of exemptions in general. See Exemptions.

Protection of homestead rights. See Homestead.

Recovery of exempt property levied on. See Claim and Delivery.

In Particular Actions or Proceedings:

To foreclose mortgage. See Chattel Mortgages; Mortgages.

Ejectment. See Ejectment.

Enforcement of liens in general. See Liens.

— Of logging liens. See Logs and Logging.

— Of mechanics' liens. See 'Mechanics' Liens.

In favor of joint judgment debtor. See Contribution.

Determination of question of exemptions. See Exemptions.

I. NATURE AND ESSENTIALS IN GENERAL.

Agreement to pay costs on retaxation as estopping party to have execution issue. See Costs, VI.

II. PROPERTY SUBJECT TO EXECUTION.

Statutory exemption. See Exemptions; Homestead.

Community property. See Husband and Wife.

Property bound by lien of judgment. See Judgment.

Property subject to attachment. See Attachment and Garnishment.

Property subject to execution issued by justices of the peace. See Justices of the Peace.

Property subject to garnishment. See Attachment and Garnishment.

Right of wife to enjoin sale of separate property under execution against husband. See Husband and Wife, V, (D).

The possessory claim and improvements of one settling on public lands are subject to levy and sale on execution.—*Maydole v. Watson*, 7 Idaho, 66, 60 Pac. 86.

Editorial Notes:

Franchises, whether subject to execution: 15 Am. Dec. 595; 31 L. R. A., N. S., 639.

Interest of heir, legatee or devisee, when subject to execution: 44 Am. Dec. 338; 23 L. R. A. 642; 30 L. R. A., N. S., 115.

Cropper's interest, when not subject to execution: 51 Am. Dec. 410.

Crops or growths which are subject to as personality: 55 Am. Dec. 161.

Money in officer's hands, whether subject to execution: 55 Am. Dec. 264.

Equities which are not subject to execution under statutes subjecting trust estates to: 97 Am. Dec. 304.

Execution against property in the hands of a receiver: 2 Am. St. Rep. 403; 71 Am. St. Rep. 370.

III. ISSUANCE, FORM AND REQUISITES OF WRIT.

Where a constable seized and held goods under an attachment and the execution in the action was directed to the sheriff, but delivered to the constable, who served the same, the execution was not void but amendable.—*Pecotte v. Oliver*, 2 Idaho, 251, 10 Pac. 302.

The officer who seizes goods and holds the same under a writ of attachment is the proper officer to whom the execution on the judgment in the attachment suit should issue. *Pecotte v. Oliver*, 2 Idaho, 251, 10 Pac. 302.

Where an action is instituted for the collection of a debt; and an attachment is issued and levied on property of the debtor and judgment is thereafter entered, and prior to the issuance of an execution the judgment debtor dies, an execution cannot issue for the collection of the same, under R. C. 4475, for the reason that such a judgment is not a judgment for the "recovery of real or personal property, or the enforcement of a lien thereon," but is a simple money judgment, and does not fall within the purview of said section.—*Rose v. Dunbar*, 20 Idaho, 1, Ann. Cas. 1912D, 1046, 115 Pac. 920.

Editorial Notes:

Amendment of writs of execution: 101 Am. St. Rep. 550.

Right to issue execution after death of judgment debtor: Ann. Cas. 1912D, 1047.

IV. LIEN, LEVY OR EXTENT AND CUSTODY OF PROPERTY.

Shares of stock in a corporation can be seized under execution only in the manner prescribed by R. S. 4307 and R. S. 4477.—*Wells v. Price*, 6 Idaho, 490, 56 Pac. 266.

Editorial Notes:

Growing crops, execution sale of land, when pass to purchaser: 19 Am. Dec. 752; 23 L. R. A. 259.

Levy of, whether necessary to sustain sale under execution: 33 Am. Dec. 697.

Duty of officers as to service of execution in the absence of directions: 95 Am. Dec. 425.

V. STAY, QUASHING, VACATING AND RELIEF AGAINST EXECUTION.

Stay of execution pending appeal. See Appeal and Error, IX.

Action to set aside sheriff's sale and deed thereunder. See post, VII.

Bona fides of purchaser as affecting right to restrain execution sale. See Fraudulent Conveyances, I.

Injunction against sale of wife's separate property under execution against husband. See Husband and Wife, V, (D).

Injunction will issue to restrain the sheriff from selling personal property, where the plaintiff has no plain, speedy or adequate remedy at law, or defendant is insolvent or unable to respond in damages.—*Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974.

Editorial Notes:

Stay laws, constitutionality of: 13 Am. Dec. 493.

Stay of execution, power of courts to grant: 49 Am. Dec. 513.

Staying of execution otherwise than by statutory proceedings: 127 Am. St. Rep. 707.

VI. CLAIMS BY THIRD PERSONS.

Where, immediately preceding the levy of an execution on certain chattels, the owner thereof repeatedly declares that he has sold the same to the judgment debtor, and the sheriff, relying on such statements, levies thereon, the owner is estopped to assert ownership of the goods as against the sheriff or the execution plaintiff.—*Lick v. Munro*, 8 Idaho, 510, 69 Pac. 285.

VII. SALE.

Failure to give statutory notice of attachment not ground for avoiding execution sale. See Attachment and Garnishment, V.

Sale together of several parcels, necessity of raising question in lower court. See Appeal and Error, V, (B).

Injunction against sale of wife's separate property under execution against husband. See Husband and Wife, V, (D).

A purchaser at a sheriff's sale, under execution, upon a judgment which is voidable only, and not void, acquires a good title.—*Hazard v. Cole*, 1 Idaho, 276.

A purchaser at an execution sale does not depend for his title upon the return of the sheriff.—*Hazard v. Cole*, 1 Idaho, 276.

In order to establish a prima facie title under a sheriff's deed, it must appear that a valid judgment was obtained against the party whose property is sought to be conveyed by it, and that the property was sold upon an execution issued upon such judgment.—*Leland v. Isenbeck*, 1 Idaho, 469.

Under R. S. 4484, when real property sold on execution consists of several known lots or parcels, such lots must be offered for sale separately, and if no bids are received, and the lots or parcels are adjacent they may then be sold in a lump.—*Ollis v. Kirkpatrick*, 3 Idaho, 247, 28 Pac. 435.

A sale of real estate under execution may be postponed by announcing that fact at the time advertised and giving notice thereof in writing on the original notice or by posting notice of postponement under it.—*Ollis v. Kirkpatrick*, 3 Idaho, 247, 28 Pac. 435.

Under R. S. 4482, notice of sale of real estate levied upon under execution may be given either by posting written or printed notices or by publication in a newspaper printed in the county.—*Ollis v. Kirkpatrick*, 3 Idaho, 247, 28 Pac. 435.

An execution having been duly issued, placed in the hands of the sheriff, and by him levied upon property during its lifetime, the property so levied upon may be sold after the date when such execution must have been returned, had not such levy been made.—*Ollis v. Kirkpatrick*, 3 Idaho, 247, 28 Pac. 435.

Under R. S. 4496, the purchaser of real estate at execution sale is not entitled to possession thereof until the period of redemption has expired.—*Cantwell v. McPherson*, 3 Idaho, 721, 34 Pac. 1095.

A sheriff's deed for land sold under execution in an attachment suit relates back to the date of the levy of the attachment and cuts off all subsequent liens.—*First Nat. Bk. v. Lieualen*, 4 Idaho, 431, 39 Pac. 1108.

Under R. S. 4484, providing that the judgment debtor has the right to direct the order in which the property levied on under execution shall be sold, when such property consists of several lots or parcels, or articles which can be sold to advantage separately, a sale by the sheriff contrary to such instructions by the debtor will be set aside.—*Wooddy v. Jameson*, 5 Idaho, 466, 50 Pac. 1008.

Where a sheriff refuses to make a deed to the purchaser of real property at an execution sale, because of claims thereto by other persons, such persons are properly made defendants under R. S. 4102, in an action to compel the execution of such deed and to settle the adverse claims of such persons.—*Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761.

Where a sheriff refuses to make a deed to the purchaser of real property at an execution sale because of claims thereto by other persons, a complaint by such purchaser to compel the execution of such deed and against the persons claiming title thereto to enjoin their claims and set aside their transfers, states but one cause of action.—*Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761.

Where plaintiff's title to land rested on a sheriff's deed based on a judgment against the owner and defendants' title rested on a conveyance from the owner made at a date when the judgment was a lien on the property conveyed, an instruction that the sheriff's deed would not bind defendants because they were not parties to the judgment is erroneous.—*First Nat. Bk. Lewiston v. Hays*, 7 Idaho, 139, 61 Pac. 287.

Defendants purchased land subject to the lien of a judgment against their grantor. Subsequently plaintiffs obtained title by virtue of an execution sale on such judgment. Held, that the title to the land was in plaintiffs.—*First Nat. Bk. Lewiston v. Hays*, 7 Idaho, 139, 61 Pac. 287.

Where a complaint in an action to set aside a judgment and a sheriff's deed based thereon fails to allege that plaintiff's intestate or his ancestors, predecessors or grantors were seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted, the cause of action will be barred under R. S. 4037.—*Ryan v. Woodin*, 9 Idaho, 525, 75 Pac. 261.

Where an action to set aside a judgment and a sheriff's deed, based thereon, is not brought within five years from the execution of the deed, the complaint must show reasonable diligence used to discover the acts complained of or reasonable excuse for the delay, or it will be demurrable on the ground of laches.—*Ryan v. Woodin*, 9 Idaho, 525, 75 Pac. 261.

In an action brought to set aside a judgment and a sheriff's deed, based thereon, brought more than five years after the execution of the deed, the complaint did not allege who had been in possession of the land from the date of the deed nor did it allege any reason or excuse for delay in bringing the action. The complaint further showed that the purchaser at the sheriff's sale had died long prior to the commencement of this action. Held, that a contention that the statute of limitations did not begin to run until the appointment of an administrator of the estate of such purchaser, was untenable in the absence of a showing as to the necessity for administration or a reason for delay in bringing the action.—*Ryan v. Woodin*, 9 Idaho, 525, 75 Pac. 261.

Though the rule of caveat emptor generally applies to execution sales of personal property, it has no application to a sale made by a sheriff on execution at which he agreed with the purchaser to return all over and above the amount paid per cord for six hundred cords of wood, if the wood did not measure up to the amount stated.—*Works v. Byrom*, 22 Idaho, 794, 128 Pac. 551.

Editorial Notes.

Sale of more land than necessary under execution: 13 Am. Dec. 212.

Sale, failure of title, purchaser's remedy: 14 Am. Dec. 131.

Return day, sales under execution after: 15 Am. Dec. 522; 28 Am. St. Rep. 120.

Sale under execution, duty of sheriff to inform purchasers of encumbrances: 43 Am. Dec. 143.

Notice of sale, failure to give: 44 Am. Dec. 238.

Execution sales, remedies against purchaser at to recover amount of bid: 69 Am. Dec. 365.

Sale, release from bid, when purchaser may obtain: 70 Am. Dec. 572.

Sale, notice of, what is proper and sufficient: 75 Am. Dec. 704.

Sale, when passes plaintiff's interest in the property sold: 89 Am. Dec. 370.

Adjournment of execution sales: 26 Am. Dec. 536; 97 Am. St. Rep. 653.

Title acquired by plaintiff purchasing at execution sale: 79 Am. St. Rep. 947.

Who may not purchase at execution sale: 136 Am. St. Rep. 789.

Sale made under execution as judicial sale: Ann. Cas. 1913A, 1217.

Right of purchaser at execution sale to recover from judgment creditor where property purchased does not belong to judgment debtor: Ann. Cas. 1913B, 544.

Judicial or sheriff's sale of property in parcels or en masse: Ann. Cas. 1913B, 619.

How far purchaser protected as bona fide purchaser: 21 L. R. A. 33.

Relief from purchaser on annulling sale: 67 L. R. A. 33.

VIII. RETURN.

Amendment of return. See Attachment and Garnishment, IX.

IX. PAYMENT, SATISFACTION AND DISCHARGE.

(No paragraphs.)

X. SUPPLEMENTARY PROCEEDINGS.

Inadequacy of supplementary proceedings as ground for creditor's bill. See Creditor's Suit.

In proceedings supplementary to execution, a third person, brought in on motion of the judgment creditor, claimed the property adversely to the debtor. The judge at chambers, after hearing the parties, held that the property was subject to the judgment and appointed a receiver to take charge of the property and subject it to the satisfaction of the judgment. Held, that such order was void as beyond the jurisdiction of the judge under R. S. 4510, which provides that, in such a case, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action for the recovery of the interest claimed by him.

Spaulding v. Coeur d'Alene Ry. Co., 6 Idaho, 638, 59 Pac. 426.

Editorial Notes.

Supplemental proceedings: 100 Am. Dec. 500.

Supplementary proceedings, patent rights may be reached by: 41 Am. Rep. 23.

Lien acquired by service of notice in supplementary proceedings: 3 L. R. A., N. S., 123.

XI. EXECUTION AGAINST THE PERSON.

(No paragraphs.)

XII. WRONGFUL EXECUTION.

Right of constable to justify under execution out of probate court. See Sheriffs and Constables, III, (C).

Liability of officer. See Sheriffs and Constables.

Where a trustee in bankruptcy sues in assumpsit for the proceeds of the sale of a bankrupt's goods alleged to have been unlawfully sold under execution, the sheriff who made the sale is not a necessary party defendant.—Dittmore v. Cable Milling Co., 16 Idaho, 298, 103 Am. St. Rep. 98, 101 Pac. 593.

EXECUTORS AND ADMINISTRATORS.**I. ADMINISTRATION IN GENERAL.****II. APPOINTMENT, QUALIFICATION AND TENURE.****III. ASSETS, APPRAISAL AND INVENTORY.****IV. COLLECTION AND MANAGEMENT OF ESTATE.****V. ALLOWANCES TO SURVIVING WIFE, HUSBAND OR CHILDREN.****VI. ALLOWANCE AND PAYMENT OF CLAIMS.**

(A) Liabilities of Estate.

(B) Presentation and Allowance.

(C) Disputed Claims.

(D) Priorities and Payment.

VII. DISTRIBUTION OF ESTATE.**VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.****IX. INSOLVENT ESTATES.****X. ACTIONS.****XI. ACCOUNTING AND SETTLEMENT.****XII. FOREIGN AND ANCILLARY ADMINISTRATION.****XIII. LIABILITIES ON ADMINISTRATION BONDS.****XIV. EXECUTORS DE SON TORT.**

See Descent and Distribution; Wills.

Administration of community property by survivor. See Husband and Wife.

Administration of partnership estate by surviving partner. See Partnership.

Competency of witness as to transactions with decedent. See Witnesses.

Courts of probate. See Courts.

Descent and inheritance. See Descent and Distribution.

Devises and legacies. See Wills.

Executors as trustees. See *Trusts*.

Appeals in probate proceedings. See *Wills*, V.

I. ADMINISTRATION IN GENERAL.

Where there are no debts against the estate of an intestate and the heirs have made satisfactory distribution of the assets among themselves, administration of the estate is not necessary.—*Gwinn v. Melvin*, 9 Idaho, 202, 108 Am. St. Rep. 119, 72 Pac. 961.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Validity of letters of administration issued on Christmas Day. See *Holidays*.

An administrator who takes possession of the assets of his decedent and administers thereon is liable to account as such administrator, though he has not taken the oath nor filed the bond required by law, since he is an administrator *de facto*.—*Harris v. Coates*, 8 Idaho, 491, 69 Pac. 475.

R. S. 4020 declares that there shall be but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs. R. S. 4080 provides that the word "action" as used in the title relating to limitation of actions shall be construed to include when necessary a special proceeding of a civil nature. R. S. 4060 provides that actions for relief not provided for in R. S. 4051-4059 must be commenced within four years. Held, that a proceeding for the appointment of an administrator was barred after four years.—*Gwinn v. Melvin*, 9 Idaho, 202, 108 Am. St. Rep. 119, 72 Pac. 961.

Const., article 18, section 6, makes the county treasurer *ex officio* public administrator. R. S. 5681 makes it his duty to take charge of certain estates therein enumerated without appointment and to administer the same forthwith. R. S. 5351 prescribes the order in which various persons are entitled to administer and names the public administrator as ninth in order. Const., article 18, section 7, as amended by the fifth amendment to the constitution, provides that county officers shall receive as full compensation for their services fixed annual salaries and that all fees from whatever source shall be turned into the county treasury. Held, that all fees and compensation received by a county treasurer in his capacity as public administrator belong to the county and must be paid into county treasury.—*In re Rice*, 12 Idaho, 305, 85 Pac. 1109.

Where a person entitled to administer upon an estate files a written application under R. S. 5365 requesting the appointment of some other competent person, such request and application is addressed to the discretion of the court, and the statute is not mandatory on the court.—*Estate of Daggett*, 15 Idaho, 504, 98 Pac. 849.

Under R. S. 5351, designating the order in which persons or classes are entitled to letters of administration, persons falling within subdivisions 4 and 5 thereof are not entitled to nominate a person falling under subdivision 11 and have that person advanced to the

rank and class occupied by the person making the nomination.—*Estate of Daggett*, 15 Idaho, 504, 98 Pac. 849.

Under R. S. 5351, designating the order in which persons or classes are entitled to letters of administration, only those persons designated in subdivision 1 thereof are entitled to nominate some other person for appointment, and thereby have such person advanced to the rank and class of the one making the request or nomination.—*Estate of Daggett*, 15 Idaho, 504, 98 Pac. 849.

R. S. 5365, providing that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court," means to provide for the appointment of any competent person upon the request of someone entitled thereto, where no application has been made by some person entitled to administer under the statute.—*Estate of Daggett*, 15 Idaho, 504, 98 Pac. 849.

R. S. 5356 must be construed in view of and in connection with R. S. 5351 and 5365 and where a number of persons are requesting or petitioning the appointment of strangers or persons falling under R. S. 5351, subdivision 11, and one only of the persons making such requests or petitions falls within the classes of preferred persons under R. S. 5366 and R. S. 5351, subdivisions 1 to 5, such person is entitled to nominate any competent person for administrator, and it is the duty of the court to appoint the person so nominated.—*Estate of Daggett*, 15 Idaho, 504, 98 Pac. 849.

When the facts contained in R. S. 5366 are presented to the probate court upon the hearing of a petition for letters of administration, the court will construe said section in connection with R. S. 5365 and 5351, and not make an appointment of an administrator, which under R. S. 5366 would immediately be subject to revocation upon the application of any of the class enumerated in said section or the nominee of such person.—*Estate of Daggett* (on rehearing), 15 Idaho, 504, 98 Pac. 849.

Editorial Notes.

Who may be executors or administrators: 54 Am. Dec. 518; Ann. Cas. 1913B, 1162.

Validity of grants of administration: 79 Am. Dec. 65; 81 Am. St. Rep. 535.

Widow's right to administer on estate of her deceased husband: 93 Am. Dec. 685.

Nonresidents, right of to act as executors or administrators: 113 Am. St. Rep. 562; 1 L. R. A., N. S., 341.

Right of alien or nonresident to act as executor or administrator: Ann. Cas. 1912A, 747; 3 Ann. Cas. 988.

III. ASSETS, APPRAISAL AND INVENTORY.

An administrator cannot have a conveyance by his intestate set aside under R. S. 5558, unless it was made with intent to defraud creditors; and where the existence of

such intent is disclaimed by plaintiff, the conveyance will not be disturbed.—*Brown v. Perrault*, 5 Idaho, 729, 51 Pac. 752.

R. C. 4100 authorizes the prosecution of an action by "the heirs or personal representatives" of a deceased person against a person wrongfully causing the death of such person, and any judgment obtained in such an action inures to the benefit of the "heirs" of the decedent, and in no case becomes a part of the assets of the estate of the deceased.—*Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Editorial Notes.

Property, summary proceedings to discover: 115 Am. St. Rep. 208.

When personal representative not entitled to possession of personal assets of estate: 3 L. R. A., N. S., 704.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

Where an administrator attempts to have the whole of the estate in his hands set aside to him as sole heir and his claim thereto is not sustained, he must pay legal interest on all money in his hands ready for distribution from the time such distribution ought to have been made.—*Harris v. Coates*, 8 Idaho, 491, 69 Pac. 475.

Where the heirs of a deceased homestead entryman make final proof on the lands originally entered by the decedent, and procure title from the government whereby the land is conveyed "unto the heirs of" the decedent, the title vests directly in the parties who are the legal heirs of the deceased and does not inure to the benefit of the estate of the deceased and the probate court has no jurisdiction over such property and no power or authority to order a sale of such real estate, and the administrator of the estate of the deceased entryman has no power or authority to convey any title to such property.—*Council Improvement Co. v. Draper*, 16 Idaho, 541, 102 Pac. 7.

Editorial Notes.

Property outside of the state, powers and duties of respecting: 45 Am. St. Rep. 664.

Deposit of trust funds in bank by executors or administrators: 98 Am. St. Rep. 371.

Interest, when executors or administrators should be chargeable with: 99 Am. Dec. 296.

Right to rents on lease of intestate's property: 40 L. R. A. 321.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND OR CHILDREN.

Right of surviving wife or heirs in homestead; selection and setting apart thereof. See *Homestead*, III.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) LIABILITIES OF ESTATE.

In an action against an administratrix, plaintiff alleged that he signed a note for

the accommodation of defendant's intestate, the note on its face showing that plaintiff and deceased had signed as joint principals. The note was in possession of plaintiff and contained an indorsement showing the payment of the principal and interest thereof by plaintiff. It was not shown who made such indorsement. The note was introduced in evidence. Held, error to grant a nonsuit.—*Tritthart v. Tritthart*, 24 Idaho, 186, 133 Pac. 121.

Editorial Notes.

Allowance of claims by executors or administrators, when and against whom conclusive: 65 Am. Dec. 121.

Effect on mortgage or debt secured thereby of appointment of mortgagor as administrator or executor of mortgage: Ann. Cas. 1912D, 667.

Liability of estate for debts contracted and expenses incurred by personal representative in carrying on business: 40 L. R. A., N. S., 224.

(B) PRESENTATION AND ALLOWANCE.

Under Rev. Laws of Idaho, section 140, page 267, which provides that "if any action be pending against the testator or intestate at the time of his death, the plaintiff shall present his claim to the executor or administrator for allowance or rejection, authenticated as in other cases, and no recovery shall be had in the action unless proof be made of the presentation required by law," an action by the United States which has been revived against the decedent's administrator without presentation of plaintiff's claim as required by statute will be dismissed, as such statute applies to the United States.—*United States v. Hailey*, 2 Idaho, 22, 3 Pac. 263.

In an equitable action in which purely equitable relief is sought (in this case, the foreclosure of a vendor's lien), the cause of action does not constitute a "claim" which must be presented to the administrator before an action can be maintained under probate practice act, section 138.—*Toulouse v. Burkett*, 2 Idaho, 184, 10 Pac. 26.

The statutes of this state give an heir the right to appear and contest a claim, after its allowance by the administrator and the probate judge, and such heir is not concluded by the order or judgment of allowance made in the first instance.—*Estate of Coryell*, 16 Idaho, 201, 101 Pac. 723.

Where a claim against an estate is in the first instance allowed by the administrator and the probate judge, and thereafter upon objections filed by an heir such allowance is set aside, such claim is then pending against such estate; and an appeal will not lie from the order of the probate judge setting aside his former allowance of such claim.—*Estate of Coryell*, 16 Idaho, 201, 101 Pac. 723.

The order or judgment of a probate judge, allowing a claim against an estate upon an ex parte showing is not a final order or judgment, which binds or affects the heirs of such estate who have not appeared, objected to,

or contested such claim.—Estate of Coryell, 16 Idaho, 201, 101 Pac. 723.

Where a claim is presented to the administrator and by him allowed, and afterward to the probate judge and by him allowed, the effect of such allowance is merely to rank the claim among the acknowledged debts of the estate to be paid in due course of administration.—Estate of Coryell, 16 Idaho, 201, 101 Pac. 723.

The fact that an administrator, jointly liable with the deceased upon a contract of guaranty, allows a claim against such estate founded upon such contract of guaranty, does not show or tend to show a collusion between the administrator and the claimant to allow or enforce such claim against the estate in fraud of the rights of the heirs of said estate.—Miller v. Lewiston Nat. Bank, 18 Idaho, 124, 108 Pac. 901.

Where claims against an estate are presented to the administrator and the probate judge, and the probate judge indorses thereon his allowance thereof, the fact that he afterward sets aside the order of allowance will not necessitate the further presentation of such claims to the administrator or probate judge.—Miller v. Lewiston Nat. Bk., 18 Idaho, 124, 108 Pac. 901.

Intestate died on March 2, 1907. Notes on which he was liable as guarantor were presented and the claims therefor allowed by the administrator and probate judge on November 16, 1907. The statute of limitations had not run at that time. An order vacating such allowance was made April 30, 1908. Held, that claimants were not required by R. C. 4071 or any other statute to have their claims either allowed or rejected and suit brought thereon within one year from the date of issuing letters of administration. Miller v. Lewiston Nat. Bk., 18 Idaho, 124, 108 Pac. 901.

The fact that an administrator allows a claim against the estate, based upon promissory notes upon which the administrator and deceased guaranteed payment, does not render void or uncollectible such claim.—Miller v. Lewiston Nat. Bk., 18 Idaho, 124, 108 Pac. 901.

Where, at the time of a debtor's death, there is not one year left of the period of limitation prescribed by the general statutes after the issuing of letters of administration, R. C. 4071 gives the claimant one year from the time of such issuance, but such statute has no effect whatever when at the time of issuing letters more than one year is left of the period prescribed by the general statutes of limitation.—Miller v. Lewiston Nat. Bk., 18 Idaho, 124, 108 Pac. 901.

Editorial Notes.

Claims against estates of decedent, statement of: 130 Am. St. Rep. 311.

Presentation of claim as condition precedent to action to foreclose mechanic's lien against decedent's estate: Ann. Cas. 1913D, 275.

Contingency of claim as affecting time for presentation: 58 L. R. A. 82.

(C) DISPUTED CLAIMS.

The admissions of an administrator, made in the allowance of a claim against an estate, although the claim is allowed only in part, bind the estate.—Meinert v. Snow, 3 Idaho, 112, 27 Pac. 677.

Under the statutes of this state, where a claim against an estate has been allowed by the administrator and afterward by the probate judge, and thereafter objections and exceptions are filed by an heir of such estate, the probate judge has power and jurisdiction to set aside his former allowance of such claim and to hear and determine the objections and exceptions filed.—Estate of Coryell, 16 Idaho, 201, 101 Pac. 723.

Where exceptions and objections are filed to the allowance of a claim against an estate, in the manner directed by statute, the issue thus presented should be heard and tried by the probate judge, and until heard and tried is pending in such court.—Estate of Coryell, 16 Idaho, 201, 101 Pac. 723.

Where claims are pending against an estate before the probate court upon an order setting aside their former allowance by the administrator and the probate judge upon objections by the heirs, the probate judge is not required to indorse upon said claims his allowance or rejection of the same within ten days after such order, nor does his failure to do so amount to a rejection of said claims, and defeat his jurisdiction to set said claims for hearing upon the objections made by the heirs.—Miller v. Lewiston Nat. Bank, 18 Idaho, 124, 108 Pac. 901.

Where claims are filed against an estate and objections are made by heirs of the decedent to their allowance, and such objections are heard and tried by the probate court and thereafter appealed to and heard and tried in the district court, a judgment rendered in the district court against the administrator of said estate for the aggregate amount due upon said claims, with direction that said judgment be paid by the administrator in due course of administration, is in proper form, and not erroneous.—Miller v. Lewiston Nat. Bank, 18 Idaho, 124, 108 Pac. 901.

Under R. C. 5474, a judgment rendered against an executor or administrator upon a claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due.—McElroy v. Whitney, 24 Idaho, 210, 133 Pac. 118.

Where a judgment was entered on the 1st day of May, 1912, and no appeal was taken therefrom within sixty days from the entry thereof, under R. C. 4807, as amended by Laws 1911, page 367, and thereafter on the 26th day of October, 1912, said judgment was amended by adding thereto the following words: "And that said judgment be paid in due course of administration of the estate of W. G. Whitney, deceased"—an appeal taken from such judgment on December 21, 1912,

is too late to have said judgment reviewed on appeal, so far as any errors are concerned alleged to have been made during the trial of said cause, as said amendment made no change in the amount or effect of said judgment.—*McElroy v. Whitney*, 24 Idaho, 210, 133 Pac. 118.

Editorial Notes.

Right of owner to have claim not due declared valid claim against decedent's estate: *Ann. Cas. 1913D, 1221*.

(D) PRIORITIES AND PAYMENT.

R. S. 5470 provides that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except that the holder of a mortgage or lien may bring an action to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. Held, that the fact that the claim of the mortgagee had been presented to and allowed by the administrator and payments made thereon, would not bar an action to foreclose the mortgage.—*First Nat. Bk. of Hailey v. Glenn*, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

Editorial Notes.

Priority, in payment of debts of decedent, between judgment and expenses of administration, funeral and last illness: *Ann. Cas. 1912A, 778*.

VII. DISTRIBUTION OF ESTATE.

A decree of distribution in the probate court will not bind a person who was not an heir, devisee or legatee and not a party to the proceedings, so as to prevent inquiry into the validity of such decree, since such person had no right to appeal therefrom.—*Coats v. Harris*, 9 Idaho, 458, 75 Pac. 243.

Editorial Notes.

Right of succession, on death of beneficiary to fund in hands of executor or trustee under will giving latter discretion in paying fund to beneficiary: *Ann. Cas. 1912D, 1177*.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

Mandamus to compel administrator to execute conveyance. See *Mandamus*, II, (C).

Under R. S. 4831, subdivision 5, providing that an appeal may be taken from the probate court to the district court from a judgment or order in probate matters "against or in favor of directing the partition, sale or conveyance of real property," an order denying the issuance of an order to show cause why the real estate of a deceased should not be sold to pay claims against his estate is an appealable order.—*State ex rel. Missoula etc. Co. v. Whelan*, 6 Idaho, 78, 53 Pac. 2.

Under R. S. 5491, providing that all sales made by an administrator of the estate of a deceased person must be reported under oath

and confirmed by the probate court before the title to the property sold passes, an order confirming such a sale is void in the absence of a report of sale under oath.—*State ex rel. Chemung Min. Co. v. Cunningham*, 6 Idaho, 113, 53 Pac. 451.

The remedy of one aggrieved by an order of the probate court directing the sale of the property of an intestate is an appeal therefrom or a motion or other proceeding in that court to set aside the order complained of.—*Clark v. Rossier*, 10 Idaho, 348, 3 *Ann. Cas.* 231, 78 Pac. 358.

Where an administrator files his petition and commences proceedings for the sale of real estate belonging to his intestate, all of the orders made in such matter are in one proceeding, and the fact that the guardian ad litem of minor heirs appeared and consented to the sale, but did not appear at the hearing for the confirmation of the sale would not deprive him or the heirs of the right to be served with notice of appeal from an order confirming the sale.—*Reed v. Stewart*, 12 Idaho, 699, 87 Pac. 1002.

Where the guardian ad litem of minor heirs has appeared in a proceeding commenced by the administrator to sell real estate belonging to his intestate and consented to the sale, and the purchaser files his objections to the confirmation of such sale, which objections are overruled by the court and the sale confirmed, and the purchaser thereupon appeals to the district court from the order of confirmation, the guardian ad litem is an adverse party and must be served with the notice of appeal.—*Reed v. Stewart*, 12 Idaho, 699, 87 Pac. 1002.

Where the purchaser appeals from an order confirming the sale of property of an intestate, and an appeal from such order is dismissed by the district court because the guardian ad litem of minor heirs was not served with notice of appeal, the heirs so appearing are adverse parties within the meaning of R. S. 4808 and are entitled to be served with notice of appeal to the supreme court by service thereof on their guardian ad litem.—*Reed v. Stewart*, 12 Idaho, 699, 87 Pac. 1002.

Where it appears on the hearing of a motion to dismiss an appeal from the probate court for failure to file an undertaking that a deposit of money was made under R. S. 4778, instead of the undertaking, the motion to dismiss was properly denied, though the probate court failed to certify the fact that such deposit had been made.—*Estate of McVay*, 14 Idaho, 56, 93 Pac. 28.

Under R. S. 5521, providing that when the return of sale of real estate is made to the probate court and filed, any person interested in the estate may file written objections to the confirmation of the sale and may be heard thereon, the return to the order of sale and the objections made thereto constitute the issues to be tried and determined by the probate court.—*Estate of Christensen*, 15 Idaho, 692, 99 Pac. 829.

Under the provisions of a will and the law, held, that it was the duty of the executors to collect outstanding accounts in favor of the estate and pay all indebtedness of the estate,

and until that was done no distribution of the entire estate could be made; and, if in the performance of those duties it was necessary to sell the whole or a part of such estate to pay the indebtedness, the executors had authority to sell and convey a good, marketable title to such property, upon confirmation by the probate court.—*Jones v. Broadbent*, 21 Idaho, 555, 123 Pac. 476.

On an appeal from an order confirming a sale of real estate by an administrator, the district court is authorized to try the case anew upon the issues made in the probate court, and, if it appears from the evidence adduced on the hearing that the proceedings were fair and the sum bid is not disproportionate to the value of the property sold, it is the duty of the district court to affirm the order of confirmation made by the probate court.—*McGregor v. Jensen*, 18 Idaho, 320, 109 Pac. 729.

R. C. 5520 provides that when an administrator makes a sale of real estate, he must make a return of his proceedings to the probate court, and a hearing upon such return for the confirmation of the sale must be had. Upon the hearing, the court must examine the return and witnesses, and, if it appears that a sum exceeding the bid by at least ten per cent exclusive of the expenses of a new sale may be obtained, the court may vacate the sale and direct another to be had. If an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person, it is then in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. Held, that the offer referred to must be made in the probate court at the time of the hearing of the confirmation of the sale.—*McGregor v. Jensen*, 18 Idaho, 320, 109 Pac. 729.

A probate court has no jurisdiction or authority in the administration of an estate of a decedent to order or confirm the sale of real estate which belongs to some one else, and the title to which is vested in another, and which property did not in fact or law belong to the estate being administered.—*Douglas v. Douglas*, 22 Idaho, 336, 125 Pac. 796.

Editorial Notes.

Sales of executors or administrators, when void because in excess of order of sale: 37 Am. Dec. 65.

Deeds of executors and administrators, form and contents of: 56 Am. Dec. 55.

Sales of property, laches in applying for orders to pay debts: 26 Am. St. Rep. 22.

Estates of decedents, causes for which legislature may authorize sale of real property of: 79 Am. St. Rep. 82.

Reimbursement or subrogation of purchaser on annulling sale: 69 L. R. A. 45.

Implied power of executor or trustee to sell real property: 32 L. R. A., N. S., 676.

IX. INSOLVENT ESTATES.

Right to specific performance of contract for sale of personality, where estate insolvent. See *Specific Performance*, II.

X. ACTIONS.

Specific performance where defendant personally and as administratrix agreed to perform intestate's contract. See *Specific Performance*, II.

Death of party as affecting attorney's right to prosecute appeal. See *Appeal and Error*, VI.

Where an administrator of a deceased person's estate brings an action upon a promissory note due the estate, the authority of such administrator cannot be attacked by the defendant, on the ground that his appointment was irregularly made.—*Glendenning v. McNutt*, 1 Idaho, 592.

In actions against the estate of a deceased person, it is not necessary to allege in the complaint that the "claim" sought to be collected has been presented to the administrator for his allowance.—*Toulouse v. Burkett*, 2 Idaho, 184, 10 Pac. 26.

The representative character of an executor or administrator and his legal authority to represent the estate for which he is suing go to the capacity of the plaintiff to maintain the action, rather than the sufficiency of the facts to constitute a cause of action.—*Anthes v. Anthes*, 21 Idaho, 305, 121 Pac. 553; *Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Editorial Notes.

Statute of limitations, when begins to run in favor of executors or administrators: 99 Am. Dec. 394.

Right of personal representative to maintain action to quiet title to decedent's real estate: Ann. Cas. 1913A, 996.

Right of domiciliary administrator to sue in another jurisdiction on judgment recovered by him in representative capacity: Ann. Cas. 1913B, 626.

Executor or administrator as real party in interest by whom action must be brought: 64 L. R. A. 611.

XI. ACCOUNTING AND SETTLEMENT.

Effect of failure to take oath or file bond. See *ante*, II.

Duty of administrators to pay interest on funds. See *ante*, IV.

Attorneys' fees incurred by an administrator in unsuccessfully attempting to gain possession of the assets in his hands or sole heir cannot be allowed to him on his final settlement.—*Harris v. Coates*, 8 Idaho, 491, 69 Pac. 475.

R. C. 4831 authorizes an appeal to the district court from an order settling and allowing an account of an administrator, but where the probate judge settles and allows part of the account of an administrator and continues the remainder for future consideration and hearing, the judgment thus rendered does not settle such account as to the matters continued for future consideration; and an appeal will not lie from such order by those affected or interested in the matters continued for future consideration.—*Estate of Coryell*, 16 Idaho, 201, 101 Pac. 723.

Where an administrator allows certain claims against the estate and thereafter renders a re-

port listing such claims, and heirs of the deceased object to such report and the allowance of such claims, on the ground that the administrator is interested in such claims as a joint debtor with the decedent, and upon the hearing of such report the probate court approves the same except as to such claims and continues such claims for future consideration, and the administrator tenders his resignation as administrator and renders his final report, and the probate court accepts such resignation and appoints his successor, the approval by the probate court of the final report of such administrator does not approve and allow such contested claims.—*Miller v. Lewiston Nat. Bank*, 18 Idaho, 124, 108 Pac. 901.

Under R. C. 5600 and 5598, the probate court or judge thereof must fix a day for hearing a final settlement filed by an administrator and notice must be given of the day appointed for settlement, at which time any person interested in the estate may appear and file exceptions to the account, and contest the same.—*Kent v. Dalrymple*, 23 Idaho, 694, 132 Pac. 301.

Editorial Notes.

Annual settlements of executors and administrators, effect of as res judicata: 86 Am. Dec. 143.

Attorneys' fees, power of administrators to make estates of decedents liable for: 93 Am. Dec. 393.

Deceased executors and administrators, methods of compelling accounting by: 8 Am. St. Rep. 684.

Right to appeal from judgment rendered on report, account or settlement of executor or administrator: *Ann. Cas.* 1913C, 858.

Remedy of distributee as to accounting of which he had no notice and on which he did not appear: 63 L. R. A. 95.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

Action by heir for death of intestate, failure to make foreign administratrix a party. See *Death*.

A person nominated as executor by a will probated in the state of Utah, and appointed as such in that state, and afterward appointed administrator, with the will annexed, in this state, represents said estate in both jurisdictions, and occupies the same position with reference to all controversies and suits by or against said estate, and in that respect, and to that extent, is the same person in both states.—*Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

Though a foreign administrator has not authority to sue outside the state of his appointment an objection on this ground goes rather to his capacity to sue or maintain the action than to the sufficiency of the cause of action or the jurisdiction of the court, and such objection must be raised by demurrer in the trial court.—*Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

Editorial Notes.

Liability of executors or administrators in a foreign jurisdiction for property of decedent: 32 Am. Dec. 632.

Ancillary administration, necessity for and powers and duties of ancillary administrators: 35 Am. Dec. 483.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

(No paragraphs.)

XIV. EXECUTORS DE SON TORT.

Effect of failure to take oath or file bond. See *ante*, II.

EXEMPTIONS.

From taxation. See *Taxation*.

Of homestead. See *Homestead*.

Of wife's separate property. See *Husband and Wife*.

Rights in public lands. See *Public Lands*.

Possessory claim on public lands and improvements, subject to execution. See *Execution*, II.

The question as to whether property is exempt from execution involves the exercise of judicial discretion, and its decision is not confined to the determination of the attaching officer.—*Roth v. Duvall*, 1 Idaho, 149.

A sheriff has no authority to release property which he has seized under execution and made return of, even if it is exempt by law, but such release should be made by order of the court or judge.—*Roth v. Duval*, 1 Idaho, 149.

Exemption laws are liberally construed.—*Coughanour v. Hoffman's Estate*, 2 Idaho, 290, 13 Pac. 231.

Under R. S. 4480, subdivision 7, making the wages and earnings of a debtor exempt from levy of execution or attachment, such exemption continues while such wages or earnings are under the control of the debtor, though temporarily in the hands of another.—*Elliott v. Hall*, 3 Idaho, 421, 35 Am. St. Rep. 285, 18 L. R. A. 586, 31 Pac. 796.

Where the plaintiff, owing to injuries, was compelled to seek other employment and purchased a team of horses to engage in the dray business and the evidence shows conclusively the bona fides of such intention, such horses are exempt from execution, though he has not actually entered upon such business, under R. S. 4480, subdivision 6, which provides that two horses, etc., by which a drayman, teamster, etc., habitually earns a living are exempt from execution.—*Cleveland v. Andrews*, 5 Idaho, 65, 95 Am. St. Rep. 165, 46 Pac. 1025.

A chattel mortgage, executed by the husband alone, on chattels that are exempt from execution, creates no lien thereon, where the wife does not join in the execution of the same, as required by act of February 16, 1899. *Kindall v. Lincoln Hardware etc. Co.*, 8 Idaho, 664, 70 Pac. 1056.

Where a chattel mortgage is given to secure a debt evidenced by a note, and thereafter a new note and chattel mortgage are given for the same debt, though a different rate of interest is provided for in the new note, and an additional sum for attorneys' fees, and it is stated in the new obligation that it is given to renew the old note, it

is not a new contract, and subject to Sess. Laws 1899, page 292, then in force relative to chattel mortgages, and providing that no personal property of either husband or wife that is exempt by law from execution shall be mortgaged by either husband or wife without a joint concurrence of both.—*Vollmer v. Reid's Estate*, 10 Idaho, 196, 77 Pac. 325.

One who resides on an Indian reservation within a certain county is entitled to claim the benefit of the exemption laws against an attachment levied on his property within the limits of the reservation, since he is a resident of the state.—*Coe v. Cleghorn*, 10 Idaho, 166, 106 Am. St. Rep. 199, 79 Pac. 72.

At the time of the levy of an attachment, defendant disclaimed ownership of the property attached. The attachment was dissolved and thereafter a second attachment was levied on most of the same property. Defendant then claimed the property as exempt. Held, that defendant had not waived his right to claim his exemptions.—*Coe v. Cleghorn*, 10 Idaho, 166, 109 Am. St. Rep. 199, 79 Pac. 72.

Editorial Notes.

Tools, what exempted as and when: 21 Am. Dec. 545; 47 Am. Rep. 190; 123 Am. St. Rep. 139.

Head of family, who is and what constitutes a family: 61 Am. Dec. 586; 32 Am. Rep. 30.

Exemption of earnings and wages from execution and attachment: 91 Am. Dec. 411; 53 Am. Rep. 768; 102 Am. St. Rep. 81; 18 L. R. A. 586.

Exemption of personal property, constitutionality of statutes relating to: 45 Am. Dec. 251.

Exemption of pensions and their proceeds: 41 Am. Rep. 411; 2 Am. St. Rep. 596; 17 Ann. Cas. 1191.

Extraterritorial effect of exemption laws: 2 Am. St. Rep. 240; 19 Am. St. Rep. 145.

Laborers, who are within the meaning of laws granting exemptions: 58 Am. St. Rep. 308.

Proceeds of exempt property, whether subject to execution: 66 Am. St. Rep. 381; 19 L. R. A. 33.

Meaning of "apparatus" in exemption statute: Ann. Cas. 1912C, 610.

Right of debtor to exemption as affected by preparation to remove from state: Ann. Cas. 1913C, 729.

EXTORTION.

See Threats.

EXTRADITION.

Questions that may be raised or inquired into on petition for habeas corpus. See Habeas Corpus, II.

Any agreement by an agent named in a requisition to take less or more than the fees allowed by law is illegal and void.—*Settle v. Sterling*, 1 Idaho, 259.

The governor has a right to the appointment of an agent to receive and return a fugitive from justice under requisition papers, but cannot fix any terms as to his fees.—*Settle v. Sterling*, 1 Idaho, 259.

The position of an agent named in a requisition to receive and return a fugitive from justice is an office; and such officer is entitled to the fees and emoluments fixed by law for his services.—*Settle v. Sterling*, 1 Idaho, 259.

Under R. S. 8425, providing that the accounts of the person bringing back a fugitive from justice under a requisition from the executive authority must be audited by the controller and paid out of the territorial treasury, the state is liable for such expense and not the county wherein the prosecution of such fugitive is pending.—*Kroutinger v. Board of Examiners*, 8 Idaho, 463, 69 Pac. 279.

Sess. Laws 1899, page 120, subdivisions 2, 3, 4, specifying the compensation of sheriffs and constables for certain services, have no application to the claim of a person for expenses in going to another state for a fugitive from justice under a requisition of the governor.—*Kroutinger v. Board of Examiners*, 8 Idaho, 463, 69 Pac. 279.

Where a prisoner has been brought within this state by virtue of a warrant of extradition, the question as to whether or not he is a fugitive from justice is one that was available to him only so long as he was beyond the jurisdiction of the state against whose laws he is alleged to have transgressed.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A.; N. S., 227, 85 Pac. 897; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

The action and conduct of the chief executive of the state in which the prisoner was found and all of the executive and ministerial officers acting in aid of a warrant of extradition is a matter for the consideration of the courts of that state, subject to the reviewing authority of the federal courts in so far as the federal question is involved, and is not open to consideration or determination by the courts of the demanding state.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 190, 897; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

The warrant of the chief executive of a state surrendering a prisoner on demand for extradition, whether issued lawfully or unlawfully, becomes functus officio when the prisoner is delivered into the jurisdiction of the demanding state, and the regularity of its issuance thereupon ceases to be a question for judicial inquiry on application of the prisoner for his discharge where he is at the time held under legal process of the demanding state.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227; 85 Pac. 897; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

The motives which actuate the governor of a state to issue his warrant for the rendition of a prisoner on extradition are not proper subjects of judicial inquiry, since jurisdiction to take the action complained of is the test

and the jurisdictional facts are subject to review by the federal courts of the surrendering state where application is made to such courts before the demanding state acquires jurisdiction of the person of the accused.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 897; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

In interstate extradition the prisoner is held under the extradition process only until such time as he reaches the jurisdiction of the demanding state, and he is thenceforth held under the process issued out of courts of that state; hence, there is no federal question involved in his detention.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 897; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

Editorial Notes.

Proceedings for arrest and surrender in one state of fugitives from justice in another: 57 Am. Dec. 389.

Arrest and detention of fugitive from justice before demand made therefor: 46 Am. St. Rep. 414.

Grounds upon which one state may refuse to surrender persons demanded by the authorities of another: 68 Am. St. Rep. 129.

Proceedings in extradition: 112 Am. St. Rep. 103.

What constitutes "crime" for which offender is subject to interstate extradition: Ann. Cas. 1912C, 1298.

Who is fugitive from justice within purview of interstate extradition laws: 7 Ann. Cas. 1076; 13 Ann. Cas. 907.

Right after interstate extradition to try prisoner for crime not designated in requisition: 3 Ann. Cas. 542.

Papers necessary to obtain surrender of fugitive from another state: 28 L. R. A. 801.

Right of court of asylum state to examine, in interstate extradition proceedings, sufficiency of papers charging the offense for which the return of the fugitive is demanded: 11 L. R. A., N. S., 424.

FACTORS.

Agency in general. See Principal and Agent.

Sales of goods through brokers not having possession or control of the property. See Brokers.

FALSE IMPRISONMENT.

See Arrest; Malicious Prosecution.

In an action to recover damages for false imprisonment, where the evidence shows without conflict that the officer was advised at the time of the arrest that such person was not the person named in the warrant, and was advised and informed by persons who were acquainted with the person arrested that such person was not the person named in the warrant, and was not at the place where the crime was committed, and there is no evidence showing that the officer had any knowledge of any facts or circumstances or had any description which in any way pointed to

the appellant as the person named in the warrant, it is error for the trial court to withdraw the case from the jury and sustain a motion for a nonsuit, as the question of illegal arrest, under the facts, was a question for the jury.—*Ludwig v. Ellis*, 22 Idaho, 475, 126 Pac. 769.

Editorial Notes.

Actions for false imprisonment, when maintainable: 54 Am. Dec. 258; 67 Am. St. Rep. 408; 118 Am. St. Rep. 719.

Making complaint before judicial officer on which warrant issues as rendering complainant liable for false imprisonment where complaint states no offense or gives officer no jurisdiction: Ann. Cas. 1912B, 1373.

Liability of officer making arrest: 51 L. R. A. 193.

FALSE PRETENSES.

Counterfeiting. See Counterfeiting.

Forgery and uttering forged instruments. See Forgery.

Fraud not involving use of false tokens or representations. See Fraud.

In a prosecution based on R. S. 6385, providing the punishment for persons presenting fraudulent claims to any county, city, etc., the evidence showed that defendant presented a claim for 150 coyote scalps; that previously he had brought a cigar-box containing coyote ears to a justice of the peace, who counted them and nailed the box up; that the justice of the peace thought they were genuine coyote ears; that the box was mailed by registered mail to the county auditor immediately after it was examined by the justice of the peace; that defendant had at one time proposed to a witness that they go into the business of manufacturing coyote ears; that the wife of the justice of the peace saw the box and that it was not the same as the box containing the spurious ears, offered in evidence, that numerous persons, including several attorneys, had access to the vault of the county auditor where the box was kept. Held, not sufficient to sustain a conviction.—*State v. Adams*, 9 Idaho, 582, 75 Pac. 258.

In a prosecution under R. S. 6385, which provides that every person who, with intent to defraud, presents for allowance or payment to any county, etc., any false or fraudulent claim, etc., is guilty of a felony, the evidence showed that defendant appeared before a justice of the peace with a box claimed to contain coyotes' ears and swore to a claim against the county for the bounty prescribed by Laws 1901, page 205, that on the following day a box of coyotes' ears was received by the county auditor by registered mail and a letter showing that the bill inclosed was from defendant claiming payment for the number of ears contained in the box; that the said ears were spurious and manufactured; that defendant and another were operating in the coyote business; that defendant took from such other person a box of spurious ears; that defendant had told a third person that he had previously turned

in several batches of spurious ears without being caught; that defendant when arrested made overtures to the sheriff toward fixing the matter up, inasmuch as he had received no money from the county for the spurious ears. Held, sufficient to sustain a conviction. *State v. Adams*, 10 Idaho, 591, 79 Pac. 398.

Under R. S. 6385, providing that every person who, with intent to defraud, presents for allowance or payment to any county, etc., any false or fraudulent claim, etc., is guilty of a felony, it is not necessary that the fraudulent bill be allowed or paid before a conviction can be had.—*State v. Adams*, 10 Idaho, 591, 79 Pac. 398.

Under R. S. 6385, prohibiting the presentation of false claims against a county, etc., it is no defense to a prosecution for presenting false claims for bounty for animals killed, that the ears of the animals for which bounty was claimed were spurious and easily detected by the board of commissioners.—*State v. Adams*, 10 Idaho, 591, 79 Pac. 398.

Laws 1901, page 205, section 4, provides a punishment for making false affidavits for bounty for killing coyotes, lynx and wildcats. R. S. 6385 provides that every person who, with intent to defraud, presents for allowance or payment to any county, etc., any false or fraudulent claim, etc., is guilty of a felony. Held, that one who presents to the county for payment a false and fraudulent claim for bounty under Laws 1901, page 205, may be prosecuted under either act.—*State v. Adams*, 10 Idaho, 591, 79 Pac. 398.

FALSE REPORTS.

By corporate officer. See Corporations, VI, (C).
— Bank officer. See Banks and Banking, II.

FALSE REPRESENTATIONS.

See False Pretenses; Fraud.
False representation affecting validity of note. See Bills and Notes, I.
Notice affecting bona fides of purchaser. See Bills and Notes, V, (D).

FEDERAL EMPLOYER'S LIABILITY LAW.

Excessive damages. See Damages, VII.

FELLOW-SERVANTS.

See Master and Servant, III, (E).

FENCES.

As indicating boundaries. See Boundaries.
Fencing railroads. See Railroads.
Fencing against sheep. See Animals.
Fence as fixture on public land. See Fixtures.
Fence on mistaken boundary line, acquiescence and occupation sufficient to give title. See Adverse Possession.
Statutes and municipal regulations as to fences. See Railroads, X, (B).
Compelling railway company to build fence. See Specific Performance, I.
Liability for injuries to animals due to failure to fence tracks. See Railroads, X, (H).
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FERRIES.

A ferry franchise is an incorporeal hereditament and may be voluntarily transferred like any other property right.—*Evans v. Kroutinger*, 9 Idaho, 153, 2 Ann. Cas. 691, 72 Pac. 882.

The franchise granting power alone, and not creditors, can question the right to transfer a ferry franchise.—*Evans v. Kroutinger*, 9 Idaho, 153, 2 Ann. Cas. 691, 72 Pac. 882.

The statutes of this state require certain proceedings to be taken by the applicant and the board of county commissioners in granting a ferry license, and, if the statutory proceedings are taken and the board issues a license, such license will be held valid, notwithstanding the fact that the complete proceedings of the board were not made a matter of record on the minute book.—*Sims v. Milwaukee Land Co.*, 20 Idaho, 513, 119 Pac. 37.

Editorial Notes.

Transferability and descendibility of ferry franchise: 2 Ann. Cas. 693.

Establishment, regulation and protection of ferries: 59 L. R. A. 513.

FINES, FORFEITURES AND PENALTIES.

I. FINES.

II. FORFEITURES.

III. PENALTIES.

Penalty and forfeiture in connection with gambling devices. See Gaming, II.
Penalties and forfeitures under usury statutes. See Usury, II.

I. FINES.

Fines for particular offenses. See titles of specific crimes.
Punishment of crime in general. See Criminal Law.
For contempt. See Contempt.

II. FORFEITURES.

Forfeiture of property or estates therein or rights under contracts for breaches of private duties or obligations. See Estates; Landlord and Tenant; Deeds; Contracts, V; and other specific heads.
Bail bonds and recognizances. See Bail and Recognizances.
Forfeiture of real estate contracts. See Vendor and Purchaser, III, IV, VI, VII.
Forfeiture of mining claims. See Mines and Minerals, I, (B), 3, (1).
— Of mining contract. See Mines and Minerals, II, (C).

III. PENALTIES.

Penalty for failure to satisfy mortgage. See Mortgages, VII.
Penalties against sheriff, recovery from surety on bond. See Sheriffs and Constables, IV.

FIRES.

See Arson.

Right of homestead entryman to recover for fire damage prior to entry. See Public Lands, II, (B), 2.

Action by tenant for damages by fire, claimed to be due to landlord's negligence. See *Landlord and Tenant*.

Civil liability for injuries from fire caused by operation of railroad. See *Railroads*, X, (I).

FISH AND GAME.

Where the owner of land constructs lakes or ponds thereon on streams which are natural spawning ground for trout and other fishes and contain at all times trout and food fishes, such lakes or ponds are not private ponds within the provisions of Laws 1905, page 258, section 3, providing that a person or corporation may establish a private pond to propagate fish in water on premises of his own, where food fishes do not naturally abound, and may propagate and grow fish therein and sell the same.—*State v. Dolan*, 11 Idaho, 256, 81 Pac. 640.

It is within the police power of the legislature to enact such general laws as may be necessary for the protection and regulation of the public's right in such fish and game, even to the extent of restricting the use of or right of property in the game after it is taken or killed.—*Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345.

Ownership acquired in game or fish is not such an ownership as one acquires in chattels or lands, but merely a qualified ownership; and the possession of fish and game is at all times subject to such regulation as the legislature may make, subject to constitutional provisions.—*Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345.

Under Laws 1903, page 189, section 3, as amended by Laws 1905, page 258, private ponds may be constructed and maintained and stocked with fish, and the right to do so is a statutory right.—*Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345.

Under the common law a person has no right to construct a fish-pond upon natural streams where food fish naturally abound, so as to prevent the fish from going up or down such stream.—*Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345.

A complaint against the state game warden for damages resulting from the releasing of fish from an alleged private pond must show that such pond was established and stocked with fish in accordance with the state fish and game laws.—*Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345.

Under Laws 1905, page 257, section 9, making it a misdemeanor for any person to have in his possession carcasses, heads or antlers of game animals in excess of the number provided in said act, the game warden has authority to take possession of game animals, or any part thereof, from any person who has possession thereof in excess of the number prescribed in the statute, irrespective of the question as to where the animals were killed.—*Binkley v. Stephens*, 16 Idaho, 560, 102 Pac. 10.

Editorial Notes.

Right of action for frightening or driving away fish or game from plaintiff's

property by lawful acts: Ann. Cas. 1913E, 536.

Governmental control over right of fisheries: 39 L. R. A. 581.

Right to fish: 60 L. R. A. 481.

FIXTURES.

Right of mortgagee of tenant to remove trade fixture. See *Chattel Mortgages*, III.

A fence placed around land of the United States by a bona fide settler thereon does not become a fixture which such settler is prohibited from removing on his entry being defeated.—*Bingham Co. Agricultural Assn. v. Rogers*, 7 Idaho, 63, 59 Pac. 931.

Where the seller of machinery for use in a permanent building retains title thereto or takes a chattel mortgage thereon for the purchase price, the machinery will be considered as a fixture, and a real estate mortgage of a prior date on the building is not a lien on the machinery, which will prevent a foreclosure of the chattel mortgage.—*Anderson v. Creamery Package Mfg. Co.*, 8 Idaho, 200, 101 Am. St. Rep. 188, 56 L. R. A. 554, 67 Pac. 493.

Evidence to show that property had been treated as personal in its character by mortgagor and mortgagee is admissible to show whether or not the property had become a fixture.—*Anderson v. Creamery Package Mfg. Co.*, 8 Idaho, 200, 101 Am. St. Rep. 188, 56 L. R. A. 554, 67 Pac. 493.

Property consisting of a front and back bar placed in a saloon building and fastened thereto constitutes trade fixtures.—*Bush v. Havird*, 12 Idaho, 352, 10 Ann. Cas. 107, 86 Pac. 529.

Trade fixtures must be removed by the tenant prior to his surrender of possession to the landlord, and if he fails to do so and there is no agreement to the contrary, the right of the tenant to sever such property from the realty will be lost.—*Bush v. Havird*, 12 Idaho, 352, 10 Ann. Cas. 107, 86 Pac. 529.

Editorial Notes.

Tenants, when may remove fixtures: 11 Am. Dec. 241.

What are fixtures: 14 Am. Dec. 303; 17 Am. Dec. 686; 24 Am. Dec. 726.

Machinery, when becomes fixtures: 11 Am. Rep. 314; 69 L. R. A. 894.

Heavy machinery screwed on to the floor: 42 Am. Rep. 447.

FOOD.

See *Fish and Game*.

FORCIBLE ENTRY AND DETAINER.

Summary remedies for recovery of possession of lands demised. See *Landlord and Tenant*.

Of lands mortgaged. See *Mortgages*, Trespasses on real property. See *Trespass*.

FORFEITURES.

See *Fines, Forfeitures and Penalties*.

FORGERY.

Counterfeiting. See Counterfeiting.

Rights of parties to and holders of forged or altered promissory notes, bills, checks, etc. See Bills and notes.

Payment of forged checks. See Banks and Banking.

An indictment for forgery will not lie for forging or counterfeiting an instrument void upon its face.—*People v. Heed*, 1 Idaho, 531.

An information charging that defendant "did willfully, unlawfully, feloniously and falsely forge and utter a bank check" and "did then and there utter the said bank check as true and genuine with intent to defraud the said R.," is fatally defective in that the part charging the making of the instrument fails to allege that the same was done "with intent to defraud another," and that the part charging the uttering fails to allege that the check was uttered "knowing the same to be false, altered, forged or counterfeited," both of which allegations are necessary under R. S. 7028, defining forgery.—*State v. Swensen*, 13 Idaho, 1, 81 Pac. 379.

Evidence in a prosecution for forgery held to contain no substantial conflict and to be insufficient to support a verdict of guilty.—*State v. Miles*, 22 Idaho, 166, 124 Pac. 786.

While the uttering of an instrument containing a forged indorsement does not raise a prima facie presumption that the person uttering the same forged the indorsement, that fact constitutes a circumstance against the defendant which the jury have a right to consider in connection with other facts and circumstances of the case in arriving at their verdict.—*State v. Miles*, 22 Idaho, 166, 124 Pac. 786.

Proof that a defendant charged with forgery had in his possession and passed a check bearing the forged indorsement of the name of the payee of the check does not constitute prima facie proof or a prima facie presumption that the defendant made the forged indorsement.—*State v. Miles*, 22 Idaho, 166, 124 Pac. 786.

The indeterminate sentence act, Laws 1909, page 82, amends R. C. 7034, and the term of imprisonment is for not less than one year nor more than fourteen years, the minimum and maximum fixed by said section.—*In re Setters*, 23 Idaho, 270, 128 Pac. 1111.

Editorial Notes.

What is forgery: 22 Am. Dec. 306; 119 Am. St. Rep. 317.

Signing of writing, what sufficient to amount to forgery: 55 Am. Rep. 651.

What may be the subject of forgery: 8 Am. St. Rep. 466.

Uttering sufficient to sustain conviction for forgery: 119 Am. St. Rep. 317.

Necessity that name of person intended to be defrauded or to whom instrument was uttered or passed be alleged in indictment for forgery: Ann. Cas. 1912C, 1143.

Forging and uttering as one offense: 1 Ann. Cas. 308.

Worthless instruments: 24 L. R. A. 33.

Making or altering mere memorandum: 54 L. R. A. 794.

FRANCHISES.

See Ferries.

FRAUD.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

II. ACTIONS.

III. CRIMINAL RESPONSIBILITY.

See Fraudulent Conveyances.

Rescission of contract. See Contracts; Sales; Vendor and Purchaser.

Affecting mortgages. See Mortgage.

Of umpire or arbitrator. See Arbitration and Award.

Fraud of attorney in obtaining admission to practice, disbarment. See Attorney and Client, I.

In locating mining claim. See Mines and Minerals, I, (B), 3, (4).

In procuring loan impressing money with trust fund character. See Banks and Banking, II.

Undue influence as affecting deeds. See Deeds, I, (E).

Effect of fraudulently securing possession of deed. See Deeds, I, (D).

Affecting validity of note. See Bills and Notes, I.

Notice affecting bona fides of purchaser. See Bills and Notes, V, (D).

Joint and several maker of note, right to defend on ground of fraud as to comaker. See Bills and Notes, VIII, 1.

As defense to action for purchase price of stock. See Corporations, IV, (E).

As defense in action on compromise agreement. See Compromise and Settlement.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

False representations as to the condition, situation and value of real estate, knowingly made by the vendor to the purchaser, are not actionable unless the purchaser has been fraudulently induced to forbear inquiry as to their truth.—*Brown v. Bledsoe*, 1 Idaho, 746.

A purchaser is bound to exercise ordinary prudence and discretion, and if the means of knowledge are within his power and he neglects to make proper inquiry, he loses his remedy against the vendor for any representations the vendor may make.—*Brown v. Bledsoe*, 1 Idaho, 746.

One who purchases real and personal property, relying on representations made by the seller and who at the time informs the seller that owing to his unfamiliarity with the subject matter he will rely on such representations, can recover damages sustained when such representations are false and fraudulent.—*Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503.

The fact that the vendor of personal property lies to the purchaser about the class or quality or character of a piece of property cannot furnish the basis of an action for deceit, unless the vendee purchased relying upon such representations and not knowing or having equal means of knowing of its

falsity.—*Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206.

Where a vendor has a good and fee simple title to a tract of land, and conveys the same to a purchaser by deed of warranty with full covenants, and thereafter deeds and conveys the same tract of land to another bona fide purchaser for value, and the subsequent purchaser places his deed of record in advance of the recording of the first deed, and thereby takes the paramount title, the acts and conduct of the vendor in executing and delivering the subsequent conveyances constitute and amount to constructive fraud within contemplation of law, although no actual fraudulent intent existed in the mind of the grantor at the time of executing the subsequent conveyance.—*Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A., N. S., 332, 100 Pac. 358.

Where the action of a vendor in reconveying property manifests a gross and culpable carelessness and negligence, and results in defeating the title of a prior vendee and his eviction from the premises, the law will impute to such vendor a fraudulent intent from the results of which it will not permit him to escape.—*Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A., N. S., 332, 100 Pac. 358.

Where an original contract has been made for the purchase of land and under that contract the purchasers take possession of the land and have full opportunity to ascertain all of the facts in regard to the water rights and roads connected therewith, and thereafter procure the seller to waive the contract and to deliver them a deed for the premises, and execute a mortgage for the purchase price upon different terms from that provided by the original contract, they thereby waive any question of fraud in the original contract.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

Though a misrepresentation is made through a mistake of the facts as they actually exist, when such misrepresentation is made by one whose duty it is to know the facts and who represents himself as possessing all the facts with reference to the matter, the misrepresentation is in law equally as fraudulent and actionable as if it had been knowingly made. *Hillock v. Idaho Title & Trust Co.*, 22 Idaho, 440, 126 Pac. 612.

Editorial Notes.

Fraud in the sale of real estate: 2 Am. Dec. 77; 28 L. R. A., N. S., 202.

Liability of vendor of realty for false representations innocently made: Ann. Cas. 1913C, 63.

Promise not to engage in business in future as fraud sufficient to support action: Ann. Cas. 1913A, 388.

Opinion on question of law by party to contract for sale of land as sufficient basis to support charge of fraud: Ann. Cas. 1913B, 1143.

Right to rely on representations: 37 L. R. A. 593.

Expression of opinion: 35 L. R. A. 417.

False statement as to cost, selling or market price of property, or as to offers therefor: 35 L. R. A., N. S., 175.

II. ACTIONS.

Discovery of, as affecting time to sue. See Limitation of Actions, II.

Striking equitable defense of fraud in procuring deed. See Ejectment.

Sufficiency of allegation to show fraud, in action by nonresident alien claiming right of succession. See Aliens.

Where there is evidence tending to show fraud, the question should be submitted to the jury.—*Cox v. Northwestern Stage Co.*, 1 Idaho, 376.

A failure by plaintiff to deny, by affidavit, the genuineness and due execution of an instrument in writing set forth in the answer as the foundation of the defense does not preclude the plaintiff from showing, on the trial, that it was procured by fraud or misrepresentation.—*Cox v. Northwestern Stage Co.*, 1 Idaho, 376.

Where a purchaser of real estate alleges false representations knowingly made by the vendor by which he has been fraudulently induced to forbear inquiry, the means by which he has been induced to forbear inquiry must be specifically set forth in the complaint.—*Brown v. Bledsoe*, 1 Idaho, 746.

In an action of fraud, findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues.—*Tage v. Alberts*, 2 Idaho, 271, 13 Pac. 19.

A much wider latitude of inquiry is permissible in cases involving a charge of fraud than in those where no such element exists or is alleged.—*Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405.

A defendant cannot set up fraudulent representations in bar of a recovery of the purchase price of property and still retain title to the property.—*Cowen v. Harrington*, 5 Idaho, 329, 48 Pac. 1059.

In an action based on fraud of defendant, the particular act and thing constituting the fraud must be pointed out.—*Abrams v. White*, 11 Idaho, 497, 83 Pac. 602.

Where a purchaser of personal property retains the property and does not offer to rescind the contract and return the property, his action for damages on account of deceit and false and fraudulent representations made by the vendor is a ratification of the sale, and the action becomes one in tort or for breach of warranty.—*Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206.

Where a party seeks to recover on the grounds of deceit and false and fraudulent representations, he must plead the particular representations that were made and that they were false and fraudulent and material, and that the party injured relied on and believed such statements and acted upon the belief, and with the understanding that such false and fraudulent representations were in fact true, and he must also show the specific in-

stances in which they were untrue and in what the untruth or deception consisted.—*Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206.

In an action on a conditional sale note given as part of the purchase price of a vehicle, defendants admitted the purchase, the execution of the note and nonpayment. By way of separate answer and cross-complaint, defendants alleged that prior to the sale plaintiffs made certain representations as to the class and quality of the materials in the vehicle, which representations defendants believed to be true; and it was further alleged that the vehicle was made of cheap material, that it proved to be valueless and had to be repaired and improved a great deal, that defendants had paid the sum of \$102 on the contract and that they had been damaged in that sum "by reason of the false and fraudulent representations of the plaintiffs so made." Held, that a demurrer to the answer and cross-complaint should have been sustained.—*Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206.

In an action on a conditional sale note given for the purchase price of personal property, the evidence held insufficient to establish fraud, deception or false representations made on the sale.—*Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206.

In an action by a vendee against his vendor for false and fraudulent representations as to the southern boundary of certain blocks sold, evidence of plaintiff held to make a prima facie case.—*Bumpas v. Stein*, 18 Idaho, 578, 111 Pac. 127.

Evidence held insufficient to show that the respondents knowingly and intentionally misrepresented the area of land contained in block 29 sold to appellants, and for that reason the court did not err in sustaining the motion for a nonsuit as to the first cause of action.—*Bumpas v. Stein*, 18 Idaho, 578, 111 Pac. 127.

Fraud is never presumed but must be established by a clear and convincing evidence, and this is especially true where a party assails the integrity of a written instrument.—*Nelson v. Hudgel*, 23 Idaho, 327, 130 Pac. 85.

Editorial Notes.

False representations, actions for: 20 Am. Dec. 626; 18 Am. St. Rep. 555.

Proof of fraud, what sufficient: 65 Am. Dec. 157.

Fraud, carelessness as a bar to relief from: 32 Am. St. Rep. 384.

Necessity of returning or tendering consideration upon repudiation of release of damages for personal injuries procured by fraud: Ann. Cas. 1912D, 1084.

III. CRIMINAL RESPONSIBILITY.

Presenting false claims against the county. See *False Pretences*.

FRAUDS, STATUTE OF.

I. AGREEMENTS IN CONSIDERATION OF MARRIAGE.

II. PROMISES BY EXECUTORS OR ADMINISTRATORS.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

IV. REPRESENTATIONS.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

VII. SALES OF GOODS.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

IX. OPERATION AND EFFECT OF STATUTE.

X. PLEADING, EVIDENCE, TRIAL AND REVIEW.

Part performance as ground for specific performance of void contract. See *Specific Performance*.

Conveyances void as to creditors. See *Fraudulent Conveyances*.

I. AGREEMENTS IN CONSIDERATION OF MARRIAGE.

(No paragraphs.)

II. PROMISES BY EXECUTORS OR ADMINISTRATORS.

(No paragraphs.)

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

Pleading. See post, X.

Where defendant at the request of his creditor agreed to pay to plaintiff money that he owed to such creditor, such contract is not within the statute of frauds requiring the promise to pay the debt of another to be in writing, since defendant is simply paying his own debt to a different person than the one to whom it was originally intended to be paid.—*Casey v. Miller*, 3 Idaho, 567, 32 Pac. 195.

A contract executed to enable one of the parties thereto to obtain credit on purchases of beer from plaintiff, contained the provision: "We do agree to become liable for the prompt payment to you by M. for all beer you may sell to him on credit, throughout the term of one year from the date hereof, and our liabilities hereunder shall not exceed \$1,000 at any one time, and that on demand pay to you such indebtedness promptly." Held, an original agreement for the direct payment of money, made by all the parties who signed.—*Elbring v. Mullen*, 4 Idaho, 199, 38 Pac. 404.

Plaintiff was proprietor of a meat market. Defendant introduced a woman to plaintiff, requesting him to let her have such meats as

she required and charge the same to him. Held, an original promise and not within the statute of frauds.—*Sears v. Flodstrom*, 5 Idaho, 314, 49 Pac. 11.

Plaintiff left with her brother B. for collection a note signed by S. S. executed an instrument authorizing C., the defendant, to sell his property for a certain sum and to pay B. \$500 thereof. C. accepted the trust in writing, stating, "I hereby comply with the above in case a sale of the property is made." Held, that R. S. 6009, subdivision 2, requiring a special promise to answer for the debt, default, etc., of another to be evidenced by some note or memorandum in writing, had no application to the transaction.—*Smith v. Caldwell*, 6 Idaho, 436, 55 Pac. 1065.

Where D. worked for defendant and on settlement therefor defendant agreed to pay plaintiff, to whom D. was indebted, the debt thus assumed was the debt of defendant and such agreement was not within R. S. 6010, requiring certain agreements to be in writing.—*Sherer v. Rubedew*, 11 Idaho, 536, 83 Pac. 512.

Where the evidence tends to show that one corporation has purchased all the property and rights of another corporation, which has been engaged in business, and as a part of the consideration for such purchase and transfer the purchaser has agreed to assume and pay the outstanding debts and liabilities of the old corporation, such a transaction constitutes the liability of the new company to pay such indebtedness an original obligation, which is not required to be in writing under the statute of frauds.—*Mineau v. Imperial Dredge etc. Co.*, 19 Idaho, 458, 114 Pac. 23.

When the consideration of a party's promise is for money to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money, such promise is collateral, and under the statute of frauds will not bind the party unless it be in writing.—*Storer v. Hatfield*, 19 Idaho, 170, 113 Pac. 80.

Editorial Notes.

Third persons, promises for the benefit of: 3 Am. Dec. 305; 9 Am. Dec. 155; 35 Am. St. Rep. 331; 71 Am. St. Rep. 178.

Promise to pay the debt of another: 5 Am. Dec. 321; 46 Am. Rep. 296.

Promises to pay the debt of another when need and when need not be in writing: 95 Am. Dec. 251.

Indemnity, contracts of, whether within statute of frauds: 42 Am. St. Rep. 186; Ann. Cas. 1912A, 884.

What, within the meaning of the statute of frauds, is a contract to answer for or pay the debt of another: 126 Am. St. Rep. 487.

Promise to pay debt of another out of debtor's property as within statute of frauds: Ann. Cas. 1912B, 446.

Promise to pay debt of another in consideration of relinquishment of lien

by promises as within statute of frauds: Ann. Cas. 1913D, 319.

Contemporary promise of one person to pay where benefit inures to another as a promise to answer for default of another: 15 L. R. A., N. S., 214; 32 L. R. A., N. S., 598.

IV. REPRESENTATIONS.

(No paragraphs.)

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

A contract, whereby a corporation agrees to employ D. at a specified salary so long as he continues to own and hold his stock in the corporation, does not come within the purview of the statute of frauds (R. S. 6009, subdivision 1), on the ground that the same was not in writing for the reason that such contract is capable of being fully performed, completed and terminated within a year.—*Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Idaho, 61, 108 Pac. 536.

Editorial Notes.

Contracts, what within statute of frauds, because not to be performed within one year: 93 Am. Dec. 86; 43 Am. Rep. 42.

Agreements not to be performed within a year: 138 Am. St. Rep. 590.

Contract not to be performed within one year but terminable at option of parties, as within statute of frauds: Ann. Cas. 1912B, 731; 17 Ann. Cas. 207.

Validity within statute of frauds of contract which is capable of being performed by one party within year and is so performed: 13 Ann. Cas. 916.

Oral contract for year's service to commence in futuro: 2 L. R. A., N. S., 738.

Contracts for services which may but are not intended to be performed within a year: 15 L. R. A., N. S., 313.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

Part performance removing bar so as to entitle party to specific performance. See *Specific Performance*, II.

Sufficiency of memorandum. See *Specific Performance*, II.

Verbal transfer of mining claims. See *Mines and Minerals*, II, (B).

Under R. S. 6007, providing that no estate or interest in real property, other than one year leases, nor any trust or power over or concerning it, or relating thereto, can be granted otherwise than by operation of law, or a conveyance in writing subscribed by the grantor or his lawful agent, an oral contract of sale of a possessory claim on public lands is not admissible in evidence against a claimant whose right is anterior to such oral contract.—*McGinness v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020.

Where a person holding a homestead right pays a former occupant, who once held the land under a desert claim that has been can-

ceded by order of the land commissioner, for his water rights and improvements thereon, and later takes a deed thereto in writing, such deed has effect only from its date, under the statute requiring all transfers of real property to be evidenced in writing.—*McGuinness v. Stanfield*, 7 Idaho, 23, 59 Pac. 936.

Where it is verbally agreed between the owner of land and the owner of a ditch that the latter shall have a right of way for his ditch through the land in consideration of the right to the use of water from the ditch, and the contract is carried out by the parties and their successors for a period of seven or eight years, equity will not allow the ditch owner to deprive the other of the use of the water, while retaining the benefit of the right of way, on the ground that the contract was void under the statute of frauds, R. S. 6008. *Feeney v. Chester*, 7 Idaho, 324, 63 Pac. 192.

W. delivered a deed in escrow to be surrendered to F. on the payment of five promissory notes. Before maturity of the last two notes, W. procured an attachment on the goods of F. By way of cross-complaint F. claimed damages for wrongful attachment. Pending the action, F. assigned his cause of action to C. for a consideration already paid. After judgment W. ordered the deed to be delivered to F., who immediately transferred the property to C. pursuant to the assignment previously made. Held, that the attachment proceeding by W. was not a waiver of his rights under the escrow agreement causing the title to vest in F., and hence, the assignment was not a parol transfer of real estate within the prohibition of the statute of frauds.—*McCornick v. Friedman*, 9 Idaho, 754, 76 Pac. 762.

Defendant sold land to plaintiff and at the same time sold him a number of shares of stock in an irrigation company, representing that said shares of stock entitled the holder to a certain quantity of water for irrigating the land. Held, that this was a sale of stock and not a sale of the water right, and hence not within the statute of frauds requiring such a contract to be in writing.—*Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503.

An easement is an interest or estate in real property, and is subject to the operation of the statute of frauds.—*Howes v. Barmon*, 11 Idaho, 64, 114 Am. St. Rep. 255, 69 L. R. A. 568, 81 Pac. 48.

B. and W. agreed to make a certain lane or highway the boundary between their lands and that each would give the other a deed for the portion of the land on the opposite side of the highway when they should receive their respective patents from the government. Each took possession of the land on his side of the highway, inclosed it and exercised acts of ownership over it for more than fifteen years and B. expended considerable money in cultivating his tract, erected buildings thereon and leased a portion thereof to third persons who erected valuable buildings thereon without protest from W. W. died before any deeds passed. Held, that said agreement does not come within the statute of frauds, the part performance thereof bringing the contract within R. S. 6008.—

Fleming v. Baker, 12 Idaho, 346, 85 Pac. 1092.

Where in a suit for the specific performance of a land contract the agency of one of the parties to the contract was denied, it was necessary, under R. S. 6007, to show such agency by an instrument in writing subscribed by the owner of the land.—*Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

Where an oral agreement was made by which plaintiff agreed to furnish the money for the purchase of real property, the title to be taken in the name of defendant and thereafter to be transferred by defendant to plaintiff, such contract was not within the statute of frauds.—*Havlick v. Davidson*, 15 Idaho, 787, 100 Pac. 91.

An oral contract for the sale of real estate, which has been fully performed does not come within the provisions of the statute of frauds, R. S. 6007.—*King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292.

The owner of land made an oral contract with an improvement company, by which the latter was permitted to construct a ditch across his land, in consideration of which right of way the owner was to take annually fifty inches of water for irrigation purposes. The ditch was constructed and subsequently the land was conveyed to defendant and plaintiff became the owner of the ditch. Defendant used fifty inches of water under such agreement for more than six years prior to the commencement of this action, which was to enjoin the defendant from taking water on the ground that the contract was void under the statute of frauds. Held, that the agreement, having been fully executed by defendant's predecessor in interest, was not void under R. S. 6007, providing that no estate in real property shall be created except by writing.—*Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033.

Where under an oral contract for the exchange of real property one of the parties was to procure an abstract of title to his property, the fact that he did pay off a mortgage on his property and procure an abstract of title would not take the contract out of the statute of frauds.—*Welch v. Bigger*, 24 Idaho, 169, 133 Pac. 381.

Editorial Notes.

Real estate, contracts relating to: 17 Am. Dec. 58.

Contracts for the sale of land, what amount to within the meaning of statute of frauds: 102 Am. St. Rep. 230.

Parol exchange of lands as affected by statute of frauds: Ann. Cas. 1912A, 308.

Oral agreement by vendor to make title to land good as within statute of frauds: Ann. Cas. 1913D, 1239.

Possession taken by vendee in parol contract for sale of land without knowledge or consent of vendor and not in pursuance of contract as part performance satisfying statute of frauds: Ann. Cas. 1913E, 510.

Parol partnership for dealing in lands:
16 L. R. A. 745; 4 L. R. A., N. S., 427;
33 L. R. A., N. S., 883.

VII. SALES OF GOODS.

Sufficiency of delivery as against attaching creditors. See Fraudulent Conveyances.

The statute of frauds does not require personal property when sold to be removed from the place where it is situated, the requirement being that there shall be actual and continued change of possession and having no reference to the place.—*Hazard v. Cole*, 1 Idaho, 276.

Delivery of goods sold and acceptance thereof by the purchaser at any time after the contract of purchase is made is sufficient to take the transaction out of the statute of frauds under R. S. 6009, subdivision 4.—*Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

Defendant applied to plaintiff to purchase certain tanks, and plaintiff not having them, defendant requested him to procure them for him, giving his description and specifications thereof, to be delivered f. o. b., Boise. Plaintiff ordered the goods and shortly after their arrival, notified defendant thereof, exhibiting the bill of lading and informing him where he had stored them. Defendant said "he guessed it was all right," paid \$100 on the purchase price, and promised to pay the balance within a few days when he would remove the goods; but he did not examine the goods. Held, that R. S. 6009, subdivision 4, the statute of frauds, did not apply to this transaction.—*Shaw Lumber Co. v. Manville*, 4 Idaho, 369, 30 Pac. 559.

Editorial Notes.

Contracts for sales of goods, when within statute of frauds: 9 Am. Dec. 188.

Acceptance and delivery of goods to satisfy statute of frauds: 49 Am. Dec. 325; 37 Am. Rep. 16; 96 Am. St. Rep. 215.

Trees growing, sale of, whether within statute of frauds: 86 Am. Dec. 182; 17 Am. Rep. 595.

Contracts for the purchase of property not then in existence, whether within statute of frauds: 54 Am. Rep. 164.

Distinction between sales and contracts for work and labor: 14 L. R. A. 230; 30 L. R. A., N. S., 319.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

A receipt in the following language: "Received from S. C. K. \$190 on land," describing it, signed by the parties sought to be charged, is insufficient on which to enforce specific performance.—*Kurdy v. Rogers*, 10 Idaho, 416, 79 Pac. 195.

Where an agreement for the sale of land shows that one of the two persons by whom it is made incurs individual liability, but acts merely as an agent for someone else who is not named or described, specific performance thereof cannot be compelled at the

suit of the principal if his relation to the transaction can be proved only by parol evidence.—*Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

Under R. S. 6007, requiring transfers of real property or estates therein to be evidenced by conveyance or other instrument in writing, the writing must state the contract with such certainty that its essentials will be known from the writing itself or by reference contained in it to some other writing, without recourse to parol evidence.—*Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

A memorandum, to be sufficient under the statute of frauds, R. C. 6009, must be complete in itself as to all the essentials of the contract, and leave no essential to be established by parol.—*Houser v. Hobart*, 22 Idaho, 735, 127 Pac. 997.

Where H. & H., as parties of the first part, agree with H., as party of the second part, that the first party "hereby sells and agrees to deliver to the second party . . . all our Barley raised this season except 400 Sacks on or before Oct. 1st 1911 Sacked and in good Condition . . . Party of Second party agrees to pay \$117½ for white Winter Barley and 112 for Blue Barley. . . . [Signed] Ed Hobart and James Hobart," and not signed by the second party, and no part of the consideration is paid, the contract was not taken out of the provisions of R. C. 6009.—*Houser v. Hobart*, 22 Idaho, 735, 127 Pac. 997.

Where W. and B. enter into an oral contract to exchange real estate, and T. undertakes to prepare a written contract embodying such oral contract, and he prepares two contracts, and it is admitted that the contracts so prepared do not contain the main features of the oral contract, such written contracts are not sufficient to take the oral contract out of the statute of frauds.—*Welch v. Bigger*, 24 Idaho, 169, 133 Pac. 381.

Editorial Notes.

Memorandum letters, when constitute parts of: 7 Am. Dec. 288; 42 Am. Rep. 347.

Memorandum, writing of may be in any kind of letters, and in pencil: 7 Am. Dec. 288.

Auction sales, memorandum of sufficient to satisfy statute of frauds: 13 Am. Dec. 398.

Memoranda, what constitute and by whom must be signed: 47 Am. Rep. 532; 22 L. R. A. 297; 28 L. R. A., N. S., 680.

Consideration of a contract, when sufficiently expressed: 60 Am. St. Rep. 432.

Recital "for value received" as sufficient statement of consideration in contract within statute of frauds: Ann. Cas. 1912A, 1242.

Sufficiency of signature by one party only to memorandum required by statute of frauds: Ann. Cas. 1912C, 416; 3 Ann. Cas. 1036; 13 Ann. Cas. 1121.

Sufficiency of printed signature to memorandum within statute of frauds: Ann. Cas. 1913B, 663.

Necessity of written acceptance of written offer to constitute sufficient memorandum under statute of frauds: *Ann. Cas.* 1913A, 1041.

IX. OPERATION AND EFFECT OF STATUTE.

Where the evidence discloses part performance by all the parties to the agreement, it removes the bar of the statute.—*Deeds v. Stephens*, 8 Idaho, 514, 69 Pac. 534.

An oral contract for the conveyance of real property or under which the title thereto is acquired may be enforced, and is binding upon the parties thereto, and is not within the statute of frauds, where there is partial or complete performance of the same.—*Havlick v. Davidson*, 15 Idaho, 787, 100 Pac. 91.

The statute of frauds (R. C. 6009, subdivision 1) will not prevent the recovery of an agreed and stipulated price contracted to be paid for services and labor which have been rendered by the employee during a period exceeding one year, simply because the contract was not reduced to writing.—*Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Idaho, 61, 108 Pac. 536.

X. PLEADING, EVIDENCE, TRIAL AND REVIEW.

The statute of frauds must be pleaded in order to be relied on as a defense.—*Kraft v. Greathouse*, 1 Idaho, 254.

Unless the evidence is clearly to the contrary, the court will presume that a parol agreement to impress real property with a servitude was made with a knowledge of the statute of frauds, and intended as a license only, and not an easement.—*Howes v. Barmon*, 11 Idaho, 64, 11 Am. St. Rep. 255, 69 L. R. A. 568, 81 Pac. 48.

A complaint alleged that H. was indebted to plaintiffs, that defendants agreed to pay such indebtedness to plaintiffs on consideration that plaintiffs release H. from his said obligation, that plaintiffs did so release H. and accepted the promise of defendants therefor. No consideration was alleged to have passed between H. and defendants for such promise. Held, not demurrable as the contract was not within the statute of frauds but was clearly a new promise under R. S. 6010, subdivision 3.—*McCallum v. McClarren*, 15 Idaho, 374, 98 Pac. 200.

Where the statute of frauds requires certain contracts to be in writing, and prohibits oral evidence to establish such contracts, they must be deemed, both in law and equity, never to have been completed and consummated until reduced to writing and subscribed by the party to be bound as required by the statute, as, in such cases, the law views the transaction as incomplete and that the assumed contract has never been consummated. *Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052.

An affirmative defense is not insufficient because it does not allege an agreement in writing to pay the debt of another, where the facts plead as a defense are not plead for

the purpose of showing an agreement to answer for the debt or default of another.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

A purported contract recited, "We, the undersigned citizens of Robin, Bannock county, Idaho, voluntarily agree to deed and re deed to the old lines as they stand at present." Held, that parol evidence was not admissible to supply the description of the lands referred to and to make the same comply with and come within the statute of frauds.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361.

Where the material allegations of the complaint are denied, defendants may prove that the contract was one of guaranty and void under the statute of frauds because not in writing without specially pleading such statutes.—*Storer v. Heitfeld*, 19 Idaho, 170, 113 Pac. 80.

Editorial Notes.

Pleadings need not allege that contract is within statute of frauds: 16 Am. Dec. 149.

When and how statute of frauds must be pleaded: 86 Am. Dec. 684; 76 Am. St. Rep. 644.

Necessity of pleading statute of frauds specially where defendant denies contract: *Ann. Cas.* 1912D, 46.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

III. REMEDIES OF CREDITORS AND PURCHASERS.

IV. CRIMINAL RESPONSIBILITY.

Voluntary assignment by nonresident giving preferences not good against resident attaching creditor. See *Assignments for Benefit of Creditors*.

Finding nondelivery of deed rendering finding unnecessary on question of fraudulent conveyance. See *Deeds*, IV.

Right of administrator to have conveyance set aside as fraudulent. See *Executors and Administrators*, III.

I. TRANSFERS AND TRANSACTIONS INVALID.

Admissibility and sufficiency of evidence. See *post*, III.

Sufficiency of delivery to comply with statute of fraud. See *Frauds, Statute of*, VII.

Where property sold in good faith is, at the time of the sale, in the custody of a third person, notice to such person of the sale is sufficient to constitute a delivery, as to subsequent purchasers and attaching creditors.—*Lufkins v. Collins*, 2 Idaho, 150, 7 Pac. 95.

A debtor sold a stock of merchandise to a creditor, who held a chattel mortgage thereon. The sale was made at the residence of the creditor, twenty-five miles from the location of the merchandise. No invoice was

taken, no inspection or examination of the stock, no change in the clerical force, nor in the conduct or management of the business. The debtor continued to conduct the business as before, except that he added the abbreviation "Mgr." when signing letters, checks, etc. Held, that there was no such immediate delivery and actual and continued change of possession as R. S. 3021 requires, and therefore the sale was void as to creditors. *Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 423.

The question of intent, bona fides or notice is immaterial in determining whether there was an "immediate delivery, followed by an actual and continued change of possession," sufficient to satisfy R. S. 3021, providing that sales of personal property without such change, etc., are conclusively presumed to be fraudulent as to creditors.—*Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 423.

Where a sale of personal property is not accompanied by an immediate delivery and actual and continued change of possession as required by R. S. 3021, the fact that an attaching creditor knew of the pretended sale and continued to deal with the debtor as the "manager" of the purchaser cannot be urged to prevent the operation of the statute.—*Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 423.

Plaintiff loaned K. \$1,500 and took a bill of sale for horses in the possession of N., telling N. in plaintiff's presence that he had transferred the horses to plaintiff as security for said loan and requesting N. to hold the property for plaintiff until spring and that plaintiff would pay for wintering them. In the spring, they were returned to plaintiff, who hired a man to look after them on the range during the following summer. Held, that there was sufficient delivery and continued change of possession to satisfy the requirements of R. S. 3021.—*Murphy v. Braase*, 3 Idaho, 544, 32 Pac. 208.

A sale and transfer of all the earth, rock, gold and everything of value now in the sluice-boxes, or to be hereafter in the sluice-boxes, with the right to take possession of the boxes, superintend the clean-up and take possession of the results of the clean-up, to have and to hold for the use of the grantee, with a contemporaneous oral agreement between grantor and grantee, that any excess of said clean-up above what was necessary to pay the grantee what was due him is a sale in trust for the benefit of the grantor and is void as to creditors under R. S. 3019. *Johnson v. Sage*, 4 Idaho, 758, 44 Pac. 641.

Where a quantity of wheat was sold but no delivery or change of possession made, such sale was void as against a creditor attaching the property twenty days thereafter while in the possession of the original owner, being conclusively presumed fraudulent under R. S. 3021.—*Hallett v. Parrish*, 5 Idaho, 496, 51 Pac. 109.

R. S. 3019 provides that all deeds of gift, all conveyances, etc., of goods, chattels or things in action, made in trust for the use of the person making the same, are void as against the creditors, existing or subsequent, of such person. R. S. 5558 provides that

when there is a deficiency of assets in the hands of an executor or administrator, and when the decedent in his lifetime has conveyed any real estate or any rights or interest therein with intent to defraud his creditors, or avoid any right, debt or duty of any person, the same shall be void. Held, that in an action under the latter statute, it must be shown that such sale was made with intent to defraud creditors, and where the existence of such intent is disclaimed by the plaintiffs the sale will not be disturbed.—*Brown v. Perrault*, 5 Idaho, 729, 51 Pac. 752.

R. S. 3019, providing that all deeds of gift, all conveyances, etc., of goods, chattels or things in action made in trust for the use of the person making the same, are void as against the creditors existing or subsequent of such person, has no application to sales of real property.—*Brown v. Perrault*, 5 Idaho, 729, 51 Pac. 752.

Defendants, holding a chattel mortgage and a real estate mortgage on the property of a firm of which plaintiff was a member, foreclosed the chattel mortgage and the firm then gave them a deed to the real estate. Defendants at the date of the deed made a written agreement to convey to the firm, or either of them, the personal and real property covered by the mortgages on payment of the amount due from the firm within eight months. Plaintiff thereafter sold his interest in the firm to his copartners, except a one-half interest in such notes and accounts assigned to defendants as might remain after the firm's indebtedness to defendants had been paid. It was shown that plaintiff was represented at the sale under the chattel mortgage. Held, that no fraud was shown sufficient to vitiate the sale under the chattel mortgage or to have the agreement and deed declared to be a mortgage.—*Felland v. Vollmer Milling etc. Co.*, 6 Idaho, 120, 53 Pac. 268.

Personal property due as rent to the owner of land was left on the land in the possession of the tenant and assigned by the owner to a third person with the understanding that the tenant was to keep possession thereof until a certain day when such third person would become entitled to the immediate and exclusive possession of the same. Held, that there was no immediate delivery followed by an actual and continued change of possession as required by R. S. 3021, and therefore the sale was void as to creditors.—*Coombs v. Collins*, 6 Idaho, 536, 57 Pac. 310.

T. purchased cattle and sold eleven head to defendant, who took possession thereof. Subsequently, owing to a disagreement having arisen between T. and the original vendor, such vendor, without defendant's knowledge or consent, seized and took possession of the eleven head sold to defendant and sold them to plaintiff. Held, that the continuity of defendant's possession having been broken by the unlawful act of plaintiff's vendor, plaintiff could not claim that there was no continued "change of possession" and that the sale to defendant was void under R. S. 3021. *Couch v. Montgomery*, 6 Idaho, 669, 59 Pac. 16.

A debtor will not be permitted to donate the services and earnings of teams belonging to him to his infant son, to avoid payment of his debts to a creditor for whom such infant son, with such teams, performs labor.—*Tuckey v. Lovell*, 8 Idaho, 731, 71 Pac. 122.

Where the debtor had been conducting a tobacco store for several years and his brother had been working for him for some time as clerk and his father, who held a note against the owner of the store, gave it to the brother, who acted as clerk, and he purchased the goods in the store from his brother, giving him the note in payment, and agreeing to give him a further sum to an amount equal to the value of the property, and a bill of sale was executed, and the keys of the store and the books and accounts were turned over to the clerk, and the balance at the bank was transferred to him, and he conducted it under the firm name, with the word "successors" added, and the owner of the store left the state, and was gone for two or three years, and the stationery was stamped in red ink to show the change, it was sufficient to show an immediate delivery, followed by a change of possession, as required by R. S. 3021.—*Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507.

In an action of claim and delivery against a sheriff for a cream separator alleged to have been wrongfully levied upon and taken, the evidence showed that the judgment debtor on whose property the levy was made had given a bill of sale thereof to plaintiff in exchange for a note in favor of plaintiff signed by such debtor. Plaintiff testified that he got the separator the same day, that he took it to his own room in the judgment debtor's house where he lived, that he used such debtor's team in transporting it to the house, and that the debtor's brother helped him in so conveying it. Held, sufficient to show a change of possession and delivery so as to take the transaction out of R. S. 3021 which provides that transfers of personal property unaccompanied by immediate delivery and change of possession are conclusively presumed fraudulent as to creditors, etc.—*Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722.

M. deeded to K. all his interest in his property in this state for a consideration of one dollar and "other good and valuable consideration," which latter consideration was not explained. At the time of the transfer, K., who was M.'s confidential agent, had notice that M. was heavily indebted in this state, that he had avoided personal service and allowed a judgment in rem to be entered against him for over \$50,000; that he had been trying to buy such claims against him for one-fifth their face value; that he was not meeting his obligations and that he had no other property in the state. Held, that K. could not restrain an execution sale of such property to pay execution creditors on the theory that he was a bona fide purchaser thereof.—*California etc. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50.

A conveyance for a mere nominal consideration, when attacked as fraudulent, will be subjected to the rules applicable to voluntary

transfers in like cases.—*California etc. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50.

The intent with which a transfer in fraud of creditors is made is established, not by attempting to ascertain the actual intent in the mind of the debtor when he transferred the property, but rather from the acts of the debtor viewed in the light of circumstances and conditions under which he acted and the result accomplished by those acts; in other words, the motive which the law imputes to him irrespective of his actual intent.—*California etc. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50.

The rule of law that governs a transaction and affects the validity of a deed of conveyance of real property, where the complaint alleges that the deed was made and accepted for the purpose of hindering, delaying and defrauding the plaintiff, and the evidence shows that there was no fraud, and that a valuable consideration has been paid for the property, is that the sale cannot be set aside at the instance of a creditor, unless it is averred and shown that the purchaser knew of and participated in the fraudulent intent of the seller.—*Kerns v. Washington Water Power Co.*, 24 Idaho, 525, 135 Pac. 70.

Editorial Notes.

Voluntary transfers, when are fraudulent conveyances: 7 Am. Dec. 362; 14 Am. Dec. 703; 28 Am. Rep. 721; 14 Am. St. Rep. 739.

Knowledge of fraudulent conveyance or notice to the grantor: 20 Am. St. Rep. 632.

Knowledge of vendee as affecting validity of fraudulent conveyances: 34 Am. St. Rep. 395; 31 L. R. A. 609; 32 L. R. A. 44.

Voluntary transfers, presumption that they are in fraud of creditors: 119 Am. St. Rep. 556.

Retention of vendor in employ of vendee as affecting change of possession within rule as to fraudulent conveyances: Ann. Cas. 1912A, 608.

Necessity for actual change of possession within rule as to fraudulent conveyances where joint owner sells interest in property in possession of other owner: Ann. Cas. 1912B, 460.

Constitutionality of statutes prohibiting sales of merchandise in bulk: Ann. Cas. 1912C, 706; 1 Ann. Cas. 557; 14 Ann. Cas. 437.

Construction of statutory provision that sale of goods in bulk shall be presumed to be fraudulent and void: Ann. Cas. 1913C, 1214.

Liability on running account as existing or prior debt within rule as to fraudulent conveyances: Ann. Cas. 1913C, 1376.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

The claim of title of one who knowingly enters into an arrangement for the purpose

of defrauding a mortgagee of his vendor cannot avail as against the claim of such mortgagee.—*Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761.

Editorial Notes.

Fraudulent conveyances, bona fide purchaser from fraudulent vendee: 28 Am. Dec. 688; 28 Am. Dec. 734.

Fraudulent conveyances, rights and title of parties thereunder: 34 Am. Dec. 765.

Right to purchase: 36 L. R. A. 335.

III. REMEDIES OF CREDITORS AND PURCHASERS.

A writ of attachment was served on M., as garnishee of defendants in the attachment suit. Thereafter, plaintiff brought this action against M. on promissory notes. M. filed a motion supported by affidavit for a suspension of proceedings herein until his liability as garnishee in the attachment suit be determined, alleging that the notes on which he was sued are the property of one of the defendants in the attachment suit and were transferred to plaintiff to defeat and defraud his creditors. Held, that the proceedings in the latter suit should be suspended until the liability of M. in the attachment suit should be determined.—*Van Ness v. McLeod*, 3 Idaho, 439, 31 Pac. 798.

A writ of attachment was served on M. as garnishee of defendants in the attachment suit. Thereafter, plaintiff brought this action against M. on promissory notes. M. filed a motion to suspend proceedings until his liability as garnishee in the attachment suit should be determined, alleging that the notes on which he was sued are the property of one of the defendants in the attachment suit and were transferred to plaintiff to defeat and defraud his creditors. Held, that property or debts transferred by a defendant in attachment in fraud of creditors may be reached by the creditors by process of garnishment, although defendant could not recover them himself.—*Van Ness v. McLeod*, 3 Idaho, 439, 31 Pac. 798.

A creditor desiring to contest the validity of the sale or transfer of personal property must prove a debt or judgment, if it has been reduced to a judgment, before he can be permitted to question the validity of the transfer of the property.—*Murphy v. Braase*, 3 Idaho, 544, 32 Pac. 208.

In attacking the good faith of a sale or conveyance, it is competent to show that the vendor or grantor was in embarrassed circumstances when the sale or conveyance was made.—*Ferbrache v. Martin*, 3 Idaho, 573, 32 Pac. 252.

Where fraud is alleged in a transfer of personal property, and that it was transferred for the purpose of defrauding, delaying or hindering creditors, and facts appear in the evidence which tend to show fraud, much latitude is allowed in the examination of the parties to the transfer, and others in any wise connected with the affair.—*Ferbrache v. Martin*, 3 Idaho, 573, 32 Pac. 252.

The acts or declarations of a party to a fraudulent transfer of property are admissible in evidence, though he is not a party to the suit, though not made in the presence of the party claiming to be the purchaser of the property.—*Ferbrache v. Martin*, 3 Idaho, 573, 32 Pac. 252; *Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254.

The grantee's knowledge of the fraudulent purpose of the grantor may be shown by any circumstances tending to show participation in the fraudulent design of the grantor.—*Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254.

Evidence examined and held not to show fraud or bring the sale of personal property to plaintiff within the provisions of R. S. 3021, requiring an immediate delivery and actual and continued change of possession, etc.—*Cornwall v. Mix*, 3 Idaho, 687, 34 Pac. 893.

Evidence in an action against a garnishee held to show that the garnishee was fully cognizant of and participated in a fraudulent transfer of the property sought to be reached by garnishment.—*First Nat. Bk. v. Van Ness*, 4 Idaho, 539, 43 Pac. 59.

Circumstances are admissible to prove fraud, ex necessitate, that would not be admissible in ordinary cases.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

Statements of the mortgagor after the execution of a chattel mortgage, as to his purpose in executing the mortgage, are inadmissible in an action attacking the validity of the mortgage unless it is first shown that the mortgagee was cognizant of or a party to the fraudulent acts or purposes of the mortgagor.—*Meyer v. Munro*, 9 Idaho, 46, 71 Pac. 969.

In an action by creditors of a mortgagor, extrinsic evidence is admissible to show bad faith in the giving of a chattel mortgage or a purpose to hinder, delay or defraud creditors of the mortgagor on the part of either of the parties to the mortgage.—*Meyer v. Munro*, 9 Idaho, 46, 71 Pac. 969.

Under R. S. 3021, providing that every transfer of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing transferred is conclusively presumed to be fraudulent as to creditors, the questions as to what constituted an "immediate delivery" and "continued possession" are for the jury.—*Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507; *Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722.

A complaint alleged that certain conveyances were made to defendant under an agreement by which defendants agreed to pay certain creditors of plaintiff. The answer denied such agreement and averred that defendants had made an actual and bona fide purchase of the property and that they had paid the full consideration therefor. The court found that the property was transferred without consideration and for the sole purpose of hindering, delaying and defrauding the creditors of plaintiff. Held, that such finding not being within the issues and taken

in connection with the failure to find on some of the material issues would work a reversal of the judgment.—*Standley v. Flint*, 10 Idaho, 629, 79 Pac. 815.

In an action by a creditor to set aside a conveyance as fraudulent, the fraudulent grantor is a proper, but not a necessary, party. *California etc. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50.

Complaint in an action by an attorney to set aside a deed given by his client held insufficient to show fraud on the part of the grantee or knowledge on the part of the grantee that the grantor intended to fraudulently convey said property for the purpose of defrauding plaintiff.—*Kerns v. Washington Water Power Co.*, 24 Idaho, 525, 135 Pac. 70.

In an action to set aside a deed of real property, where it is alleged that said deed was made and accepted for the purpose of hindering, delaying and defrauding the plaintiff, the rule of law which especially applies to such case is that fraud is not presumed, but must be established by clear and convincing evidence, and this is especially true where a party assails the integrity of a written instrument.—*Kerns v. Washington Water Power Co.*, 24 Idaho, 525, 135 Pac. 70.

Editorial Notes.

Pleadings attacking fraudulent conveyances, what must aver: 20 Am. Dec. 315.

Declarations of vendor, when evidence against his vendee to show fraud: 42 Am. Dec. 631.

Actions by creditor of fraudulent vendor against fraudulent vendee: 24 L. R. A., N. S., 545.

IV. CRIMINAL RESPONSIBILITY.

R. S. 6519 provides that every debtor who fraudulently sells, conveys, assigns or conceals his property with intent to defraud, hinder or delay his creditors of their rights, claims or demands, is punishable, etc. R. S. 6540, subdivision 4, provides that if two or more persons conspire to cheat and defraud any person of any property by any means which are in themselves criminal, they are punishable, etc. Held, in a prosecution against the seller and purchasers of goods, an instruction that a sale was not necessarily fraudulent because it is made with intent to hinder, delay and defraud creditors, is erroneous.—*Martin v. Steele*, 7 Idaho, 497, 63 Pac. 1040.

GAME.

See Fish and Game.

GAMING.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

II. PENALTIES AND FORFEITURES.

III. CRIMINAL RESPONSIBILITY.

Deprivation of property without due process of law.
See Constitutional Law, XI.

Concurrent and conflicting regulations by state and city. See Municipal Corporations, X.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

Where a bank check is given for the purpose of procuring money with which to gamble, and the person to whom the check is given has knowledge that the same is to be used for such unlawful purpose, and cashes such check with that knowledge, he cannot recover the debt evidenced thereby, from the drawer of such check.—*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 128 Am. St. Rep. 81, 21 L. R. A., N. S., 703, 99 Pac. 833.

In a suit, by a payee of a bank check, to recover the debt evidenced thereby upon the drawee refusing to pay the same, and a defense is interposed by the drawer that the money advanced upon such check was used for the purposes of gambling, and that the payee knew such fact at the time the check was cashed, the issue is one of fact to be determined by the jury.—*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 128 Am. St. Rep. 81, 21 L. R. A., N. S., 719, 99 Pac. 833.

Editorial Notes.

What is gaming: 33 Am. Dec. 134.

Wagers, actions founded upon: 12 Am. Dec. 230.

Wagers, when void as against public policy: 11 Am. Rep. 58.

Loan for purposes of gaming, when not collectible: 1 Am. St. Rep. 302.

Wagers and their validity: 37 Am. St. Rep. 697.

Defenses to notes and other obligations given for gambling debts: 119 Am. St. Rep. 172.

II. PENALTIES AND FORFEITURES.

Destruction of gambling devices not deprivation of property without due process of law. See Constitutional Law, XI.

Laws 1899, page 309, section 4, authorizing the summary seizure and destruction of gambling devices, is a legitimate exercise of the police power of the state for the prevention of crime and the protection of public morals and welfare.—*Mullen & Co. v. Moseley*, 13 Idaho, 457, 121 Am. St. Rep. 277, 12 L. R. A., N. S., 394, 13 Ann. Cas. 450, 90 Pac. 986.

Gambling was a nuisance at common law and is a crime under the statutes of this state, and therefore the machines, instruments and devices designed and intended for carrying on such nuisance and crime are nuisances. *Mullen & Co. v. Moseley*, 13 Idaho, 457, 121 Am. St. Rep. 277, 12 L. R. A., N. S., 394, 13 Ann. Cas. 450, 90 Pac. 986.

Claim and delivery will not lie to recover gambling devices known as "slot machines," which are incapable of use for any purpose except in violation of Laws 1899, page 309, prohibiting gambling.—*Mullen & Co. v. Moseley*, 13 Idaho, 457, 121 Am. St. Rep. 277, 12 L. R. A., N. S., 394, 13 Ann. Cas. 450, 90 Pac. 986.

Editorial Notes.

Use of premises for gambling as forfeiting tenant's rights under lease: Ann. Cas. 1913C, 1355.

III. CRIMINAL RESPONSIBILITY.

Power of city to license gaming house. See Municipal Corporations, X.

The common law in relation to the offense of keeping a gaming-house was superseded by act of January 13, 1871, "relating to all games of chance."—*People v. Goldman*, 1 Idaho, 714.

Laws 1899, page 389, prohibiting gambling and providing a punishment therefore, is not unconstitutional in failing to fix a maximum punishment, since R. S. 6313 provides that except where otherwise prescribed, misdemeanors are punishable by imprisonment in a county jail not exceeding six months, or by fine and not exceeding \$300, or both.—*State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17.

There is no constitutional objection to a statute fixing the minimum punishment for gambling but failing to fix the maximum punishment.—*In re Rowland*, 8 Idaho, 595, 70 Pac. 610.

Under Laws 1899, page 389, section 1, making it a misdemeanor to play cards, etc., for money, one who plays cards for money is guilty of a misdemeanor whether he owns the game or not.—*In re Rowland*, 8 Idaho, 595, 70 Pac. 610.

Laws 1899, page 399, section 1, prohibits gambling and declares that anyone who commits any of the forbidden acts "is guilty of a misdemeanor and is punishable by fine not less than \$200 on imprisonment in the county jail not less than four months." R. S. 6313 provides "except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by fine not exceeding \$300, or by both. Held, that the trial court had jurisdiction to render a sentence and judgment imposing a fine of \$250 and imprisonment in the county jail for three months on one convicted of gambling.—*In re Burgess*, 12 Idaho, 143, 84 Pac. 1059.

GARNISHMENT.

See Attachment and Garnishment.

GIFTS.

To religious society. See Religious Societies.
Effect of particular personal or confidential relations.
See Husband and Wife; Parent and Child, etc.

A declaration of intention to make a gift, unaccompanied by a transfer or delivery of the property, is no gift at all, and cannot be enforced by the courts.—*Bliss v. Bliss*, 20 Idaho, 467, 119 Pac. 451.

Editorial Notes.

Delivery sufficient to support gifts: 50 Am. Rep. 178.

Gift of check as valid gift inter vivos: Ann. Cas. 1912A, 330.

GRAND JURY.

Sureties on recognizance cannot attack jurisdiction. See Bail and Recognizance.

Holding to bail after ignoring of charge by grand jury. See Bail and Recognizance.

Motion to set aside indictment for prejudice of officer summoning. See Indictment and Information, II.

Where a challenge is interposed to an individual grand juror and, notwithstanding the injunction of the court, he takes part in the deliberation of the grand jury in respect to the charge on which he is challenged, he is liable to punishment for contempt; but the indictment should not be set aside for that reason.—*Territory v. Staples*, 3 Idaho, 35, 26 Pac. 166.

In case of a challenge to an individual grand juror under R. S. 7613, the juror cannot be present during the consideration of the charge as to which he is challenged, but he still remains a member of the grand jury.—*Territory v. Staples*, 3 Idaho, 35, 26 Pac. 166.

R. S. 7640, providing, "and no other person must be permitted to be present during the expressions of their opinion, or giving their votes on any matter before them," means no person, except members of the grand jury, and does not refer to any member of the panel.—*Territory v. Staples*, 3 Idaho, 35, 26 Pac. 166.

Grounds set forth in a motion to summon the grand jury to appear in court to be examined as to the causes of challenge to certain members thereof, held insufficient under R. S. 7609.—*State v. Hardy*, 4 Idaho, 478, 42 Pac. 507.

Where the record in a criminal case shows that one of the persons called to serve on the grand jury was deputy sheriff of the county and had been engaged in serving process in the case on trial and was also a witness in the case, it was within the discretion of the court to excuse him from serving on the grand jury and it was proper to excuse him from so serving.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

The summoning of a grand jury under R. S. 3961, under the conditions that existed in Shoshone county in 1899, was proper.—*In re Corcoran*, 6 Idaho, 657, 59 Pac. 18.

Under Laws 1899, page 25, section 3, requiring that the county attorney shall, when requested, attend the sessions of the grand jury, an attorney appointed to act temporarily as county attorney is authorized to appear before the grand jury.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Under R. S. 7730, subdivision 4, giving a defendant, who has not had an opportunity to challenge the panel of grand jurors that indicted him before the finding of the indictment, the privilege of doing so afterward, defendant, who was under arrest pending an investigation of a murder growing out of a riot in which he participated, and was in court with counsel when the grand jury which afterward indicted him was impaneled, cannot have the indictment set aside on the ground that he had good cause for challenge

to the panel or to any individual juror.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Under Laws 1891, page 186, section 7, a judge at chambers may make an order drawing a grand jury for any county in his district, and it is not necessary that such order be made by the court.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Where the court or judge makes an unauthorized and illegal appointment of an attorney to act as prosecuting attorney before the grand jury, an indictment found by such grand jury should be quashed.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Under Laws 1897, page 74, section 2, providing under what conditions and circumstances the court may appoint an attorney to perform the duties of the county attorney, the appointment of an attorney to attend upon and perform the duties of prosecuting attorney with the grand jury on the ground that a "necessity exists therefor, the prosecuting attorney being engaged in other matters," was unauthorized and illegal.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Laws 1891, page 186, section 7, providing that grand jurors shall not be summoned, etc., unless the judge of the district court shall so direct by writing, is not in conflict with Const., article 1, section 8, providing that a grand jury may be summoned upon the order of the district court in the manner provided by law.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Editorial Notes.

Incompetency of member of grand jury, whether may be taken advantage of after indictment found: 34 Am. Rep. 705.

Grand jury, competency and qualification of: 12 Am. St. Rep. 900.

Effect on indictment of appearance of private or substituted prosecutor before grand jury: Ann. Cas. 1912D, 184.

Effect of failure to comply with statute requiring grand jury to be selected certain time before term: Ann. Cas. 1913D, 96.

Organization of grand jury: 27 L. R. A. 776.

GRANT.

Effect of use of word "grant" in conveyances. See Covenants.

Of public land in aid of railroad. See Public Lands, II, (H).

GUARANTY.

Requirements of statute of frauds. See Frauds, Statute of.

Suretyship. See Principal and Surety.

Right of attachment against indorser or guarantor of note. See Attachment and Garnishment, I.

Promise to answer for the debt, default, or miscarriage of another. See Frauds, Statute of.

A surety, guarantor or indorser of a promissory note is deemed to contract that the principal maker is in every way competent to con-

tract in the way he has done.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

Plaintiff left with her brother, B., for collection a note signed by S. S. executed an instrument authorizing C., the defendant, to sell his property for a certain sum and to pay to B. \$500 thereof. C. signed an instrument stating, "I hereby comply with the above in case there is a sale made of the property. I have full charge of the property." C. bought the property and refused to pay the \$500. Held, that such transaction in no way involved a "guaranty."—*Smith v. Caldwell*, 6 Idaho, 436, 55 Pac. 1065.

The holder of a promissory note is under no obligation in equity to pursue the maker of such note rather than a guarantor of the payment of such note, upon default being made in the payment of such note according to its terms, but may rely wholly upon the contract of guaranty and resort to such in enforcing the payment of such obligation.—*Miller v. Lewiston Nat. Bank*, 18 Idaho, 124, 108 Pac. 901.

"A 'guaranty' is a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party."—*Miller v. Lewiston Nat. Bank*, 18 Idaho, 124, 108 Pac. 901.

A contract indorsed on a note, "for value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof," is a several as well as a joint obligation of each person who signs the contract.—*Miller v. Lewiston Nat. Bank*, 18 Idaho, 124, 108 Pac. 901.

A contract of guarantee, whereby the guarantor agrees that a note is perfectly good and will be paid by the maker as it becomes due, is a separate obligation of the grantor and becomes absolute upon the default of the maker of such note.—*Frost v. Harbert*, 20 Idaho, 336, 118 Pac. 1095.

Where a person guarantees the payment of a promissory note, and there is default in the payment of such note by the principal debtor, and by reason thereof the contract of guaranty becomes absolute, the guarantor will not be released from his liability as such, by reason of an agreement made by the creditor, the principal debtor, and the guarantor that certain personal property covered by a mortgage securing the note be sold and applied on the note, and that the original debtor be released from such debt.—*Frost v. Harbert*, 20 Idaho, 336, 118 Pac. 1095.

R. C. 3577 does not apply to a case where there is default in the payment of a note by the original debtor, and by reason thereof the guarantor's liability becomes absolute, as in such case the default of the payment of the note by the original debtor makes the obligation of the guarantor absolute, and upon such default the guarantor was no longer secondarily liable. The statute refers to discharges of persons secondarily liable on the instrument guaranteed, and not to persons whose contract of guaranty has become absolute by reason of default.—*Frost v. Harbert*, 20 Idaho, 336, 118 Pac. 1095.

Editorial Notes.

Contract of guaranty: 105 Am. St. Rep. 502.

Discharge of accommodation guarantor under negotiable instruments law by extension of time to principal debtor: Ann. Cas. 1913C, 530.

Necessity of notice of default to bind guarantor: 20 L. R. A. 257.

Necessity of acceptance to bind guarantor: 16 L. R. A., N. S., 353; 33 L. R. A., N. S., 960.

When is a guaranty a continuing one: 39 L. R. A., N. S., 724.

GUARDIAN AND WARD.

Guardian ad litem. See Infants.

— Of insane persons. See Insane Persons.

Jurisdiction of probate courts in general. See Courts.

Right to guardianship, determination in habeas corpus proceedings. See Habeas Corpus, I.

The guardian of a minor is not permitted to bring suit in his own name for money or property belonging to the ward and of which he has a right to possession as such guardian, but must bring suit as guardian.—*Dennison v. Willcutt*, 3 Idaho, 793, 35 Pac. 698.

Where the probate court decides against the validity of a will, and the testamentary guardian appeals to the district court, which decides against the validity of the will, the guardian will not be justified in charging up the costs and expenses of a further appeal against the estate of his wards.—*In re Brady*, 10 Idaho, 366, 79 Pac. 75.

Where wards were domiciled within this state and their only property consisted of three insurance policies which were within this state, the probate court had authority to appoint a general guardian and to retain jurisdiction for all purposes connected therewith until the final account and discharge of the guardian; and the fact that the wards were removed without authority to another state and placed under the control of a guardian there appointed would not oust the probate court of such jurisdiction.—*In re Brady*, 10 Idaho, 366, 79 Pac. 75.

In a petition for the settlement and allowance of a guardian's account, it is not necessary to show that all the statutory steps were taken to secure the appointment, since probate courts, in such matters, are courts of general jurisdiction, whose records import verity and are not open to collateral attack.—*In re Brady*, 10 Idaho, 366, 79 Pac. 75.

Under R. C. 5774, providing that the surviving parent, who is competent to transact his own business and not otherwise unsuitable, is entitled to the guardianship of his minor children, a finding that the father is lacking in integrity is not sufficient to deprive him of the custody of his children.—*In re Crocheron*, 16 Idaho, 441, 33 L. R. A., N. S., 868, 101 Pac. 471.

Evidence in an action to determine the right to the guardianship of minor children held to show that the father was competent to transact his own business and that he was

not otherwise unsuitable to have the guardianship of his minor children.—*In re Crocheron*, 16 Idaho, 441, 33 L. R. A., N. S., 868, 101 Pac. 471.

The application for the appointment of a guardian of a minor is a statutory proceeding and the power of the court is fixed and determined by the statute, the usual powers exercised by courts of equity not being given to the court in making the appointment of a guardian under the laws of this state.—*In re Crocheron* (on rehearing), 16 Idaho, 441, 33 L. R. A., N. S., 868, 101 Pac. 471.

The fact that a father at times indulges in the use of intoxicating liquors or does not pay his debts is not ground for depriving him of his right to the guardianship of his minor children.—*In re Crocheron* (on rehearing), 16 Idaho, 441, 33 L. R. A., N. S., 868, 101 Pac. 471.

Editorial Notes.

Personal liability of guardians: 75 Am. Dec. 447.

Nonresident minors and proceedings to transmit their property to foreign guardians: 95 Am. Dec. 666.

Right of general guardian to institute in individual capacity action on behalf of minor ward: Ann. Cas. 1912B, 407; 11 Ann. Cas. 1092.

Right of infant to select his own guardian: Ann. Cas. 1912C, 477.

Parent's right to appointment: 33 L. R. A., N. S., 869.

HABEAS CORPUS.**I. NATURE AND GROUNDS OF REMEDY.****II. JURISDICTION, PROCEEDINGS AND RELIEF.****III. SUSPENSION OF REMEDY.****I. NATURE AND GROUNDS OF REMEDY.**

Where a court did not have authority to render a particular sentence, the person so sentenced should be released on habeas corpus. *Ex parte Cox*, 3 Idaho, 530, 95 Am. St. Rep. 29, 32 Pac. 197.

Where the petitioner is imprisoned on a bench warrant issued upon an information irregular on its face, but which charges a public offense within the jurisdiction of the trial court and the court has jurisdiction of the person of defendant, the writ of habeas corpus does not lie.—*In re Marshall*, 6 Idaho, 516, 56 Pac. 470.

Where it does not appear by a petition for a writ of habeas corpus that the warrant of arrest or commitment under which petitioner is held was issued by the probate court without jurisdiction or that the right to a preliminary examination is denied to the accused, improper conduct of the probate judge or of the county attorney is not ground for habeas corpus.—*In re Green*, 7 Idaho, 94, 60 Pac. 82.

Where an indictment charges that "on or about the twenty-first day of June, —," an assault was committed, the indictment is de-

murrable, but where no demurrer is filed, the objection cannot be raised after conviction and sentence by petition for a writ of habeas corpus.—In *re* Alcorn, 7 Idaho, 101, 60 Pac. 561.

Where the court sustains a demurrer to an information and grants the prosecuting attorney leave to file a new information, no specific direction to file a new information is required by R. S. 7745-7747; and a writ of habeas corpus will not issue to release petitioner from a judgment of conviction under such new information.—In *re* Pierce, 8 Idaho, 183, 67 Pac. 316.

The fact that all of the witnesses subpoenaed by the state were not examined at the preliminary examination is not ground for the discharge of a defendant held to answer the charge of murder.—In *re* Sly, 9 Idaho, 779, 76 Pac. 766.

The failure of the coroner to hold an inquest is no ground for the discharge of one charged with the murder of the deceased.—In *re* Sly, 9 Idaho, 779, 76 Pac. 766.

The supreme court is a court of original jurisdiction in matters of habeas corpus, and upon such application it cannot exercise the jurisdiction of an appellate court or for such purpose convert itself into an appellate court for the examination of questions reviewable upon appeal.—In *re* Knudtson, 10 Idaho, 676, 79 Pac. 641.

The jurisdiction of the question of the custody of a child under a writ of habeas corpus is of an equitable nature, and courts are given a large discretion in the matter.—*Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

The right to the guardianship of an infant cannot be tried on habeas corpus.—*Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

Where a defendant is held for trial after a preliminary examination, the evidence cannot be weighed on an application of habeas corpus, but if it wholly fails to disclose a public offense for which the prisoner may be held on a preliminary examination, the prisoner is entitled to his discharge.—In *re* Heigho, 18 Idaho, 566, Ann. Cas. 1912A, 138, 110 Pac. 1029.

On November 9, 1909, defendant was convicted of the crime of rape, committed on January 1, 1909, and sentenced to imprisonment for a term of five to fifteen years under "the indeterminate sentence law," Laws 1909, page 82, which took effect May 6, 1909. R. C. 6768, which was in force at the time the crime was committed, fixed the punishment for rape at a minimum of five years and the maximum extended to life. Held, that though defendant should have been sentenced under R. C. 6768, the sentence was valid as to the term of five years, and that, therefore, defendant cannot be discharged on habeas corpus until he has performed so much of the sentence as was within the power of the court to impose. In *re* Chase, 18 Idaho, 561, 110 Pac. 1036.

Where a defendant who has been convicted and sentenced to serve a term of imprisonment appeals from such judgment, and applies to the trial judge for admission to bail, such

application is addressed to the sound legal discretion of such judge or court, and, unless it clearly appears that such discretion has been abused, the action of the trial judge or court will not be disturbed or interfered with by the supreme court on application for a writ of habeas corpus.—In *re* Schriber, 19 Idaho, 531, 37 L. R. A., N. S., 692, 114 Pac. 29.

Habeas corpus cannot be resorted to or employed as an appellate remedy, or for the purpose of reviewing or correcting errors.—In *re* Davis, 23 Idaho, 473, 130 Pac. 786.

Errors committed in the ruling upon the sufficiency of a criminal complaint or upon the legality or regularity of a warrant of arrest, and errors committed upon the trial in a criminal case, must be reviewed and corrected on appeal, and cannot be availed of by the defendant on habeas corpus.—In *re* Davis, 23 Idaho, 473, 130 Pac. 786.

Editorial Notes.

Refusal of writ of habeas corpus, when justifiable: 67 Am. Dec. 395.

Sentences not authorized by law, when authorize discharge upon habeas corpus: 55 Am. St. Rep. 267.

Release of prisoner under habeas corpus because not given a speedy trial: 85 Am. St. Rep. 202; Ann. Cas. 1912D, 1273.

Right of bailed person to writ of habeas corpus: Ann. Cas. 1912C, 951; 35 L. R. A., N. S., 882.

Right of person in custody under judgment to be discharged on habeas corpus when judgment ceases to be operative: Ann. Cas. 1913B, 878.

II. JURISDICTION, PROCEEDINGS AND RELIEF.

R. S. 8370 requires that all writs, warrants, process, etc., authorized under the provisions of the chapter relating to habeas corpus must be issued by the clerk of court. R. S. 3925 provides that in the exercise of its jurisdiction, if the course of proceedings be not specially pointed out by this code or by statute, the court may use any suitable process or mode of proceeding, etc. Held, that a temporary order for the care and custody of an infant pending an application for a writ of habeas corpus need not have the seal of the court affixed nor be issued by the clerk.—In *re* Miller, 4 Idaho, 711, 43 Pac. 870; In *re* Dowling, 4 Idaho, 715, 43 Pac. 871.

Under R. S. 3925, providing that when jurisdiction is conferred on a court or judicial officer, all the means necessary to carry it into effect are given; and in the exercise of the jurisdiction, if the course of proceedings be not specially pointed out by code or statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code, a temporary order providing for the care and custody of an infant child may be issued by the district judge at chambers, pending the hearing of an application for habeas corpus.—In *re* Miller, 4 Idaho, 711, 43 Pac. 870; In *re* Dowling, 4 Idaho, 715, 43 Pac. 871.

The district judge at chambers has all the powers of a court in habeas corpus proceedings.—*In re Dowling*, 4 Idaho, 715, 43 Pac. 871.

On application for a writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed.—*In re Boyle*, 6 Idaho, 609, 96 Am. St. Rep. 286, 45 L. R. A. 832, 57 Pac. 706.

On application for a writ of habeas corpus, the court will not consider the question of drawing, summoning and impaneling the grand jury, which found the indictment upon which the petitioner was convicted.—*In re Corcoran*, 6 Idaho, 657, 59 Pac. 18.

Where it is not shown that a magistrate has abused his discretion in committing a person on a criminal charge, an application for a writ of habeas corpus should be denied. *In re Levy*, 8 Idaho, 53, 66 Pac. 806.

Under R. S. 8353, providing that on application for a writ of habeas corpus, "the court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree," it is too late after conviction to apply for a discharge on habeas corpus on the ground that the evidence produced at the preliminary examination did not show the commission by him of any offense, or reasonable or probable cause for commitment.—*In re Knudtson*, 10 Idaho, 676, 79 Pac. 641.

Where a prisoner brought into the state on an extradition warrant has been indicted on the charge of murder, and the proceedings appear regular on the face of the return and in conformity with the laws of the state, as the prisoner is held under process duly issued by a court of competent criminal jurisdiction, an application on his part to be discharged on habeas corpus will be denied.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 897; *In re Pettibone*, 12 Idaho, 264, 85 Pac. 902; *In re Haywood*, 12 Idaho, 264, 85 Pac. 902.

Where a prisoner is within the jurisdiction of the demanding state, and is there applying to its courts for his discharge on habeas corpus, he cannot raise the question as to whether or not he has been, as a matter of fact, a fugitive from the justice of the state within the meaning of the federal constitution and the act of Congress authorizing interstate extradition.—*In re Moyer*, 12 Idaho, 250, 118 Am. St. Rep. 214, 12 L. R. A., N. S., 227, 85 Pac. 897; *In re Haywood & Pettibone*, 12 Idaho, 264, 85 Pac. 902.

Where a defendant was charged with murder, and found guilty of an assault with a deadly weapon under an information which did not charge an assault, the defect in the verdict of the jury and the judgment is not sufficient to release the petitioner, provided

the county attorney files a complaint against the petitioner within five days after the judgment in this case is transmitted to the clerk of the district court of Elmore county; but, if the information is not filed, then the facts justify and authorize the petitioner's release. *In re McLeod*, 23 Idaho, 257, 128 Pac. 1106.

Where a return to a writ of habeas corpus shows that the petitioner is detained by the chief of police of Boise City in the city jail thereof, under and by virtue of a commitment issued by the police magistrate of Boise City, which commitment is in due form, regular on its face, and recites that the prisoner has been convicted of the violation of a city ordinance and sentenced to imprisonment, under the provisions of R. C. 8353, it is the duty of the court to remand the prisoner; and the court has no authority to go back of the commitment or process on which the prisoner is held and examine the sufficiency of a complaint upon which the prisoner was tried, or the validity and regularity of a warrant that was issued thereon, and upon which the prisoner was arrested in the first instance.—*In re Davis*, 23 Idaho, 473, 130 Pac. 786.

III. SUSPENSION OF REMEDY.

In case of insurrection or rebellion, the governor or military officer in command may, for the purpose of putting down the insurrection or rebellion, suspend the writ of habeas corpus or disregard it, if issued.—*In re Boyle*, 6 Idaho, 609, 96 Am. St. Rep. 286, 45 L. R. A. 832, 57 Pac. 706.

HAWKERS AND PEDDLERS.

Laws governing, as interference with interstate commerce. See Commerce.

Laws regulating, as class legislation. See Constitutional Law, IX.

Laws 1901, page 155, requiring peddlers, hawkers, etc., to have a license and providing that "this act shall not be construed to apply to runners traveling for wholesale houses and taking orders from merchants only," does not authorize runners or drummers traveling for a wholesale house to carry the goods to be sold with them.—*In re Abel*, 10 Idaho, 288, 77 Pac. 621.

Laws 1901, page 155, requiring hawkers, peddlers, etc., to procure a license, though unconstitutional as to section 8 thereof in attempting to confine the taking of orders for merchandise to merchants only, is capable of being executed in accordance with the legislative intent wholly independent of section 8; and in construing such law the invalid portion may be rejected and the remainder permitted to stand.—*In re Abel*, 10 Idaho, 288, 77 Pac. 621.

Beef from slaughtered animals raised and slaughtered on the farm is the product of the farm and may be sold within the corporate limits of cities of the state without first procuring a license.—*In re Snyder*, 10 Idaho, 682, 68 L. R. A. 708, 79 Pac. 819.

Editorial Notes.

Hawkers and peddlers, license taxes by the state upon: 96 Am. St. Rep. 844.

Who is "hawker" or "peddler" within licensing statute or ordinance: *Ann. Cas.* 1912D, 1289.

HEALTH.

See Physicians and Surgeons.

Authority of one member of county board to employ physician for smallpox patients. See Counties, II, (C), 4.

Removal of member of county board for failure to make sanitary regulations. See Counties, II, (C), 2.

HIGHWAYS.

I. ESTABLISHMENT, ALTERATION AND DISCONTINUANCE.

II. HIGHWAY DISTRICTS AND OFFICERS.

III. CONSTRUCTION, IMPROVEMENT AND REPAIR.

IV. TAXES, ASSESSMENTS AND WORK ON HIGHWAYS.

V. REGULATION AND USE FOR TRAVEL.

Bridges. See Bridges.

Dedication of highway. See Dedication.

Private roads. See Private Roads.

Streets and other public ways in cities and towns. See Municipal Corporations.

Water-ways, irrigation ditches and canals in general. See Waters and Watercourses.

Waters capable of navigation in their natural condition. See Navigable Waters.

Existence of as breach of covenant. See Covenants, III.

Navigable streams as public highways. See Navigable Waters.

Action for special damage caused by obstruction of street or road. See Nuisance.

I. ESTABLISHMENT, ALTERATION AND DISCONTINUANCE.

Streets in cities. See Municipal Corporations.

A land owner cannot change the lines of a public highway by changing the lines of his fence, even though the new road is shorter and better than the one fenced up.—*Gross v. McNutt*, 4 Idaho, 286, 38 Pac. 935.

Under R. S. 851, amended by Laws 1893, page 12, it is not necessary that a highway be worked throughout its entire length, at public expense, to come within the provision that all roads used as such for five years which have been worked and kept at public expense are highways.—*Gross v. McNutt*, 4 Idaho, 286, 38 Pac. 935.

A highway by prescription under R. S. 851 rests upon user for a period of five years, not on the theory of a grant or dedication, but a public right founded on user and lapse of time.—*Gross v. McNutt* (on rehearing), 4 Idaho, 300, 38 Pac. 936.

A complaint, alleging that a petition for the establishment of a road was "signed by a number of more than ten residents and taxpayers of the said road district," sufficiently shows that the petitioners were taxable for road purposes.—*County of Canyon v. Toole*, 8 Idaho, 501, 69 Pac. 320.

A complaint alleged that a petition for the establishment of a road was accompanied with a bond, which was duly filed, and that the board of county commissioners thereafter appointed viewers to view and survey the proposed road, and received and accepted the report of said viewers. Held, sufficient to show that the bond was approved by the board.—*County of Canyon v. Toole*, 8 Idaho, 501, 69 Pac. 320.

Where a petition for establishing a public road does not contain substantially all the facts required to be stated by R. S. 920, 921, a nonconsenting land owner who does not appear at the hearing of the petition is not bound by the decision of the board of commissioners thereon.—*Canyon County v. Toole*, 9 Idaho, 561, 75 Pac. 609.

Where nonconsenting land owners appear at the hearing of a petition for establishing a public road and resist the same, and the board decides against them, their remedy is to appeal and they cannot collaterally attack such decision in an action of condemnation brought by the county pursuant to R. S. 930 on the ground that the petition fails to state all the facts required by R. S. 920, 921.—*Canyon County v. Toole*, 9 Idaho, 561, 75 Pac. 609.

Under R. S. 850, defining highways and R. S. 851, as amended by Laws 1893, page 12, defining highways by prescription, a road constructed by private parties as a logging road, and kept in repair by such parties, who maintain a gate across the road, is not a public highway.—*Palmer v. Northern Pac. Ry. Co.*, 11 Idaho, 583, 83 Pac. 947.

Under R. S. 851, amended by Laws 1893, page 12, defining highways, a town or the public could acquire private property for public use as a highway by user thereof from the year 1887 until 1903.—*Town of Juliaetta v. Smith*, 12 Idaho, 288, 85 Pac. 923.

In an action, commenced on May 10, 1906, the complaint alleged that "for more than ten years immediately preceding the commencement of the action the public generally have enjoyed and used a public highway over, across and through said described lands," and further, that the road had been kept up at public expense for the same time. R. S. 851, prior to its amendment by Laws 1893, page 12, did not require the road to be kept up at the expense of the public. Held, error to enter judgment on a finding that the road had become a highway by prescription prior to 1893.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

In an action, commenced on May 10, 1906, the complaint alleged that "for more than ten years immediately preceding the commencement of the action the public generally have enjoyed and used a public highway over, across and through said described lands," and further, that the road had been kept up at public expense for the same time. R. S. 851, prior to its amendment by Laws 1893, page 12, did not require the road to be kept up at the expense of the public. Held, that the court erred in failing to find either on the

question that the road had been worked and kept up at the expense of the public or that it had been located and recorded by order of the board of county commissioners.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

In an action, commenced on May 10, 1906, the complaint alleged that for more than ten years immediately preceding the commencement of the action the public generally have enjoyed and used a public highway over, across and through said described lands," and further, that the road had been kept up at public expense for the same time. R. S. 851, prior to its amendment by Laws 1893, page 12, did not require the road to be kept up at the expense of the public. Held, error to admit evidence of the establishment of the road from 1887 to 1893, as the issues showed that the action was based on the requirements of R. S. 851, as amended.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

The public use of a highway for the statutory period and the keeping of it in repair at public expense is sufficient to establish it as a highway, whether the owner of the land consents or dissents thereto.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

Under R. S. 851, as amended by Laws 1893, page 12, defining highways, roads used as such for a period of five years that have been worked and kept up at the expense of the public are highways whether they are recorded or not.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

Under R. S. 932, fixing the width of highways at fifty feet, except those consisting of less width at the date of enactment of said section, the legislature determined the width of a road that is considered reasonably necessary for the convenience of the public generally, and the width of a road acquired by prescription and user is such as is reasonably necessary for the reasonable convenience of the traveling public and must be determined from a consideration of the facts and circumstances peculiar to each case. *Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

An allegation that a road has been used as a public highway for more than ten years prior to the commencement of the action cannot be treated as definitely describing a longer period than ten years and one day.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

Editorial Notes.

Highways established by prescription: 57 Am. St. Rep. 744; 11 L. R. A. 55.

II. HIGHWAY DISTRICTS AND OFFICERS.

Eligibility of member of legislature to hold office of highway commissioner. See *Officers*, I, (C).

Authority and contracts of state wagon road commission. See *post*, III.

R. C. 1056, 1058, as amended by Laws 1909, page 172, are not in conflict in providing for the application and expenditure of the

revenue raised in a good road district by the levy made by the road commissioners of the district and the general tax levy made by the board of county commissioners.—*Hettinger v. Good Road Dist. No. 1*, 19 Idaho, 313, 113 Pac. 721.

The publication of the notice calling for an election for the purpose of determining whether a good road district should be organized, published once a week for two consecutive weeks, beginning with the issue of August 14, 1909, and ending with the issue of August 21, 1909, of the election to be held August 30, 1909, is a compliance with the provisions of section 1052, which requires that the notice be published at least two weeks prior to such election.—*Hettinger v. Good Road Dist. No. 1*, 19 Idaho, 313, 113 Pac. 721.

The good roads law, R. C. 1049 to 1068, inclusive, providing for the organization and government of good road districts, is not local or special law as used in Const., article 3, section 9, as it is general in its application, and applies alike to all sections of the state where the taxpayers are willing to assume the burden of additional taxation for the purpose of improving the roads within such sections, and applies to all good road districts within the state, and relates to all of a class.—*Hettinger v. Good Road Dist. No. 1*, 19 Idaho, 313, 113 Pac. 721.

R. C. 1054, authorizing the issue of bonds of a good road district, provides no method or means of giving notice of the election authorizing such bonds, or the method of conducting the same, and is incomplete, indefinite and incapable of being executed, and is therefore illegal and void.—*Hettinger v. Good Road Dist. No. 1*, 19 Idaho, 313, 113 Pac. 721.

A state wagon road commission is authorized to act only as a commission or through its authorized agent, and the unauthorized action of any individual member does not bind the state.—*Whiteway v. State*, 19 Idaho, 322, 113 Pac. 98.

A highway district, as intended by Laws 1911, page 121, chapter 55, is not a political municipality, such as a city, town or village, but is a municipality created for a special purpose and is made a taxing district, of territory to be organized under the provisions of said act, and is created for the purpose of assessing the property within a district for the sole purpose of improving the highways within the district.—*Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 219.

The fact that Laws 1911, page 121, chapter 55, makes no provision for the dissolution of highway districts created thereunder does not render such law unconstitutional, since municipal corporations organized under authority of the legislature can be dissolved as directed by the legislature, and this may be effected by the provisions of the law creating the corporation, or by the general laws of the state, or by a subsequent legislative act. *Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 219.

Where a person is appointed as a member of the board of highway commissioners under Laws 1911, page 121, chapter 55, and such person is ineligible to hold such office, and such person accepts such office and acts in that capacity, until such eligibility of such officer is called in question, he acts as a de facto officer, and the action of the board is not illegal or void by reason of the fact that such de facto officer acts as a member of such board.—*Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 219.

Where, under Laws 1911, page 121, chapter 55, a highway district is created, and the governor of the state appoints such commissioners as provided in said act, and three members unanimously act upon the calling of an election and the issuing of bonds of said district, the fact that a majority of the board, constituted of members who are qualified as such, and controlling the power of the board, approves and indorses the entire proceedings, makes such action of the board legal as the action of the board.—*Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 219.

To create an office means to cause it to exist, and Laws 1911, chapter 55, page 121, which provides for the organization and government of highway districts, etc., does not create the office of commissioner of highway districts, but makes it possible for the people to organize highway districts and thereby bring into existence the office of highway commissioner.—*State v. Gooding*, 22 Idaho, 128, 124 Pac. 791.

Laws 1911, page 121, section 16, is identical with R. C. 887a, as added by Laws 1911, page 168, chapter 60, and said chapter amends the general road and bridge laws under which the county commissioners operated.—*Reinhart v. Canyon County*, 22 Idaho, 348, 125 Pac. 791.

Under Laws 1911, page 121, the highway district law, the district may issue highway district bonds for certain highway purposes within such district, and the county may issue its bonds for bridge or other highway purposes, where such improvement is a benefit to all parts of the county.—*Reinhart v. Canyon County*, 22 Idaho, 348, 125 Pac. 791.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

Under Laws 1893, page 23, providing for the establishment of state wagon roads, the state wagon road commission has no authority to let a contract for the construction of a section of said road until the survey of the same has been completed according to law.—*Dunn v. Sharp*, 4 Idaho, 98, 35 Pac. 842.

Under Laws 1893, page 23, providing for the construction of a system of state wagon roads, a contract may be let for the construction of a section of such a road, although the appropriation to the division of which such section is a part is not sufficient to complete the entire division and mandamus will lie to compel the execution and delivery of the contract awarded therefor.—*Ingram v. State Wagon Road Commission*, 4 Idaho, 139, 36 Pac. 702.

A citizen and taxpayer, the value of whose property will be affected by the location and building of a state wagon road, has the right to bring suit to determine whether the state wagon road commissioners have exceeded the authority given them by law in letting a contract for the construction of such road.—*Dunn v. Sharp*, 4 Idaho, 98, 35 Pac. 842.

Where a contract for the construction of a section of the state wagon road stipulates that final payment will be made when the contract is executed to the satisfaction of the state wagon road commission and the board of examiners, the auditor cannot be required to issue a warrant until the road is examined by said board of examiners and their report made, and said board is entitled to reasonable time within which to make such examination.—*Winters v. Ramsey*, 4 Idaho, 303, 39 Pac. 193.

A board of county commissioners has no power to accept the resignation of a bidder to whom they have regularly awarded a contract, under R. S. 875 (Laws 1899, p. 129), for the care, keeping and repair of the roads for a contract road district.—*Corker v. Elmore County Commrs.*, 10 Idaho, 255, 77 Pac. 633.

Where county commissioners have contracted for the care, keeping and repair of the roads, it is against the interest of the county for the contractors to be released and relieved from their obligation.—*Corker v. Elmore County Commrs.*, 10 Idaho, 255, 77 Pac. 633.

In an action to recover compensation for extra work alleged to have been performed upon a road contract, which does not specify yardage of material moved as a basis of compensation, and where the evidence shows that neither party in making the contract considered yardage as the basis of compensation, the plaintiff cannot be heard to complain if in the building of the road the contractors moved a greater yardage than may have been indicated upon the stakes set to mark out the line of the road.—*Whiteway v. State*, 19 Idaho, 322, 113 Pac. 98.

In a contract for the construction of a road upon a mileage basis, where at the request of the contractors a change is made in the course of the road subsequent to entering into the contract, which change results in the expenditure of a larger sum of money than that originally estimated by the contractors, plaintiff is estopped from claiming payment for extra work performed by reason of such change.—*Whiteway v. State*, 19 Idaho, 322, 113 Pac. 98.

Where it is apparent from the specifications of a contract for the construction of a road that the roadbed was intended to be a certain number of feet in width, but the contract is silent as to the amount of excavation necessary to be made or the amount of yardage that would have to be moved in order to comply with the terms of the contract with reference to the width of the road, the specifications must control, and should be construed with reference to the width of road

required, and not the amount of yardage moved in order to meet such requirement.—*Whiteway v. State*, 19 Idaho, 322, 113 Pac. 98.

Under R. C. 882b, as added by Laws 1911, chapter 60, the entire jurisdiction of building and repairing roads and bridges (outside of highway districts and such highways as are under the jurisdiction of the state highway commission), is given to the respective boards of county commissioners in the several counties of the state.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

County roads are improvements in which the entire public is interested and benefited, although a particular individual may never use such road.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

Editorial Notes.

Labor on highways, right to compel: 74 Am. St. Rep. 667.

IV. TAXES, ASSESSMENTS AND WORK ON HIGHWAYS.

Presentation by municipality of claim for proportion of road taxes. See *Taxation*, XIV.

Double taxation. See *Taxation*, II.

Uniformity of taxation. See *Taxation*, II.

R. S. 886, providing that county commissioners shall levy road tax on all property in the county for road purposes, includes property of towns and villages.—*City of Genesee v. Latah County*, 4 Idaho, 141, 36 Pac. 701.

R. S. 870, subdivision 7 (amended by Laws 1890-91, pp. 190, 191) giving the county commissioners the right to levy a property road tax is not repugnant to nor conflicting with R. S. 2238 (amended by Laws 1890-91, p. 159), confirming in towns and villages the right to levy and collect taxes for general revenue purposes; but the laws, construed together, mean that the county commissioners have the exclusive right to levy a property road tax.—*City of Genesee v. Latah County*, 4 Idaho, 141, 36 Pac. 701.

Laws 1909, page 285, section 21, the "good roads law," imposes no duty upon the board of county commissioners to levy the special tax referred to in such section, and provides no method or manner of levying such tax or the collection of the same, and provides no machinery for carrying said section into execution, and is therefore inoperative and void. *Cunningham v. Thompson*, 18 Idaho, 149, 108 Pac. 898.

Laws 1911, page 121, section 65, the highway district act, when construed by itself, has two purposes: First to place in the highway district board the exclusive power to levy and apply the road, bridge, and highway taxes within the district except in respect to general county taxes, the distribution of which taxes is provided for by section 37 of said act; and, second, to protect without change the method of levying taxes to pay bonds issued prior to the organization of the highway district, and from the language used in said section 65, considered in connection with section 37, the right of highway dis-

tricts to levy and apply taxes within the district relates to general levies for road purposes, and not to special levies made to meet the payment of bonds for the construction of bridges, issued by the county.—*Reinhart v. Canyon County*, 22 Idaho, 348, 125 Pac. 791.

Editorial Notes.

Validity of statute assessing cost of construction or repair of rural highway on land benefited: Ann. Cas. 1913D, 550.

V. REGULATION AND USE FOR TRAVEL.

Duty to construct bridges where canals or ditches are constructed across public highway. See *Waters and Watercourses*, IX, (B), 7.

On streets. See *Municipal Corporations*.

County commissioners are not individually liable in damages for injuries sustained by reason of defective bridges or highways.—*Gorman v. Commissioners*, 1 Idaho, 655; *Worden v. Witt*, 4 Idaho, 404, 95 Am. St. Rep. 70, 39 Pac. 1114.

In an action to remove an obstruction from a highway established by user, it is not necessary to allege title by adverse possession under R. S. 4039, as the only right acquired by the public is an easement in the land consisting of a right to pass over the same and keep it in repair, the legal title remaining in the owner of the adjoining land. *Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

R. S. 3634 provides that a public nuisance may be abated by any public body or officer authorized thereto by law. R. S. 873, as amended by Laws 1899, page 128, requires the road overseer to take charge of the public highways in his district and keep them clear from obstructions and in good repair. Laws 1899, page 306, provides for the election of road overseers, thereby making them public officers. Held, that the road overseer is the proper officer to bring an action for the removal of an obstruction of a public highway.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

Under R. S. 960, 963, providing that encroachments on highways duly laid out or erected may be removed by action to abate the same and also providing a penalty if the road overseer recovers judgment in such action, no penalty can be recovered where the highway is established by user or abandonment to the public and has not been recorded as a highway.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

In an action by a private person to abate a public nuisance, consisting of obstructions placed in and upon a public highway, wherein it is alleged that the road is the only one which plaintiff can use in getting out and into the place where he lives, and that the plaintiff's buildings are so located that there is no other way for the use and enjoyment of the same and carrying on his business of farming without constantly using said highway, and wherein it is alleged that his buildings are so situated with reference to the road that to deprive the plaintiff of the use

and benefit of the road would require him to move said buildings at great cost; and that he has a valuable orchard adjoining the road and to deprive him of the use of said road would damage his orchard; and that he has a good and sufficient water right and ditches and laterals, and that if the road is obstructed, he will be compelled to build new ditches, the complaint states special injuries in which the public would not necessarily share or sustain, and state facts sufficient to authorize the plaintiff, a private person, to maintain an action to abate such nuisance.—*Stricker v. Hillis*, 15 Idaho, 709, 99 Pac. 831.

In an action where a private person seeks to enjoin the maintenance of a public nuisance in unlawfully maintaining obstructions in a public highway, where the facts alleged show that the injury sustained by plaintiff is not shared by the general public and is different in kind from those inflicted upon the general public, and is direct and substantial, the complaint is sufficient in this particular to authorize the plaintiff to maintain such action.—*Stricker v. Hillis*, 15 Idaho, 709, 99 Pac. 831.

R. C. 3656 provides that any unlawful obstruction of the clear passage or use in the customary manner of any highway is a nuisance. R. C. 3657 defines a public nuisance as one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal. R. C. 3665 provides that a private person may maintain an action for a public nuisance if it is specially injurious to himself but not otherwise. Held, to authorize a private person to bring an action to abate a public nuisance on allegations of facts showing that by an obstruction of a public road he is specially injured in a different way from the public generally, or deprived of the free use of his own property.—*Stricker v. Hillis*, 15 Idaho, 709, 99 Pac. 831.

Where, by reason of an obstruction in a public highway, an individual has suffered a loss not common to the public, and in which the public do not share, he should be allowed to maintain his action for the injury sustained.—*Stricker v. Hillis*, 17 Idaho, 646, 106 Pac. 1128.

Under R. C. 3669, a ditch or canal constructed and maintained under the express authority of a statute cannot be deemed to be a nuisance.—*MacCammelly v. Pioneer Irr. Dist.*, 17 Idaho, 415, 105 Pac. 1076.

Editorial Notes.

Officers of highways, liability of for injuries occasioned by their neglect of duty: 83 Am. Dec. 563; 22 L. R. A. 824.

Liability of individuals and of towns for injuries from excavations on roadsides by reason of failure to maintain fences or guards: 79 Am. Dec. 702.

Obstructions upon any part of highways are nuisances: 38 Am. Rep. 127.

Obstruction of highways, injunction against on behalf of private citizens: 52 Am. Rep. 574.

Purposes for which highways may be used: 131 Am. St. Rep. 532.

Liability of township for defects in highways: 13 L. R. A., N. S., 1220.

HOLIDAYS.

See Sunday.

Exclusion of, in computation of time. See Time.

The act of appointing an administrator of an estate by a probate court is a judicial act, while that of issuing letters of administration is merely ministerial; therefore, the statute only forbidding the transaction of judicial business on Christmas Day, letters issued on that day are not void.—*Glendenning v. McNutt*, 1 Idaho, 592.

HOMESTEAD.

- I. NATURE, ACQUISITION AND EXTENT.
- II. TRANSFER OR ENCUMBRANCE.
- III. RIGHTS OF SURVIVING HUSBAND, WIFE OR HEIRS.
- IV. ABANDONMENT, WAIVER OR FORFEITURE.
- V. PROTECTION AND ENFORCEMENT OF RIGHTS.

Estoppel of wife in action to compel transfer under oral agreement performed by purchaser. See Specific Performance, II.

On government land. See Public Lands, II, (B), 2. Relinquishment by heir prior to patent to heirs of deceased entryman. See Descent and Distribution.

I. NATURE, ACQUISITION AND EXTENT.

Protection and enforcement of rights. See post, V.

Homestead and exemption laws are construed liberally, as a protection of the unfortunate.—*Coughanor v. Hoffman's Estate*, 2 Idaho, 290, 13 Pac. 231.

Plaintiff sold and conveyed his homestead, and with a part of the proceeds of such sale purchased another residence intending it for a homestead. Defendants levied an attachment on the residence so purchased before plaintiff filed his homestead declaration therefor. Held, that the purchase of a new homestead with the proceeds of an old homestead does not exempt such new homestead from attachment or execution, levied prior to filing the homestead declaration for record, as required by R. S. 3071.—*Wright v. Westheimer*, 3 Idaho, 232, 25 Am. St. Rep. 267, 28 Pac. 430.

A mortgage lien cannot be defeated by a declaration of homestead made after the mortgage lien attaches.—*Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

A declaration of homestead which describes certain town lots and also a certain quarter section of land "containing 160 acres, upon a portion of which the claimant, with family, are residing," is invalid for indefiniteness.—*Wilcox v. Deere*, 5 Idaho, 545, 51 Pac. 98.

Where a married woman filed a declaration of homestead upon community property, which declaration was not acknowledged or certified

as required by R. S. 3070, it is too late after the property has been attached and sold under a sheriff's deed on execution to ask for a reformation of the certificate of acknowledgment and that such reformation shall relate back to the time of filing the declaration of homestead.—*Burbank v. Kirby*, 6 Idaho, 210, 96 Am. St. Rep. 260, 55 Pac. 295.

The certificate to a declaration of homestead may be amended, but not as against a creditor who has, by attachment, judgment or other means, acquired a lien on the premises claimed as a homestead.—*Burbank v. Kirby* (on rehearing), 6 Idaho, 210, 96 Am. St. Rep. 260, 55 Pac. 295.

Where a declaration of homestead is not acknowledged and certified in the manner required by law, the recorder is not required to file or record it, and if he does the record imparts no notice to creditors and does not bind them.—*Burbank v. Kirby* (on rehearing), 6 Idaho, 210, 96 Am. St. Rep. 260, 55 Pac. 295.

A hotel may be claimed as a homestead when occupied by the owner as a home and within the statutory limitations as to value. *Kiesel v. Clemens*, 6 Idaho, 444, 96 Am. St. Rep. 278, 56 Pac. 84.

R. S. 3071 requires a declaration of homestead to contain a statement that the person making it is the head of a family, or when made by the wife, showing that her husband has not made such declaration and that she therefore makes it for their joint benefit. Held, that a declaration stating, "I am married and now actually reside with my family on the land and premises hereinafter described. My family consists of a wife and two children," sufficiently alleges that the homestead claimant is "the head of a family." *Mellen v. McMannis*, 9 Idaho, 418, 75 Pac. 98.

A homestead declaration in substantial compliance with R. S. 3071 is sufficient, though not in exact language of the statute.—*Mellen v. McMannis*, 9 Idaho, 418, 75 Pac. 98.

Editorial Notes.

Head of family, who is and what constitutes a family: 61 Am. Dec. 586; 70 Am. St. Rep. 107.

Whether homestead may be acquired in an undivided interest in lands: 63 Am. Dec. 122.

What may be exempt as homestead: 70 Am. Dec. 344.

Proceeds of homestead, whether and when exempt from execution: 45 Am. St. Rep. 237.

Lien for purchase money of homestead: 99 Am. Dec. 574; 86 Am. St. Rep. 174.

Homestead exemption as extending to premises used for hotel or lodging-house: Ann. Cas. 1913E, 1256.

What constitutes a family: 4 L. R. A., N. S., 366.

II. TRANSFER OR ENCUMBRANCE.

That part of community property occupied as a residence by husband and wife, but on which no declaration of homestead has been

fled, is subject to the control of the husband, except that the husband cannot convey or encumber it so long as it continues to be their residence, without the wife's joining in the conveyance.—*Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

A husband and wife entered into an oral contract for the sale of their homestead, and the purchaser took possession, and paid the price, and made valuable improvements, with the full knowledge and consent of the wife. Held, that he was entitled to a decree requiring a conveyance of the premises to him.—*Grice v. Woodworth*, 10 Idaho, 459, 109 Am. St. Rep. 214, 69 L. R. A. 584, 80 Pac. 912.

R. S. 3040, 3041, providing that a homestead of a married person cannot be conveyed or encumbered, unless the instrument is executed and acknowledged by both husband and wife, are in their nature rules of evidence, and are subject to the same legal principles as are conveyances falling under the statutes of frauds and the rules of equitable estoppel and waiver.—*Grice v. Woodworth*, 10 Idaho, 459, 109 Am. St. Rep. 214, 69 L. R. A. 584, 80 Pac. 912.

R. S. 2921, 2922, 3040, 3041, relating to the conveyance of homesteads and community property, and for the acknowledgment of the same, were enacted to protect homesteads and other rights of married women, and were not intended to operate as a shield to relieve against a fraudulent transaction on their part. *Grice v. Woodworth*, 10 Idaho, 459, 109 Am. St. Rep. 214, 69 L. R. A. 584, 80 Pac. 912.

Editorial Notes.

Conveyance of homestead: 65 Am. Dec. 482.

Conveyance of homestead by one spouse, whether may become operative on abandonment or other future event: 12 Am. St. Rep. 683.

Conveyance or encumbrance by one spouse only: 95 Am. St. Rep. 909; 8 L. R. A., N. S., 565; 37 L. R. A., N. S., 807.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN OR HEIRS.

Heirs of deceased entryman are tenants in common. See Tenancy in Common.

Under Rev. Laws 1875, page 627, the widow is the head of a family entitled to select a homestead after the death of her husband and the benefits of the act are secured to her as a wife surviving her husband by section 4 of this act.—*Coughanor v. Hoffman's Estate*, 2 Idaho, 290, 13 Pac. 231.

Under Rev. Laws 1875, page 627, the widow may select a homestead after the death of her husband and have the same set apart by the probate court for the benefit of herself and children.—*Coughanor v. Hoffman's Estate*, 2 Idaho, 290, 13 Pac. 231.

In a proceeding by a widow to have a homestead set apart out of real estate of her deceased husband, the record showed that petitioner resided upon the land with the deceased until she was compelled by his cruel

treatment to leave; that he paid her a sum of money when she left; that such separation was not voluntary and was not mutually intended to be permanent; that at the time of his death the husband was away temporarily from the premises sought to be set aside as a homestead; that he did not leave with the intention of taking up a new residence; that the property at the time of his death was in the possession of his lessee and that he left a will devising and bequeathing all his real and personal property to said lessee. The jury found the foregoing facts in substance. Held, that the widow was entitled to have a homestead and all exempt property set apart to her. *Estate of McVay*, 14 Idaho, 50, 93 Pac. 28.

Under R. S. 5440, 5441, a probate homestead is one created by the probate court out of any property belonging to the estate which was subject to a homestead at the time of the death of decedent, which was of less than \$5,000 in value and which might have been occupied as a home at the time of decedent's death; and it is not necessary that the husband or wife should actually have lived on the property at the time of his death.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Where property has been set aside by a decree of the probate court for the use of the widow and her minor children in compliance with R. S. 5445, the widow can do no act that would relieve the property of its burden or free it from the obligation and purposes to which it was set aside until the children reach their majority.—*Booth Mercantile Co. v. Murphy*, 14 Idaho, 212, 93 Pac. 777.

Where property has been set aside by a decree of the probate court for the use of the widow and her minor children in compliance with R. S. 5445, and the widow thereafter mortgages all her interest in and to such estate, the mortgage covers only her interest in the property as an heir of her husband's estate, but does not cover her interest acquired by virtue of the probate court decree.—*Booth Mercantile Co. v. Murphy*, 14 Idaho, 212, 93 Pac. 777.

Editorial Notes.

Nonresident widow, rights of in homestead: 96 Am. Dec. 412.

Wives, suits by for and concerning homestead: 76 Am. Dec. 442.

Rights of children in parent's homestead: 56 L. R. A. 34.

IV. ABANDONMENT, WAIVER OR FORFEITURE

Under R. S. 3041, providing that a homestead can only be abandoned by a declaration of abandonment or a grant or conveyance thereof executed by the husband and wife if the claimant be married, a conveyance by the husband without the wife's signature is not an abandonment.—*Mellen v. McMannis*, 9 Idaho, 418, 75 Pac. 98.

Editorial Notes.

Abandonment of homestead, what constitutes: 60 Am. Dec. 607; 36 Am. Rep. 728; 102 Am. St. Rep. 389.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

Homestead acquired with proceeds of old homestead. See ante, I.

A judgment lien acquired before the filing of a declaration of homestead by the judgment debtor and his wife subjects the property claimed as a homestead to sale under execution; and such lien cannot be divested by any subsequent act of the owners.—*Smith v. Richards*, 2 Idaho, 499, 21 Pac. 419.

On a motion to dissolve an attachment it is not competent nor proper practice to determine the homestead character of the property attached.—*Mason etc. v. Lieuallen*, 4 Idaho, 415, 39 Pac. 1117.

Where the affidavits in support of a motion to discharge an attachment only go to the question as to whether the property levied on is a homestead or not, they are insufficient to authorize the judge to dissolve the attachment.—*Mason etc. Co. v. Lieuallen*, 4 Idaho, 415, 39 Pac. 1117.

Editorial Notes.

Judgment liens on homestead: 34 Am. St. Rep. 496.

Attachment and judgment liens against homestead: 38 Am. St. Rep. 247.

HOMICIDE.

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Jurisdiction of prosecution for murder of member of Indian tribe. See Indians.

I. THE HOMICIDE.

(No paragraphs.)

II. MURDER.

Degree as question for jury. See post, VIII, (B).

It is competent for the legislature to prescribe what felonious homicides shall be deemed murder, and to define the degrees.—*People v. Mooney*, 2 Idaho, 17, 2 Pac. 876.

The statutory definition of murder in the first degree is a distinct and substantive definition, and excludes therefrom certain homicides which would be murder at common law. *People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

Where an unnatural abortion is sought to be caused by the use of instruments and drugs, or either, and death results, an abortion not being necessary to save the life of the woman, such acts constitute the crime of murder in the second degree; and hence an instruction that such acts constitute the crime of murder in the second degree or manslaughter is erroneous.—*State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

At common law all murder was of the first degree, and no such distinction was recognized as that incorporated in R. S. 6562, designating the class of cases in which the offense shall be murder of the first degree and those in which it shall be murder of the second degree.—*State v. Phinney*, 13 Idaho, 307, 12 Ann. Cas. 1079, 12 L. R. A., N. S., 935, 89 Pac. 634.

R. S. 6562 provides that all murder perpetrated by means of poison, etc., shall be murder of the first degree. R. S. 6560 defines murder as the unlawful killing of a human being, with malice aforethought. Held, that before a jury can find a defendant guilty of murder, they must first find that there has been an "unlawful killing with malice aforethought," and the fact that the killing has been accomplished by means of poison does not of itself establish "malice aforethought." *State v. Phinney*, 13 Idaho, 307, 12 Ann. Cas. 1079, 12 L. R. A., N. S., 935, 89 Pac. 634.

Editorial Notes.

Murder, degrees, statutory division of: 18 Am. Dec. 774.

Word "murder" in statute as including manslaughter: Ann. Cas. 1913C, 929.

Malice aforethought: 38 L. R. A., N. S., 1054.

III. MANSLAUGHTER.

Sufficiency of evidence. See post, VII, (E).

Under R. C. 6565, a prosecution for manslaughter may be had where the death of a human being has been caused or accomplished through fright, fear, terror or nervous shock produced by the accused while in the commission of an unlawful act, even though the accused made no hostile demonstration and directed no overt act at the person of the deceased. It would seem that in some instances force or violence may be applied to the mind or nervous system as effectually as to the body.—*In re Heigho*, 18 Idaho, 566, Ann. Cas. 1912A, 138, 110 Pac. 1029.

Editorial Notes.

Manslaughter, condition of mind of slayer which reduces murder to: 134 Am. St. Rep. 726; 9 Ann. Cas. 929.

IV. ASSAULT WITH INTENT TO KILL.

Where, in a prosecution for assault with intent to commit murder, the defense of alcoholic insanity is set up, and the evidence shows that at the time of the assault defendant was drunk, that he approached the person assaulted while the latter was quietly reading a newspaper and calling his attention to the fact of a difficulty between them, informed such person that he was going to kill him and proceeded to carry his threat into execution by drawing and cocking a revolver, which was discharged several times in the ensuing struggle, a verdict of conviction is supported by the evidence.—*State v. Rigley*, 7 Idaho, 292, 62 Pac. 679.

A mere civil trespass, unaccompanied by such force as to make it a breach of the peace, is not a sufficient provocation to warrant the shooting of the trespasser.—*State v. Dixon*, 7 Idaho, 518, 63 Pac. 801.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

Self-defense in assault. See Assault and Battery.

Admissibility of evidence. See post, VII, (E).

Instructions. See, also, post, VIII, (C).

While the law recognizes the right of the husband to protect the person of his wife from assault or personal injury, even to the taking of the life of the assailant, still, before this plea can be invoked, it is incumbent on defendant to first establish that the relation of husband and wife existed and that an assault was actually being made or attempted against the wife of defendant at the time the homicide was committed, and that, in the judgment of a reasonable person, the killing of the deceased was necessary, at the time, to protect the wife from death or great bodily harm.—*People v. Pierson*, 2 Idaho, 76, 3 Pac. 688.

A private citizen cannot interfere between two persons, both of whom are in the wrong, and slay one to save the other.—*Territory v. Evans*, 2 Idaho, 425, 17 Pac. 139.

In a prosecution for murder, the evidence showed that deceased unarmed was passing on a trail which ran through another's premises; that defendant, who was the servant of the owner of the premises, had warned deceased not to pass over the road; that defendant, while completely concealed, fired at and killed deceased, who was making no hostile demonstration and no attempt to approach the house in which defendant was concealed. Held, that a plea of self-defense was untenable.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

An instruction on self-defense, that the conditions under which it may be asserted are "that the party himself was not the first aggressor, or, if the aggressor, that he had in good faith withdrawn from the contest before

he struck the blow or fired the fatal shot; second, that the striking or shooting was necessary to prevent the infliction upon himself of a great bodily injury by the party stricken or shot," correctly states the law.—*State v. Lyons*, 7 Idaho, 530, 65 Pac. 236.

The following instruction does not correctly state the law of self-defense, and it is held to be erroneous: "The court instructs the jury that, before a party can justify the taking of life in self-defense, he must show that there was reasonable ground for believing that he was in great peril, and that the killing was necessary for his escape, and that no other safe means was open to him. When one believes himself about to be attacked by another and to receive great bodily injury, it is his duty to avoid the attack if he can safely do so, and the right of self-defense does not arise until he has done everything in his power to avoid this necessity."—*State v. McGreevey*, 17 Idaho, 453, 105 Pac. 1047.

The trial court did not err in refusing to give the following instruction: "The jury are instructed that if, from the evidence, they have any reasonable doubt as to whether the defendant, John Fleming, at the time of firing the fatal shot, was under reasonable and honest fear that said deceased intended and was about to inflict upon him great bodily harm, and that he fired the shot under that belief and in self-defense, then the jury must acquit the defendant."—*State v. Fleming*, 17 Idaho, 471, 106 Pac. 305.

Editorial Notes.

Homicide in self-defense: 26 Am. Dec. 297.

Homicide in the defense of one's house, person, or family: 12 Am. Rep. 212.

Self-defense by one who has made an attack or voluntarily entered into a encounter: 109 Am. St. Rep. 804.

Plea of self-defense as available to person charged with killing peacemaker: Ann. Cas. 1913C, 265.

Withdrawal from participation in homicide which will relieve from criminality: 4 L. R. A., N. S., 576; 2 L. R. A., N. S., 49.

Negligent homicide: 61 L. R. A. 277.

"Retreat to the wall": 2 L. R. A., N. S., 49.

Standpoint of determination as to danger and necessity to kill in self-defense: 3 L. R. A., N. S., 535.

Homicide by misadventure: 3 L. R. A., N. S., 1153.

VI. INDICTMENT AND INFORMATION.

Indorsement of names of witnesses. See Criminal Law, XII, (A).

Joinder of counts. See Indictment and Information.

Surplusage. See Indictment and Information.

An indictment for homicide examined and held sufficient.—*People v. Walters*, 1 Idaho, 271.

An indictment for murder is sufficient if it charges the killing to have been done with

malice aforethought.—*People v. Ah Choy*, 1 Idaho, 317.

An indictment for murder in the first degree must be substantially in the language of the statute, defining that degree of the offense.—*People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

An indictment for murder, which would be sufficient at common law is not necessarily so for murder of the first degree under the statute.—*People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

The indictment for murder need not name the degree, but must show by a statement of facts substantially in the language of the statute the highest grade of the offense for which the party charged is to be tried, and then a conviction may be had for any lower degree included therein.—*People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

An indictment for murder must support the judgment and this question may be raised for the first time in the supreme court.—*People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

In determining whether an indictment for murder is sufficient, all parts of the instrument will be considered together and if from the whole it appears that a crime is sufficiently alleged, it will be sustained.—*Territory v. Evans*, 2 Idaho, 425, 17 Pac. 139.

An indictment which charges that the beating with the hatchet, which is alleged to be a deadly weapon, was done willfully, feloniously and unlawfully, premeditatedly, deliberately and with his malice aforethought, and with intent to kill him, the said M., to kill and murder, did then and there strike, beat, etc., inflicting a mortal wound, of which he, the said M., then and there immediately died, is sufficient to support a conviction of murder in the first degree.—*State v. Perry*, 4 Idaho, 224, 38 Pac. 655.

An indictment which sets forth the crime of murder in the language of the statute is sufficient.—*State v. Ellington*, 4 Idaho, 529, 43 Pac. 60.

It is not requisite or essential that the words defining the degrees of murder should be set forth in the indictment to constitute a good indictment for murder in the first degree.—*State v. Ellington*, 4 Idaho, 529, 43 Pac. 60, overruling *People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

Under R. S. 7683, providing that "when an offense involves the commission of or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material," an information for murder, describing the deceased as one John Doe, "whose true name was unknown to the district attorney," and proof that the deceased was one John Decker, does not show a material variance.—*State v. St. Clair*, 6 Idaho, 109, 53 Pac. 1.

Where an information states in ordinary and concise language the commission of the crime of assault with intent to commit mur-

der, it is not error to overrule a demurrer thereto, as it is sufficient.—*State v. Dixon*, 7 Idaho, 518, 63 Pac. 801.

R. S. 7686 states when indictments shall be deemed sufficient. R. S. 7960 provides that a motion in arrest of judgment may be founded on any of the defects in the indictment or information that are grounds of demurrer unless the objection has been waived by failure to demur. R. S. 8236 provides that errors and mistakes shall not render a pleading or proceeding invalid, unless it has actually prejudiced or tended to prejudice defendant in respect to a substantial right. Held, that a motion in arrest of judgment on the ground that the indictment did not charge that death ensued within a year and a day after the assault was properly denied where no demurrer was interposed and it was not shown that defendant was prejudiced by the defect in the indictment.—*State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

Under R. S. 7685, 7686, relating to the sufficiency of indictments, and R. S. 8236, providing that no departure from the form or mode prescribed by the code in respect to any pleading or proceeding nor any error or mistake therein renders it invalid unless actually prejudicial to defendant or tending thereto in respect to a substantial right, an indictment for murder charging that the defendant did unlawfully, feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, shoot, etc., is sufficient without alleging that the killing was done premeditatedly, deliberately and of his malice aforethought.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

An information charged that defendant at a time and place specified "then and there being, did then and there willfully, unlawfully and feloniously and of his deliberately premeditated malice aforethought, kill and murder one John H. Hays, a human being, by then and there unlawfully and feloniously, and of his deliberately premeditated malice aforethought, shooting at and against the body and person of the said John H. Hays, with a certain gun then and there loaded with gunpowder and leaden bullet," etc. Held, a sufficient allegation that Hays died within a year and a day.—*State v. Sly*, 11 Idaho, 110, 80 Pac. 1125.

An information charged that defendant at a time and place specified "then and there being, did then and there willfully, unlawfully and feloniously and of his deliberately premeditated malice aforethought, kill and murder one John H. Hays, a human being, by then and there unlawfully and feloniously, and of his deliberately premeditated malice aforethought, shooting at and against the body and person of the said John H. Hays, with a certain gun then and there loaded with gunpowder and leaden bullet," etc. Held, that the information sufficiently specifies the means by which the death was occasioned.—*State v. Sly*, 11 Idaho, 110, 80 Pac. 1125.

An information charging the defendant with the crime of murder and alleging that

the defendant at a specified time and place, "then and there being, did then and there willfully, unlawfully and feloniously, in a manner unknown, strike, beat, wound and ill-treat the body and person of Robert Clemm, a human being; by reason whereof the said Robert Clemm sickened and languished with mortal sickness and feebleness of body," etc., and thereafter died from such injuries within a year and a day, is a sufficient allegation of the means whereby the homicide was effected and the manner of the commission of the same.—*State v. Squires*, 15 Idaho, 545, 98 Pac. 413.

An information in which it is charged that "said Norman D. McLeod, on or about the 19th day of October, 1912, at Rocky Bar, Idaho, and prior to the time of filing this information, did then and there willfully, unlawfully, feloniously, and with malice aforethought, kill and murder one George Guay, a human being, all of which is contrary to the form and force of the statute in such cases made and provided, and against the peace and dignity of the state of Idaho." is sufficient, and charges the crime of murder under R. C. 6560.—*In re McLeod*, 23 Idaho, 257, 128 Pac. 1106.

Editorial Notes.

Indictment or information for homicide: 3 Am. St. Rep. 379.

Necessity of allegation of deliberation and premeditation in indictment for murder: 3 Ann. Cas. 936.

Necessity of using word "feloniously" in indictment for homicide: 11 Ann. Cas. 996.

Necessity that indictment for homicide should allege that deceased was human being: 20 Ann. Cas. 775.

VII. EVIDENCE.

(A) PRESUMPTIONS AND BURDEN OF PROOF.

Where the defendant relies on insanity as a defense in a prosecution for murder, he assumes the burden of proof as to such insanity.—*People v. Walter*, 1 Idaho, 386.

In a prosecution for murder, where the defense is insanity, the burden of proving such defense is on defendant, but he is not required to establish such defense beyond a reasonable doubt, a preponderance of the evidence being sufficient.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

In a prosecution for murder, where the defense is insanity, it devolves on the defendant to create a reasonable doubt in the minds of the jurors as to his responsibility at the time of the homicide, and if he fails to do this the prosecution may rest on the legal assumption that all men are responsible for their acts; but he is entitled to the benefit of any reasonable doubt as to his sanity and when such doubt is created, the responsibility of overcoming such doubt shifts to the prosecution.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

Editorial Notes.

Presumption of intent to kill arising from use of deadly weapon in manner not ordinarily employed: Ann. Cas. 1912A, 107.

Burden of proof in prosecution for homicide with respect to issue of self-defense: Ann. Cas. 1912C, 47.

(B) ADMISSIBILITY IN GENERAL.

Declarations of deceased or others as part of the *res gestae*. See Criminal Law, X, (B).

The reputation of the deceased cannot be given in evidence unless the circumstances of the case raise a doubt whether the defendant acted in self-defense.—People v. Stock, 1 Idaho, 218.

Evidence of flight by the defendant, who admits that he took the life of the deceased, cannot be resorted to for the purpose of fixing the crime or the grade of the crime.—People v. Ah Choy, 1 Idaho, 317.

Where defendant seeks to justify a homicide on the ground that the killing was necessary to protect the person of his wife, evidence to show the bad character of the woman alleged to be defendant's wife and that she kept a house of prostitution, with a view of showing that the deceased was upon the premises for purposes other than felonious, is proper.—People v. Pierson, 2 Idaho, 76, 3 Pac. 688.

Where deceased was killed while endeavoring to escape from defendant, and had succeeded in wholly withdrawing in good faith from the vicinity of the defendant and his house, and all danger to the person of defendant, to his habitation, or anyone residing therein was over, then the killing can neither be justified, excused or mitigated by declarations of defendant, made to another person shortly before the homicide, and evidence thereof was properly refused.—People v. Pierson, 2 Idaho, 76, 3 Pac. 688.

In a prosecution for murder it was shown that about three hours before the homicide, defendant said to a witness for the state, "I would like to take you with me, but I have a dirty piece of business to do to-night." Defendant arrived at the house of deceased about one hour after making such remark. Held, admissible to show the animus of defendant toward deceased and as tending to show an abandoned, reckless, and malicious spirit on the part of the accused.—State v. Larkins, 5 Idaho, 200, 47 Pac. 945.

In a prosecution for murder, the evidence showed that deceased was an unchaste woman; that defendant and deceased were on intimate terms; that defendant was jealous of the attentions of a person called "Red"; that about nine days previous to the homicide, in a conversation in the presence of deceased, defendant had said "if he caught 'Red' there, he would kill the pair of them, and burn the house down, but what he would get them." Held, admissible to show a motive for the commission of the crime.—State v. Larkins, 5 Idaho, 200, 47 Pac. 945.

Where the defendant, a cattleman, was making war against sheep-herders generally and threatening to keep them off a certain range by use of deadly weapons, and had made threats against sheep-herders generally and against deceased, who was a sheep-herder, it was competent for the state to show that a short time prior to the homicide, defendant had attacked another camp of sheep-herders, as such evidence tended to show motive on the part of defendant.—State v. Davis, 6 Idaho, 159, 53 Pac. 678.

The defendant was a cattleman; the deceased, a sheep-man. Evidence was introduced over objection to show that defendant was making war against sheep-men generally, and threatening the lives of all sheepmen who failed to keep off a certain range. The deceased was killed on such range and the circumstances pointed to defendant as guilty. Held, that the evidence objected to was competent to show motive on the part of defendant.—State v. Davis, 6 Idaho, 159, 53 Pac. 678.

The evidence in a prosecution for murder showed that just before the shooting defendant came into the store where deceased was standing and that defendant had a paper bag in his hand; that defendant approached the table on the other side from deceased, leaned his arm on the table and slightly raised his hand, whereupon the report of a firearm was heard. A candle was burning on the table between deceased and defendant and when the shot was fired the candle was extinguished. A notch was cut in the candle which was not there before the shot was fired. Immediately after the shooting a paper bag similar in appearance to the one held in the hand of defendant was found outside the door of the building, where all the persons in the store had run when the shot was fired. The bag and candle were kept in the store till morning. Held, that the bag and candle were properly introduced in evidence.—State v. Yee Wee, 7 Idaho, 188, 61 Pac. 588.

In a prosecution for murder, a witness testified that he was the superintendent of a company whose property had been destroyed in the explosion which caused the death of deceased. The witness was then asked: "Is it not a fact that your company is interested in this prosecution and that they have made a claim, or notified the county that they will hold it responsible for the destruction of the mill?" Held, that an objection was properly sustained to the question on the ground that it was irrelevant, incompetent and immaterial. State v. Corcoran, 7 Idaho, 220, 61 Pac. 1034.

Where a person charged with murder claims that he acted in self-defense, the fact that the killing is admitted does not preclude evidence of defendant's flight after the killing.—State v. Lyons, 7 Idaho, 530, 64 Pac. 236.

In a prosecution for murder, resulting from a criminal abortion, the pregnancy of the deceased can be shown by declarations and by circumstances.—State v. Alcorn, 7 Idaho, 569, 97 Am. St. Rep. 252, 64 Pac. 1014.

In a prosecution for murder, the account-books of the deceased, identified by witnesses

familiar with his handwriting and some of whom had seen deceased write in the same books, were properly admitted to show a variance between the amount shown to be on hand at the time of the homicide and the amount discovered in possession of deceased, there being other evidence to show that defendant at the time of the homicide suddenly acquired money.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

In a prosecution for murder, the evidence showed that two handkerchiefs were found stuffed into the wounds in the neck of deceased when the body was first discovered. One of the handkerchiefs was marked "ED." [Another was found the next day in the room of defendant with the same mark. It was shown that defendant's linen was marked "ED" at the laundry. The handkerchiefs had been laundered before the trial at the instance of the sheriff. Held, that the handkerchiefs were admissible in evidence.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

In a prosecution for murder, the evidence showed that for some time preceding and up to the date of the homicide, defendant was without money and hard pressed by creditors for small debts; that shortly after the homicide, he made numerous small purchases and paid numerous small debts, aggregating more than \$100, some of them being of long standing; that deceased was in the habit of carrying money on his person; that there was a shortage of about \$800 between the amount shown by his cash-book and the amount accounted for. Held, that the evidence showing the expenditure of money by defendant was admissible.—*State v. Rice*, 7 Idaho, 762, 66 Pac. 87.

Evidence in a prosecution for murder to show the general reputation of the deceased in the neighborhood in which he lived was that of a quiet, peaceable and law-abiding citizen was properly admitted to show the motive and intent of deceased in the light of surrounding circumstances and was not prejudicial to defendant.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

A trial court may properly allow a witness for the state to illustrate to the jury the location of the wounds on the body of the deceased by pointing to corresponding portions of his own body.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

In a prosecution for murder, defendant should be permitted to show why he had the gun used at the time of the killing.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

Where, in a prosecution for murder, the comparative physical strength of defendant and deceased is sought to be shown, it is not error to restrict the evidence to the time of the homicide.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

In a prosecution for murder, evidence showing that defendant was so situated as not to be able to retreat out of the reach of deceased far enough back to escape his attack, was admissible.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

Uncommunicated threats made by deceased are not admissible in a prosecution for murder where there is no question as to who was the aggressor and all the facts of the encounter are practically without question or dispute.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

In a prosecution for murder, the statements of deceased made three days after the affray are inadmissible, unless they are dying declarations.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

In a prosecution for murder, the relative size and physical condition of deceased and defendant may ordinarily be shown, but it must be done by statement of facts and not by conclusions of the witness.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

The general reputation of the deceased for peace and quietness is not admissible where defendant is not shown to have had knowledge or information as to such reputation.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Evidence of the previous good character of an accused person is admissible in cases of homicide, where the plea is self-defense, for the purpose of showing that the defendant, when he committed the fatal act, did so under an honest and conscientious belief that it was necessary for the protection of his person, and to likewise show that he acted with good motives and without malicious, wrongful or criminal intent, and such evidence should go to the jury to be considered by them the same as any other evidence in the case.—*State v. McGreevey*, 17 Idaho, 453, 105 Pac. 1047.

In proving threats made by an accused person prior to the commission of the offense charged, it is necessary to in some manner show that the threats made were meant for and had reference to the person subsequently killed or injured by the accused.—*State v. McGreevey*, 17 Idaho, 453, 105 Pac. 1047.

In a prosecution for homicide, it was error for the court to permit the state to introduce in evidence a card showing the membership of the deceased in a particular organization of which a majority of the jurors were members, where the only reason for introducing the card was that it tended to establish the name of the deceased.—*State v. Lockhart*, 18 Idaho, 730, 111 Pac. 853.

Where an information charges that murder has been committed in the perpetration of, or attempt to perpetrate, robbery it is proper to show that the deceased had money or valuables on his person prior to his death, and that his money or other valuables had been taken from him; and it is likewise competent to show that the defendant was in impecunious and necessitous circumstances prior to the time of the homicide, and that he had money soon thereafter, or that he had property or valuables soon after the homicide which had belonged to the deceased.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

Where a defendant is on trial on the charge of murder, and the evidence on the part of the state tends to show that the murder was committed in an attempt to commit robbery, and

the state introduced evidence tending to show that defendant was "broke" and without any means, it was not reversible error to refuse defendant's offer to prove that he was in fact not "broke," but, on the contrary, had money and property of his own, and was in good financial circumstances.—*State v. Allen*, 23 Idaho, 772, 131 Pac. 1112.

Editorial Notes.

Threats by deceased, when admissible: 1 Am. Dec. 373; 61 Am. Dec. 53; 89 Am. St. Rep. 691; 17 L. R. A. 655.

Character or reputation of the deceased in homicide cases, admissibility of: 124 Am. St. Rep. 1018; 4 Ann. Cas. 338; 11 Ann. Cas. 229; 2 L. R. A., N. S., 102; 3 L. R. A., N. S., 352.

Admissibility in evidence of uncommunicated threats by deceased in prosecution for homicide: Ann. Cas. 1912C, 480.

Admissibility in evidence, in prosecution for homicide, of clothing worn by deceased at time of killing: Ann. Cas. 1912B, 775.

Admissibility of evidence of relative physical condition or strength of parties on issue of self-defense: 19 Ann. Cas. 124.

(C) DYING DECLARATIONS.

Declarations of deceased or others as part of res gestae. See *Criminal Law*, X, (E).

An ante-mortem statement made three hours after the shooting of deceased under the belief that death was impending, and the imminence of death being apparent at the time, is admissible though the attending physician had not informed deceased that he was about to die.—*State v. Yee Wee*, 7 Idaho, 188, 61 Pac. 588.

Evidence to show that two days after the date of a dying declaration deceased was in such a condition and frame of mind as to render him incompetent to make a dying declaration is inadmissible.—*State v. Wilmbusse*, 8 Idaho, 608, 70 Pac. 849.

The fact that the formal part of a dying declaration was written on a typewriter, out of the presence of the deceased, will not render such declarations inadmissible, where it is shown that the main part of it was written in the presence of deceased and carefully read over to him before he signed it.—*State v. Wilmbusse*, 8 Idaho, 608, 70 Pac. 849.

Where it is shown that a dying declaration was reduced to writing and witnessed by the prosecuting attorney, he was a competent witness to testify in regard thereto and as to the mental condition of deceased at the time of the declaration.—*State v. Wilmbusse*, 8 Idaho, 608, 70 Pac. 849.

Statements of deceased made a week prior to his death that he had no hope of recovery and detailing the manner in which defendant shot him and what was said at the time of the shooting, are admissible in evidence as a dying declaration.—*State v. Wilmbusse*, 8 Idaho, 608, 70 Pac. 849.

Editorial Notes.

Admissibility as dying declaration of statement respecting provocation for defendant's act: Ann. Cas. 1912C, 429.

Inference from wound or state of illness that declarant was sensible of impending death as rendering declaration admissible: Ann. Cas. 1912C, 85.

Fact that dying declaration is made by acts or signs instead of words as affecting its admissibility: Ann. Cas. 1912B, 231.

Dying declarations as admissible only when death of declarant is under inquiry: Ann. Cas. 1913C, 412.

Necessity that there should be expectation of "immediate" death to render dying declaration admissible: 17 Ann. Cas. 287.

Dying declarations: 56 L. R. A. 353.

(D) PROCEEDINGS AT INQUEST.

During the prosecution for murder, defendant asked the court to require the coroner to produce the testimony of witnesses who testified before the coroner's jury, so that defendant might cross-examine such witnesses touching their testimony at the inquest. The inquest had not been concluded, nor had the state examined the witnesses as to their testimony at the inquest or shown that they had testified thereat. Held, that a denial of defendant's request was proper.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Depositions taken at a coroner's inquest under R. S. 3382 are not admissible on the trial of a person accused of having caused the death of the person over whose body the inquest was held.—*State v. Squires*, 15 Idaho, 545, 98 Pac. 413.

(E) WEIGHT AND SUFFICIENCY.

Evidence in a prosecution for murder held sufficient to support a judgment of conviction.—*State v. Ellington*, 4 Idaho, 529, 43 Pac. 60; *State v. Davis*, 6 Idaho, 159, 53 Pac. 678; *State v. Fleming*, 17 Idaho, 471, 106 Pac. 305; *State v. Marren*, 17 Idaho, 766, 107 Pac. 993.

Evidence examined and held sufficient to sustain a verdict of murder in the second degree.—*State v. O'Brien*, 3 Idaho, 374, 29 Pac. 38.

Evidence reviewed in a prosecution for murder, resulting from an abortion, and held sufficient to establish the corpus delicti and the felonious intent of defendant.—*State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

The evidence in a prosecution for murder showed that defendant approached deceased with a paper bag over his hand, rested his arm on the table in front of deceased, and pointed his hand, covered by the paper bag, at deceased; that thereupon a flash was seen and the report of a revolver heard; that deceased then cried out that defendant shot him; that defendant immediately ran away; that immediately thereafter, defendant

feigned ignorance of the facts surrounding the shooting. Held, sufficient to show malice and premeditation on the part of defendant. *State v. Yee Wee*, 7 Idaho, 188, 61 Pac. 588.

Where, in a prosecution for murder, the evidence shows ill-will, hatred and malice toward the deceased, and the conduct, appearance and whereabouts of defendant about the time of and immediately after the murder tend to prove defendant's guilt, and all the facts and circumstances shown by the evidence are incapable of explanation upon any reasonable hypothesis or rational conclusion other than defendant's guilt, a verdict of the jury finding the defendant guilty on circumstantial evidence will not be disturbed.—*State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

Evidence in a prosecution for manslaughter committed by carelessly and recklessly discharging a gun held sufficient to support the verdict.—*State v. McGinnis*, 12 Idaho, 336, 85 Pac. 1089.

Where the undisputed evidence in a murder case is not only entirely consistent with defendant's innocence, but inconsistent with his guilt, a judgment of conviction will be reversed.—*State v. Squires*, 15 Idaho, 545, 98 Pac. 413.

Evidence in a prosecution for murder held to support a verdict of murder in the second degree.—*State v. Willis*, 24 Idaho, 252, 132 Pac. 962.

VIII. TRIAL.

(A) CONDUCT IN GENERAL.

Criminal Practice Act, section 356, provides that "if the indictment be for an offense punishable with death the counsel on each side may argue the case to the jury, in which case they must do so alternately." Held, that defendants waived such statutory right by not claiming it upon the argument. *People v. Ah Hop*, 1 Idaho, 698.

In a prosecution for murder, defendant's counsel asked the court to permit a chemical and microscopical examination of a bullet offered in evidence to ascertain whether or not traces of human blood and human tissues were discoverable on the surface of the bullet. Such an examination would take from one to two weeks. There was nothing on the surface of the bullet to indicate the presence of human blood or human tissue. Held, that the denial of the request was not error.—*State v. Hendel*, 4 Idaho, 88, 35 Pac. 836.

In a prosecution for murder, defendant, jointly informed against with another, was granted a separate trial. During the trial a certain bullet was offered in evidence and defendant's counsel asked the court to permit a chemical and microscopical examination of the bullet to ascertain whether or not traces of human blood and human tissues were discoverable on the surface of the bullet. Counsel for the other defendant objected to this on the ground that to grant such request would jeopardize his client by the destruction of evidence vital to his defense. Held, that it was not error to permit

codefendant's counsel to interpose such objection.—*State v. Hendel*, 4 Idaho, 88, 35 Pac. 836.

In a prosecution for murder, the coroner was asked whether he had held an inquest over the deceased, and the court, in sustaining defendant's objection to the question said: "I sustain that. There was nothing mysterious about it. People knew who shot him. A coroner's inquest is only to find out how a person came to his death. If known otherwise, they do not have to hold one." Held, that the remarks of the court were reversible error.—*State v. Taylor*, 7 Idaho, 134, 61 Pac. 288.

Where, in a prosecution for murder, a witness testified that after the shooting and while the witness was leaving the house where the shooting occurred and going down an alley, "he took a shot at" the witness, and the court in overruling an objection to this evidence, remarked that "the object of the admission of that testimony is to show the character, disposition and action of the defendant at the time, as to being evilly disposed to some one," such remarks of the court are prejudicial error.—*State v. Taylor*, 7 Idaho, 134, 61 Pac. 288.

(B) QUESTIONS FOR JURY.

Every homicide, unexplained, is murder; but it is the province of the jury to determine from the evidence and circumstances before them, whether the crime is murder in the first or second degree.—*People v. Walter*, 1 Idaho, 386.

Where defendant in a prosecution for murder pleads insanity and admits the killing, he admits that he was guilty of murder, if he was not insane; and it should have been submitted to the jury, under proper instructions, to say, from the evidence, whether the crime was murder in the first or second degree.—*People v. Walter*, 1 Idaho, 386.

(C) INSTRUCTIONS.

See, also, ante, V.

On a trial for murder, it is the duty of the court to give an instruction to the jury, if requested, that they can find the defendant guilty of a less grade of offense than murder in the first degree, if warranted by the evidence; and a refusal to give such instruction is error.—*People v. Dunn*, 1 Idaho, 74.

An instruction that "malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart" is not objectionable under a statute, providing that "malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."—*People v. McDonald*, 2 Idaho, 10, 1 Pac. 345.

Upon a trial for murder an instruction to the effect that the defendant is guilty of murder in the first degree if the jury believe from the evidence, beyond a reasonable doubt, that the deceased was killed by defendant while defendant was attempting to commit a robbery, is correct under a statute

which makes such an offense murder in the first degree.—*People v. Mooney*, 2 Idaho, 17, 2 Pac. 876.

An instruction that if the jury believe from the evidence beyond a reasonable doubt that the defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder, is proper.—*People v. Pierson*, 2 Idaho, 76, 3 Pac. 688.

Where the evidence as to a homicide was entirely that of eye-witnesses, except the dying declaration of deceased, it was not error to refuse an instruction as to circumstantial evidence.—*People v. Ah Too*, 2 Idaho, 44, 3 Pac. 10.

An instruction "that if, without such provocation as is apparently sufficient to excite irresistible passion, a person shoots another, and by such shooting occasions death, although he had no previous malice or ill-will toward the person shot, yet he is presumed to have had such malice at the time of the shooting, and the person shooting will be guilty of murder," will sustain a verdict of murder in the second degree.—*Territory v. Evans*, 2 Idaho, 425, 17 Pac. 139.

In a prosecution for murder in which the defendant pleaded self-defense, it was not error to instruct the jury that they could consider the fact of defendant's flight after the killing in determining the probabilities for or against him—the probabilities of his guilt or innocence.—*State v. Lyons*, 7 Idaho, 530, 64 Pac. 236.

In a prosecution for murder, this instruction was given: "It is claimed that this is murder in the first degree, as being unlawful, malicious, willful, deliberate and premeditated. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer and if such is the case the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other or how quickly they may be followed by the act of killing. Held, that the omission of the word "malice" in the last sentence did not vitiate the instruction.—*State v. Shuff*, 9 Idaho, 115, 72 Pac. 664.

In a prosecution for murder an instruction stated: "If the evidence shows an unlawful killing, then in order for such unlawful killing to be manslaughter and not murder there must have been shown by the evidence to have been a serious and highly provoking injury inflicted on the person killing, or an attempt by the person killed to commit a serious injury on the person killing." Held, erroneous, since a person resisting an attempt to commit a great injury on his person would be justified in killing.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

The following instruction substantially states the correct rule of law, and should ordinarily be given in a murder case where the plea is self-defense: "The court instructs

the jury as a matter of law that a person need not be in actual, imminent peril of his life or of great bodily harm before he may assault his assailant; it is sufficient if in good faith he has a good and reasonable belief from the facts as they appear to him at the time that he is in such imminent peril."—*State v. Fondren*, 24 Idaho, 663, 135 Pac. 265.

Editorial Notes.

Verdict of guilty of murder in first degree as curing error in instruction with respect to lower degree of homicide: *Ann. Cas.* 1913A, 735.

(D) VERDICT.

The fact that in a prosecution for murder many of the state's witnesses were from the slums of the city and for that reason unworthy of credence is not sufficient to disturb the verdict of the jury finding defendant guilty.—*State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

R. S. 6562 provides that all murder perpetrated by means of poison, etc., shall be murder of the first degree. R. S. 7925 requires the jury to find the degree of the crime of which they convict defendant, where the crime is distinguished into degrees. R. S. 7926 provides that the jury may find the defendant guilty of any offense, the commission of which is necessarily included in the offense charged. Held, that in a trial for murder committed by means of poison, the jury had the right to find defendant guilty of manslaughter and the defendant cannot complain that the verdict should have been either guilty of murder in the first degree or not guilty.—*State v. Phinney*, 13 Idaho, 307, 12 *Ann. Cas.* 1079, 12 L. E. A., N. S., 935, 89 Pac. 634.

IX. NEW TRIAL.

New trial in general. See *Criminal Law*, XIII.

X. APPEAL AND ERROR.

Where an indictment sufficiently charges murder in the second degree, and the verdict is "guilty of murder in the first degree as charged" and there is no claim that the verdict is not supported by the evidence, and no other error appearing, the supreme court may treat such verdict as a verdict for murder in the second degree and modify the judgment of the court below accordingly.—*People v. O'Callaghan*, 2 Idaho, 156, 9 Pac. 414.

In a prosecution for murder, resulting from an abortion, a reversal of a conviction cannot be had because the elements of the crime were not proven in a certain order.—*State v. Alcorn*, 7 Idaho, 599, 97 *Am. St. Rep.* 252, 64 Pac. 1014.

Where a paper purporting to be a dying declaration is offered in evidence, counsel for defendant should be allowed to introduce evidence of the incompetency of deceased to make such declaration, but refusal to allow such evidence of incompetency will not be reversible error, where such evidence was afterward allowed to be given.—*State v. Wilmusse*, 8 Idaho, 606, 70 Pac. 849.

Where, in a prosecution for murder, it appears that defendant was living with prostitutes and that he had stated that deceased was the cause of his leaving the city by reason of the failure of one of such prostitutes to obtain a "health certificate," the admission of evidence to show that one of such women was afflicted with syphilis and for that reason could not obtain such certificate and that deceased had nothing to do with the matter was not prejudicial to defendant. *State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

XI. SENTENCE AND PUNISHMENT.

R. S. 8021 provides that the judgment of death must be executed within the walls or yard of a jail or some convenient place in the county in the presence of the sheriff, etc. Laws 1899, page 230, amending R. S. 8021 provides that the punishment of death must be inflicted by the warden in the state penitentiary and repeals all acts in conflict therewith. R. S. 159 provides that the repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless such intention is expressly declared in the repealing act. Held, that a person convicted and sentenced to death prior to Laws 1899, page 340, must be punished under the law as it existed at the time of the commission of the offense.—*In re Davis*, 6 Idaho, 766, 59 Pac. 544.

R. S. 8021 provides that the judgment of death must be executed within the walls or yard of a jail or some convenient place in the county in the presence of the sheriff, etc. Laws 1899, page 340, amending R. S. 8021, provides that the punishment of death must be inflicted by the warden in the state penitentiary. R. S. 159 provides that the repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless such intention is expressly declared in the repealing act. Held, that R. S. 159 is a general saving clause for all penal statutes and that by reason thereof the amendatory act did not repeal the original law as to the manner, time and place of the execution of the death penalty.—*In re Davis*, 6 Idaho, 766, 59 Pac. 544.

HORTICULTURE.

Salary of deputy bee inspector. See *States*, II, (C).

HUSBAND AND WIFE.

I. MUTUAL RIGHTS, DUTIES AND LIABILITIES.

II. MARRIAGE SETTLEMENTS.

III. CONVEYANCES, CONTRACTS AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

V. WIFE'S SEPARATE ESTATE.

- (A) What Constitutes.
- (B) Rights and Liabilities of Husband.
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- (D) Conveyances and Contracts to Convey.

VI. ACTIONS.

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X. ENTICING AND ALIENATING.

XI. CRIMINAL CONVERSATION.

See *Adultery*; *Bigamy*; *Divorce*; *Homestead*; *Marriage*; *Parent and Child*.

Acknowledgment of instruments. See *Acknowledgment*.

Administration of decedents' estates. See *Executors and Administrators*.

Sufficiency of title under deed from married woman and husband to support ejectment. See *Ejectment*.

Rights of surviving wife or heirs in homestead. See *Homestead*, III.

Inheritance tax. See *Taxation*, XIII.

Olographic will of married woman. See *Wills*, II.

Marriage as revocation of will. See *Wills*, IV.

Confidential relations and privileged communications. See *Witnesses*, II, (D).

Presumption that the community property law prevails in sister state. See *Evidence*, II.

I. MUTUAL RIGHTS, DUTIES AND LIABILITIES.

Conveyance without wife's signature not abandonment. See *Homestead*, IV.

Community property. See *post*, VII.

Consent of wife to transfer or encumbrance of homestead. See *Homestead*, II, IV.

Domicile of married woman follows that of husband. See *Domicile*.

Right of husband to protect wife from assault. See *Homicide*, V.

Wife estopped to defend action to compel conveyance of homestead under oral contract fully performed by purchaser. See *Specific Performance*, II.

A wife cannot bind her husband nor the community property for counsel fees in a divorce action.—*Wyatt v. Wyatt*, 2 Idaho, 236, 10 Pac. 228.

Where necessities are furnished to a married woman on the strength of her personal promise to pay therefor, the debt is incurred for her use and benefit and she is liable therefor as a feme sole.—*Edminston v. Smith*, 13 Idaho, 645, 121 Am. St. Rep. 294, 14 L. R. A., N. S., 871, 92 Pac. 842.

The fact that the debt for board and lodging of a married woman was contracted by her and that credit was extended on the faith of her promise to pay does not relieve the husband of the liability therefor imposed on him by operation of law, independent of the wife's contractual liability to pay.—*Edminston v. Smith*, 13 Idaho, 645, 121 Am. St. Rep. 294, 14 L. R. A., N. S., 871, 92 Pac. 842.

II. MARRIAGE SETTLEMENTS.

(No paragraphs.)

III. CONVEYANCES, CONTRACTS AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Conveyance by husband to wife through third person, sufficiency of delivery. See *Deeds*, I, (D).

Sufficiency of complaint alleging assignment of cause of action to wife. See *post*, VI.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

Action by wife against husband for damages for incontinence with venereal disease. See *post*, VI.

Application of payments made by wife on debts for which she could not be held. See *Payment*.

Contracts for necessities. See *ante*, I.

Contracts relating to community property. See *post*, VII.

Contracts relating to wife's separate property. See *post*, V.

Specific performance of contracts. See *Specific Performance*.

Validity of contract to teach school made by wife of member of school board. See *Schools and School Districts*, II, (G).

Requisites and validity of conveyances of wife's separate property. See *post*, V.

Unless a married woman be adjudged and declared a sole trader according to R. S. 5850, 5858, she cannot engage in business or recover prospective profits by reason of loss of her business through a wrongful attachment, though the money invested in such business was her separate property.—*McDonald v. Rozen*, 8 Idaho, 352, 69 Pac. 125.

The statutes of this state with reference to contracts, powers and liabilities of married women must be construed as grants instead of restrictions of power and authority to contract.—*Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497.

Laws 1903, page 345, amending R. S. 2495, giving the wife the absolute control and management of her separate property with sole and absolute power to sell and dispose of the same and carry on business therewith

and make contracts in reference thereto and for the benefit thereof, repeals R. S. 2498 and 2499. Held, not to enlarge the liability of married women or change their status as to contracts except as to their separate property. *Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497.

Under Laws 1903, page 346, section 2, giving the wife the power to make contracts with reference to her separate property, a married woman is not liable on a promissory note executed by her as a comaker with a person not her husband where the debt was not contracted for her own use or for the use or benefit of her separate estate, or in connection with the control and management thereof, or in carrying on or conducting business with her separate estate.—*Bank of Commerce v. Baldwin*, 14 Idaho, 75, 17 L. R. A., N. S., 676, 93 Pac. 504.

R. C. 2674-2693, concerning the rights of married women, are in the nature of a grant or an enlargement of the powers of the wife to make contracts as such rights existed at the common law.—*Hall v. Johns*, 17 Idaho, 224, 105 Pac. 71.

Where a husband and wife both contract to purchase a parcel of real estate, the purchase price is as much the debt of the wife as of the husband.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

In an action to recover bonds deposited with defendant bank, the evidence showed that such deposit had been made by plaintiff several years before her husband's death, that two years after his death plaintiff agreed to turn said bonds over to the bank for the return to her of her deceased husband's promissory notes, amounting to about \$17,000. The notes were delivered and the bank agreed to sell the bonds for the best price obtainable and to pay the surplus over the amount of the notes to plaintiff. Held, that plaintiff had authority and capacity to make the contract and that she received a valuable consideration therefor.—*Bates v. Capital State Bank*, 21 Idaho, 141, 121 Pac. 561.

Where a wife joins her husband in a warranty deed, conveying his separate property and for the conveyance of which the husband receives the consideration, the wife is not liable in an action for breach of the covenant of warranty, for the reason that such contract and covenant of warranty is not made with reference to the wife's separate property or for her own use or benefit.—*Humbird Lbr. Co. v. Doran*, 24 Idaho, 507, 135 Pac. 66.

Editorial Notes.

Wife, when regarded as a feme sole at the common law: 37 Am. Dec. 709.

Torts, his and her liability for hers: 92 Am. St. Rep. 164; 6 Am. Dec. 106; 83 Am. Dec. 776; Ann. Cas. 1913D, 997; 9 Ann. Cas. 1225; 16 Ann. Cas. 378.

Necessaries, what are: 10 Am. Dec. 462.

Necessaries, liability of wife for: 31 Am. Rep. 697; 33 L. R. A., N. S., 426.

Necessaries for which he is chargeable: 98 Am. St. Rep. 627; 65 L. R. A. 529.

Dental charges as necessities for which husband is liable on wife's contract: Ann. Cas. 1912C, 142.

V. WIFE'S SEPARATE ESTATE.

Right of married women engaged in business to recover prospective profits on wrongful attachment. See ante, IV.

(A) WHAT CONSTITUTES.

Distinguished from community property. See post, VII.

Property partly separate and partly community property. See post, VII.

Evidence in an action to quiet title wherein defendant, a married woman, claimed the property as her separate property, held, to support a finding that the property was not the separate property of such defendant.—*Coleman v. Jagers*, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894.

Evidence that certain property attached for the debt of the husband was the separate property of the wife, held sufficient to support the verdict and judgment.—*Humbird Lbr. Co. v. Doran*, 24 Idaho, 507, 135 Pac. 66.

Editorial Notes.

Separate property of wife, statutes designating: 76 Am. Dec. 366.

(B) RIGHTS AND LIABILITIES OF HUSBAND.

Liability of wife's separate property for husband's debts. See post, V, (C).

Under R. S. 2498, prior to the repeal thereof by Laws 1903, page 345, the husband had the right to draw from a bank moneys of the wife deposited therein by the wife in her own name.—*Sencerbox v. First Nat. Bk.*, 14 Idaho, 95, 93 Pac. 369.

Under R. S. 2498, prior to the repeal thereof by Laws 1903, page 345, the husband had full authority to collect debts due his wife and his receipt therefor to the debtor released the debtor.—*Sencerbox v. First Nat. Bk.*, 14 Idaho, 95, 93 Pac. 369.

Under R. S. 2498, prior to repeal thereof by Laws 1903, page 345, the husband had the management and control of his wife's separate property, without the power to alienate or encumber, except by an instrument signed by husband and wife and acknowledged according to law, and such control and management continued during marriage unless the wife availed herself of R. S. 2499, authorizing the appointment of a trustee for her separate property on her application.—*Sencerbox v. First Nat. Bk.*, 14 Idaho, 95, 93 Pac. 369.

Under R. S. 2498, prior to the amendment by Laws 1903, page 345, the husband had the management and control of the separate estate of the wife, but he had no authority to erect a building on her separate real estate, and thereby bind the wife and create a lien on such real estate without her consent. *Larson v. Carter*, 14 Idaho, 511, 94 Pac. 825.

Editorial Notes.

Wife's chattels and choses in action, husband's interest in: 29 Am. Dec. 47.

Choses in action of wife, reducing of to possession by husband: 37 Am. Dec. 577.

(C) LIABILITIES AND CHARGES.

Contracts in general. See ante, IV.

— For necessities. See ante, I.

Defendants recovered judgment against certain persons, including the husband of the plaintiff. Execution was issued and levied upon certain mining property of plaintiff "as community property" of plaintiff and her husband, the same being claimed as separate property of plaintiff, and was advertised to be sold under such execution. Plaintiff sued under R. S. 4538 to enjoin the sale and vacate the writ of execution as to such property. Held, that the levy of attachment and execution created a cloud on plaintiff's title and that she could therefore maintain the action. *Young v. First Nat. Bk. Hailey*, 4 Idaho, 323, 39 Pac. 557.

In order to charge the separate property of the wife, or render it liable to levy and sale, it must be alleged and proven that the debt sued for was incurred for the use or benefit of her separate property or for her own use or benefit.—*Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.

A married woman may contract debts for the use and benefit of her separate property, or for her own use and benefit, and thereby charge her separate property.—*Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643.

It is error to render judgment jointly against husband and wife on a note signed by both in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate.—*Jaekel v. Pease*, 6 Idaho, 131, 53 Pac. 399.

Under R. S. 4479, providing that all real and personal property belonging to a married woman in her own right and all the rents, issues and profits thereof, is exempt from execution against her husband, the increase of cattle, belonging to a married woman in her own right, are exempt as well as the cattle.—*Thorn v. Anderson*, 7 Idaho, 421, 63 Pac. 592.

Where a married woman was operating a public ferry without a franchise from the county and the ferry and all its appurtenances were purchased and acquired as her separate property, the profits arising therefrom were exempt from execution against her husband by virtue of R. S. 4479.—*Evans v. Krontinger*, 9 Idaho, 153, 2 Ann. Cas. 691, 72 Pac. 882.

Under the laws of this state, a married woman may bind her separate property jointly by her contract for her own or her husband's debt.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

R. S. 2922, which is identical with R. C. 3107, was repealed by Laws 1903, page 345, and under the second section of said act, which is now R. C. 2677, during the continuance of the marriage the wife has the management, control and absolute power of disposition of her separate property, without the signature of her husband, and may enter into contracts with reference to the same in the same manner and to the same extent and with like effect as a married man may in relation to his real and personal property. *Stewart v. Weiser Lumber Co.*, 21 Idaho, 340, 121 Pac. 775.

Under the statutes of this state, a married woman is given the absolute control of her separate property and estate, and has the power and right to contract with reference to such separate property and estate, and she may create a debt against herself personally when such debt is created for her own use or benefit and for the use and benefit of her separate estate.—*McFarland v. Johnson*, 22 Idaho, 694, 127 Pac. 911.

Editorial Notes.

Separate property of wife, liability of: 5 Am. Dec. 589.

Separate estate of married women, when chargeable with their debts: 72 Am. Dec. 513.

Right of husband's creditors to reach fruits or his management of, or services in connection with, wife's separate estate or business: 21 L. R. A. 629; 23 L. R. A., N. S., 1124.

(D) CONVEYANCES AND CONTRACTS TO CONVEY.

Contracts for necessities. See ante, I.
Contracts in general. See ante, IV.

R. S. 2498, providing inter alia that no lien or encumbrance can be created on the separate property of the wife unless by written instrument, signed by both and acknowledged separate and apart from her husband, does not prohibit a married woman from contracting for improvements on her separate property.—*Basset v. Beam*, 4 Idaho, 106, 36 Pac. 501.

The fact that, at the time a wife executed and delivered a deed of land owned by her, her husband did not sign the same, did not render the deed void, where the husband at the time was out of the county, and the parties expected him to sign on his return.—*Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928.

R. S. 2612 provides that shares of stock in corporations held or owned by a married woman, may be transferred by her as if she were a feme sole. R. S. 3023 provides that the provisions of the chapter relating to "unlawful transfers" do not affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchasers had notice of the fraudulent intent of his grantor, or of the fraud rendering void the title of such grantor. Held, that where a married woman transfers stock under duress and coercion of her husband, such transfer confers a good title on a bona fide

purchaser who has no knowledge of such duress.—*Bryan v. Montandon*, 6 Idaho, 352, 55 Pac. 650.

Attorneys cannot, by stipulation, bind a married woman in a case where she could not bind herself, or make her liable on a contract that she has never executed.—*Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893.

Where a husband gives a mortgage on property which is in part community property and in part the separate property of his wife, the mortgage creates a lien only on that part which is community property.—*Northwestern etc. Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516.

Where the wife sells her separate property, without joining her husband in an instrument in writing conveying the same, as provided by R. S. 2498, and the purchaser uses the property and is sued for the price, he is estopped from interposing the defense that the sale was not entered into in the manner provided by statute.—*Karlson v. Hanson & Karlson Sawmill Co.*, 10 Idaho, 361, 78 Pac. 1080.

R. S. 2498, requiring a wife, on sale of her separate property, to have her husband join in the instrument, was enacted to protect the wife against fraud and duress, and was not intended as a shield for the defense of those who would cheat her.—*Karlson v. Hanson & Karlson Sawmill Co.*, 10 Idaho, 361, 78 Pac. 1080.

In order to create a charge against the estate of a married woman for a debt, it must be made a charge in rem by a mortgage or pledge of the property or in some manner known to or recognized by the law as constituting a lien upon a charge against the specific property, mere representations by the married woman as to her ownership of certain property in her own right being insufficient to bind such property.—*Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497.

Under the express terms of act of March 9, 1903 (Laws 1903, p. 345), a married woman is given the absolute control of her separate property and estate, and has the unqualified right of contracting with reference to such property and may sell and dispose of the same without the consent or approval of her husband.—*Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497.

A contract made by a married woman, by which she secures property for which the contract is executed, is for her own use and benefit, and such use and benefit is a fact resulting from the contract itself.—*Booth Mercantile Co. v. Murphy* (on rehearing), 14 Idaho, 212, 93 Pac. 777.

Where a married woman purchases hotel furniture, furnishings and fixtures for conducting a hotel business and executes her promissory note therefor, and at the same time executes a mortgage on her separate real property to secure the payment of such note, the contract is one for her own use and benefit, and the mortgage constitutes a contract with reference to her separate property, and the debt and obligation thus incurred is enforceable against her and against her sep-

arate estate so mortgaged.—Booth Mercantile Co. v. Murphy, 14 Idaho, 212, 93 Pac. 777.

Where an indebtedness is contracted by the husband and the credit given to him, the wife cannot be held liable therefor, even though the indebtedness was created for the erection of a building on the separate estate of the wife.—Larson v. Carter, 14 Idaho, 511, 94 Pac. 825.

Editorial Notes.

Purchase by and deed to a married woman, effect of: 57 Am. Dec. 194.

Separate estate, married women's power to contract and bind: 78 Am. Dec. 226.

VI. ACTIONS.

Measure of damages in action by a married woman for injuries due to defective highway. See Damages, VI.

To enforce liabilities against married woman's separate estate. See ante, V, (C).

Presumptions as to community property. See post, VII.

Relating to community property or separate debts. See post, VII.

Action by widow for death of husband. See Death.

Evidence in action by married woman to show deposit for safekeeping and not collateral security for husband's debts. See Depositories.

Right of wife to enjoin sale of separate property under execution against husband. See ante, V, (D).

Right of wife to intervene in action against husband for debt. See Parties, III.

The complaint in an action to have a chattel mortgage executed by plaintiff and wife on her separate property declared fraudulent and void, which fails to make the wife a party, is demurrable on the ground of nonjoinder of parties.—Beane v. Givens, 5 Idaho, 774, 51 Pac. 987.

Reformation of a mortgage may be decreed against a married woman.—Christensen v. Holingsworth, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

In an action by husband and wife to recover damages for injuries received by the wife, the verdict and judgment should run to both husband and wife.—Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 545.

Plaintiff, a married woman having a husband from whom she had never been lawfully divorced, married defendant. The latter marriage having been declared void, plaintiff brought an action to recover damages from defendant for injuries alleged to have been received by her from defendant while they were living together, by reason of defendant's having inoculated her with a venereal disease. Held, that no recovery could be had, it not appearing that defendant had induced plaintiff to enter into marital relations with him by any fraud, deceit or misrepresentation and the injury being consequent on plaintiff's own illegal act.—Deeds v. Strode, 6 Idaho, 317, 96 Am. St. Rep. 263, 43 L. R. A. 207, 55 Pac. 656.

R. S. 2921 provides that no estate in the homestead of a married person, or in any part of the community property occupied as a resi-

dence by a married person, can be conveyed or encumbered by the act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered and it be acknowledged by the wife. R. S. 4094 provides that if a husband and wife be sued together, the wife may defend her own right, and if the husband neglects to defend, she may defend for his right also. Held, that, in an action against husband and wife relating to a water right appurtenant to the land occupied as a residence by husband and wife, the record being silent as to whether the land and water right were the wife's separate estate, a disclaimer of the husband as to the subject matter of the action would not affect the wife's right to defend.—Stowell v. Tucker, 7 Idaho, 312, 62 Pac. 1033.

In an action against a married woman on a note, plaintiff must show that the debt was contracted for the use or benefit of her separate property or for her own use or benefit, or in reference to the management, control or business transactions touching said property. Bank of Commerce v. Baldwin, 12 Idaho, 202, 85 Pac. 497.

In an action brought by a married woman in her own name to recover judgment on promissory notes and foreclose a mortgage given to secure said notes, defendant alleged that the notes were delivered to the husband of plaintiff and were made, executed and delivered in the name of plaintiff at the request of and for the use and benefit of her husband; that the notes were given in part payment of certain lots which were community property of plaintiff and her husband; that said husband was indebted to defendant in a certain sum and that the husband should be made a party to the action. Held, that it was error to deny defendant's motion to make the husband a party plaintiff.—Campbell v. Kerns, 13 Idaho, 287, 90 Pac. 108.

In an action brought by a married woman in her own name to recover judgment on promissory notes and foreclose a mortgage given to secure said notes, defendant alleged that the notes were delivered to the husband of plaintiff and were made, executed and delivered in the name of plaintiff at the request of and for the use and benefit of her husband; that the notes were given in part payment of certain lots which were community property of plaintiff and her husband; that said husband was indebted to defendant in a certain sum and that the husband should be made a party to the action. The court denied the motion to make the husband a party. Held, that it was not obligatory on defendant to try the issues as to whether the property was community property or as to the indebtedness set out in defendant's counterclaim, as the ruling of the court rendered such evidence immaterial.—Campbell v. Kerns, 13 Idaho, 287, 90 Pac. 108.

Under R. S. 4093, the husband must be joined with the wife in an action for personal injuries to the wife, but the husband need not join the wife in an action for personal injuries received by himself alone.—Lindsay v. Oregon etc. R. R. Co., 13 Idaho, 477, 12 L. R. A., N. S., 184, 90 Pac. 984.

Under R. S. 4094, if a husband and wife be sued together, the wife may defend in her own right, and if the husband neglects to defend, she may defend for him also, and may testify in such action.—*Larson v. Carter*, 14 Idaho, 511, 94 Pac. 825.

In an action against a husband and wife, it was error to refuse to permit the wife to testify that the husband contracted the debt sued on without her knowledge or consent.—*Larson v. Carter*, 14 Idaho, 511, 94 Pac. 825.

A complaint alleging that plaintiff's husband had assigned, transferred and given to the plaintiff all his right, title and interest in and to the contract sued on, and that the same was her sole and separate estate, is not demurrable.—*Salisbury v. Spofford*, 22 Idaho, 393, 126 Pac. 400.

Under R. C. 2677, a married woman is given the absolute control of her separate estate, which includes the right to bring an action for the protection of her separate property.—*Salisbury v. Spofford*, 22 Idaho, 393, 126 Pac. 400.

Where an action is brought by the assignee of the payee upon a promissory note, executed by Sarah S. Johnson to John Adolph Johnson, and the evidence shows that at the time of the execution of said note Sarah S. Johnson and John Adolph Johnson were husband and wife, but such evidence does not show that such debt was contracted for the wife's own use and benefit and for the use and benefit of her separate estate, it is not error to grant a motion for a nonsuit upon the ground that such note was not executed and the obligation thereof incurred for her own use and benefit or for the use and benefit of her separate property.—*McFarland v. Johnson*, 22 Idaho, 694, 127 Pac. 911.

Editorial Notes.

Husband and wife, action by the one for injuries to the other: 48 Am. Dec. 619.

Suits between husband and wife, when maintainable: 73 Am. St. Rep. 268; 3 Ann. Cas. 145; 14 Ann. Cas. 881.

Judgment against married women: 55 Am. Dec. 599; 60 Am. St. Rep. 656; 134 Am. St. Rep. 927.

Recovery by mother against father for money expended in support of children: 38 L. R. A., N. S., 508.

VII. COMMUNITY PROPERTY.

Application of payments made by wife on debts for which she was not liable. See *Payment*.

Injunction restraining foreclosure of chattel mortgage on exempt property where wife did not sign mortgage. See *Chattel Mortgages*, IX, (B).

Right of wife to bind for counsel fees in divorce action. See *ante*, I.

Rights of surviving spouse or heirs in homestead. See *Homestead*, III.

A husband has the absolute power to dispose of the common property of himself and wife, to the extent, and in the same manner, as he has of his separate property, until a legal separation has been effected by a court of competent jurisdiction, and a division

made under the direction of such court.—*Ray v. Ray*, 1 Idaho, 866.

Mining property acquired in this state under the laws of the United States during coverture is community property.—*Jacobson v. Bunker Hill etc. Co.*, 3 Idaho, 126, 28 Pac. 396.

Under Rev. Laws 1875, page 634, all property acquired by the husband in the territory of Idaho, during coverture, except such as was acquired by gift, bequest, devise or descent, was community property, even though the wife may never have been a resident of the territory.—*Jacobsen v. Bunker Hill etc. Co.*, 3 Idaho, 126, 28 Pac. 396.

Plaintiff brought ejectment for the recovery of certain mining property, claiming it to be community property of her deceased mother and one K., from whom defendant deraigned title. The complaint alleged the coverture of K. and plaintiff's mother, and that the property described in the complaint was community property. Held, that the objection that the complaint did not contain the exceptional words of the statute in defining what is community property, namely, that it was not obtained by "gift, devise, bequest or descent," could not be raised by general demurrer but only by special demurrer for ambiguity or uncertainty.—*Jacobson v. Bunker Hill etc. Co.*, 3 Idaho, 126, 28 Pac. 396.

A residence can be changed or abandoned at any time by the husband without the consent of his wife, and when such change or abandonment has taken place, the property is again under the husband's absolute control, unless a statutory declaration of homestead has been filed.—*Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

A purchaser in good faith from the husband after the death of the wife is not bound to show, in order to support his title against a child of the community, that the sale of the premises conveyed to him was in point of fact necessary to provide for the payment of the community debts.—*Von Rosenberg v. Perrault*, 5 Idaho, 719, 51 Pac. 774.

S. acquired title to lands during coverture in 1871 and 1873; the wife died in 1877, leaving her husband and children surviving. In 1887, S. and his second wife deeded said lands to K. In 1895 the said children brought a partition suit against the heirs of K., claiming under their deceased mother by virtue of Laws 1874 (8th Sess.), page 636, section 11 (repealed in 1879), providing that on the dissolution of the community by the death of either the husband or wife, one-half of the common property shall go to the survivor and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. Plaintiffs did not allege or prove the extent of the assets and liabilities of the community at the death of their mother or that the community was free from debt or that K. purchased with notice of their claims. Held, that the surviving spouse held the legal title one-half for himself, the other in trust for plaintiffs; that the husband could sell the lands to pay community debts, and that the

existence of such debts and of the necessity for sale are presumed from lapse of time, and therefore that judgment of nonsuit was proper.—*Von Rosenberg v. Perrault*, 5 Idaho, 231, 51 Pac. 774.

Under our statutes, making the time and earnings of both husband and wife community property, loss of ability to labor is an element of damage in an action by the husband and wife for a tortious injury to the wife and a separate action by the husband need not be brought to recover for such damage.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Under R. S. 2505, giving the husband power of disposition of the community property, a deed of community property, which is not the homestead of the grantor nor occupied or used as a residence by the husband and wife, is valid without the wife's signature and is not rendered invalid by the wife having signed it and her acknowledgment thereto being defectively taken.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

Where a husband executes one note and he and his wife execute two other notes, each of the three notes being secured by separate mortgages on separate pieces of property, the presumption is that the notes were given for the husband's debts and on community property, and a deficiency judgment entered against the wife on foreclosure is erroneous.—*Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893.

The husband may encumber by mortgage, without the wife joining him, an undivided interest in lands not a homestead, nor used as a residence, which belong to the community, although the wife may have a separate estate in said lands.—*Northwestern etc. Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516.

As a rule, property purchased with money borrowed by either spouse during the existence of the community is community property.—*Northwestern etc. Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516.

Property purchased in the name of the wife partly with money of her separate estate and partly with money borrowed during the existence of the community, is her separate estate to the extent of her own money used in the purchase and community property to the extent of the money borrowed.—*Northwestern etc. Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516.

Where the evidence in an action against husband and wife relating to a water right fails to show whether or not the land and appurtenant water right were the separate property of the wife and it is shown that the husband and wife reside on the land, it will be presumed that the land and water right are community property.—*Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033.

R. S. 2479 provides that all property acquired after marriage by either husband or wife, including the rents and profits of the separate property of either of them, is community property, unless the instrument by which such property is acquired expressly provides otherwise. R. S. 4479 provides that

all real and personal estate belonging to any married woman at the time of her marriage, or to which she subsequently becomes entitled in her own right, and all the rents and profits thereof, is exempt from execution against her husband. Held, that such sections, having been adopted in one act, are to be construed in pari materia, and the increase of cattle belonging to the wife is her separate property.—*Thorn v. Anderson*, 7 Idaho, 421, 63 Pac. 592.

Where in a suit on an account the complaint does not show that plaintiff is a married woman and hence not the real party in interest, the account being community property, such defense may properly be taken by answer since it cannot be taken by demurrer.—*Holton v. Sand Point Lumber Co.*, 7 Idaho, 573, 64 Pac. 889.

Where suit is brought on an open account and defendant pleads that plaintiff is a married woman and not the owner of the account sued on, the account being community property and as such the property of plaintiff's husband, it is error to strike out such defense.—*Holton v. Sand Point Lumber Co.*, 7 Idaho, 573, 64 Pac. 889.

Where a husband signs and acknowledges a mortgage executed by his wife, he is estopped to deny the validity thereof, though his name does not appear in the body of the mortgage.—*Hadley v. Clark*, 8 Idaho, 497, 69 Pac. 319.

R. S. 4480, as amended by Laws 1899, pages 251, 252, enumerates property exempt from execution, and Laws 1899, page 292, section 1, provides that no personal property of either husband or wife that is exempt from execution shall be mortgaged without the concurrence of both husband and wife. Held, that a chattel mortgage on community property exempt from execution, signed by the husband but not by the wife, was void.—*Kindall v. Lincoln Hardware etc. Co.*, 8 Idaho, 664, 70 Pac. 1056.

A wife abandoned her home and husband in this state, took up her residence in another state and there procured a decree of divorce on service by publication. She afterward married and with her second husband as plaintiff brought action in this state nine years after the abandonment for a partition of the community property of the former marriage. Held, that by the second marriage she formed a new community and that the action could not be maintained.—*Bedal v. Sake*, 10 Idaho, 270, 66 L. R. A. 60, 77 Pac. 638.

A wife, who does not assert her rights to or interest in the property of her husband until after his death, even though living separate and apart from such husband, but does assert such right immediately after the death of such husband, and prosecutes her action with diligence, is not guilty of laches or estopped from asserting such right.—*Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

C. died intestate in 1875, owning community property, leaving a widow and two minor children. There were no community debts. Laws 1875, page 636, provided that

in such cases an undivided one-half interest descends to the widow and the other undivided one-half to the minor children. Held, that as the widow did not have the title to the undivided one-half interest of the children, she did not hold the land or their interest therein as trustee.—*Coe v. Sloan*, 16 Idaho, 49, 100 Pac. 354.

The wife cannot either directly or indirectly make the community property liable for her debts which are contracts for the benefit of her separate property for her own use and benefit.—*Hall v. Johns*, 17 Idaho, 224, 105 Pac. 71.

The one-half interest which the wife receives from the community property upon the death of her husband comes to her in her own right by reason of the death of the community agent and her survival of the dissolution of the community partnership.—*Kohny v. Dunbar*, 21 Idaho, 258, Ann. Cas. 1913D, 492, 39 L. R. A., N. S., 1107, 121 Pac. 544.

The presumption that property acquired during marriage is community property may be rebutted.—*Stewart v. Weiser Lumber Co.*, 21 Idaho, 340, 121 Pac. 775.

Where a married woman purchases a forty acre tract of land as and for her own separate property and pays a part of the purchase price at the time of the purchase, and assumes a mortgage then existing on said land, and executes a mortgage thereon for the balance of the purchase price, which mortgage and notes are signed by the husband, held, under the facts, that said forty acre tract of land is the separate property of the wife, and that no part of it is community property.—*Stewart v. Weiser Lumber Co.*, 21 Idaho, 340, 121 Pac. 775.

Under the community property laws of this state, whenever, after marriage, the husband purchases real estate within this state, a prima facie presumption arises that such property is community property, and such presumption may be overcome by the husband assuming the affirmative and burden of proof and showing as a matter of fact that such property was purchased with his separate property or estate.—*Douglas v. Douglas*, 22 Idaho, 336, 125 Pac. 796.

Personal property acquired during coverture is governed and controlled by the law of the matrimonial domicile, and, if the title thereto and property therein was vested in the husband under the law of the domicile, it will be presumed everywhere to be his property, and the same is true of any property that was the separate and individual property of the wife under the law of the matrimonial domicile.—*Douglas v. Douglas*, 22 Idaho, 336, 125 Pac. 796.

In inquiring into and ascertaining the law of a sister state with reference to the title and ownership of property acquired by husband and wife in that state during coverture, the courts of this state do not make such inquiry and investigation for the purpose of executing a foreign law within this state, but rather, to ascertain the status of the foreign law as a probative fact in ascertaining and

establishing the title and ownership of such property at the time it is brought into this state.—*Douglas v. Douglas*, 22 Idaho, 336, 125 Pac. 796.

Where husband and wife during coverture accumulated property in a state where the community law did not exist and where property accumulated and acquired during coverture vests absolutely in the husband, and such property or the proceeds thereof is brought into the state of Idaho and here invested in real property, the property so acquired will be the separate property of the husband.—*Douglas v. Douglas*, 22 Idaho, 336, 125 Pac. 796.

Facts of this case examined, and held sufficient to support a finding by the trial court that certain bakery supplies, purchased by a married woman and by her mortgaged, were at the time of the execution of the mortgage, the separate property of the wife, and not the community property of husband and wife.—*Gooding Milling etc. Co. v. Lincoln County State Bank*, 22 Idaho, 468, 126 Pac. 772.

Where a junior mortgagee has notice, at the time of taking a mortgage, that a senior mortgage exists on the same property, which was executed by the wife alone, and that the wife claimed the property as her separate property, and that the husband admitted and declared that the property was the separate property of the wife, and at the time of the execution of the junior mortgage the junior mortgagee understood that he was taking a second mortgage on the property, the junior mortgagee is estopped from questioning the validity of the senior mortgage, or contending that the property mortgaged was community property, instead of the separate property of the wife.—*Gooding Milling etc. Co. v. Lincoln County State Bank*, 22 Idaho, 468, 126 Pac. 772.

Where property was purchased by a married woman in a foreign state, and under the laws of that state such property became her separate property, and the property is thereafter brought into the state of Idaho, it will continue to be the separate property of the wife.—*Gooding Milling etc. Co. v. Lincoln County State Bank*, 22 Idaho, 468, 126 Pac. 772.

Where real property is owned by Whitney, and is a part of section 13, township 1 south, range 6 east, and is described on the assessment-roll as in section 23, and such assessment becomes delinquent, and is sold for delinquent taxes by the same description, and is purchased by the county, and thereafter the county issues a deed to said land to Wolfe, and Wolfe executes a deed and conveys said property to the wife of Whitney, the owner of said property at the time the assessment of taxes is made, Whitney and wife acquire such property as community property, and such purchase will be recognized as the payment of the taxes upon the property owned by Whitney at the time the assessment is made, and Whitney acquires no new title by reason of the transfer from the county, except an acknowledgment upon the part of the county of the payment of such taxes.—*Meserole v. Whitney*, 22 Idaho, 543, 127 Pac. 553.

All property acquired by either spouse during coverture is presumed to be community property, and the burden of proof rests upon the party who asserts that it was separate property to show such fact by a preponderance of the evidence.—*Humbird Lbr. Co. v. Doran*, 24 Idaho, 507, 135 Pac. 66.

Where a government homestead entry has been made and the equitable title thereto has been earned prior to the marriage of the entryman, the property acquired under such entry will become the separate property of the entryman under R. C. 2678, 2679, although such entryman marries prior to making final proof or acquiring the legal title to the land.—*Humbird Lbr. Co. v. Doran*, 24 Idaho, 507, 135 Pac. 66.

Editorial Notes.

What is community property: 126 Am. St. Rep. 99.

Community property, what is and when presumption that property is community may be rebutted: 86 Am. Dec. 628.

Property granted by the government to a married person: 96 Am. St. Rep. 916.

Community property, widow's election between right to and benefits of a will: 92 Am. St. Rep. 695.

Debts or claims for which community property is liable: Ann. Cas. 1913A, 319; 19 L. R. A. 233.

Effect of removal into community property state on separate property rights of married persons theretofore acquired: 13 Ann. Cas. 840.

Profits accruing during marriage in connection with property belonging to separate estate of either spouse as community property: 31 L. R. A., N. S., 1092.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

(No paragraphs.)

IX. ABANDONMENT.

As bar to action for partition of community property. See ante, VII.

Evidence examined and held insufficient to show an abandonment of a wife by her husband.—*Jacobson v. Bunker Hill etc. Co.*, 3 Idaho, 126, 28 Pac. 396.

Editorial Notes.

Desertion of wife, effect of on her property rights and her power to contract: 64 Am. St. Rep. 861.

Validity of statute making it crime for husband to abandon or fail to support wife: Ann. Cas. 1912B, 280.

X. ENTICING AND ALIENATING.

(No paragraphs.)

XI. CRIMINAL CONVERSATION.

(No paragraphs.)

III-FAME.

House of ill-fame. See Disorderly House.

IMPROVEMENTS.

On public lands. See Public Lands.

On married woman's separate property. See Husband and Wife, V, (B).

INCEST.

The crime of incest may be committed by one party to the act without the consenting mind of the other party thereto.—*People v. Barnes*, 2 Idaho, 161, 9 Pac. 532.

Editorial Notes.

Incest, the crime of: 111 Am. St. Rep. 19.

Consent of both parties as element of crime of incest: 8 Ann. Cas. 910.

INDEMNITY.

Of sheriffs and constables. See Sheriffs and Constables, III.

Contracts of indemnity by particular classes of persons. See Corporations, etc.

Requirements of statute of frauds. See Frauds, Statute of.

Where an injury occurs on account of the willful neglect of a duty enjoined by law, or the gross negligence or willful misconduct of the lot owner, he is liable to the person injured and is liable over to the city if the city should pay the damages for such injury. *City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

Where defendant lot owner was not permitted to appear and defend in the case of a pedestrian suing the plaintiff city for injuries from a defective sidewalk, he was not bound by the judgment entered in that case.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

Where a person or corporation negligently extends a sign over the sidewalk so low that a pedestrian is injured by collision therewith and such pedestrian thereafter recovers judgment against the city for negligence in permitting such sign to remain, the city has a right of action against the person responsible for the placing of the sign.—*Baillie v. City of Wallace*, 27 Idaho, 706, 135 Pac. 850.

Editorial Notes.

Right of action on indemnity when accrues: 49 Am. Dec. 362.

Judgments against principals, conclusiveness against indemnitors: 22 Am. St. Rep. 204.

Necessity for actual damage before recovery on indemnity contract: Ann. Cas. 1913D, 1152.

Conclusiveness of judgment against constructive tort-feasor in subsequent action for indemnity: 40 L. R. A., N. S., 1172.

INDETERMINATE SENTENCE.

See Criminal Law, XVI; Forgery; Habeas Corpus, I.

INDIANS.

Admissibility of purported confession made by Indian. Criminal Law, X, (F).

Compensation of attorneys for prosecuting claims for Indian depredations. See Attorney and Client, IV.

Right of state to tax railroad on Indian reservation. See Taxation, III, (B).

Residence on Indian reservation as affecting right to claim exemptions. See Exemptions.

It was by virtue of the act of Congress of June 5, 1850, and not the act of June 30, 1834, that the law regulating trade and intercourse with the Indian tribes east of the Rocky mountains, or such provisions of the same as were applicable, was extended over the Indian tribes of Oregon.—Pickett v. United States, 1 Idaho, 523.

The territory of Idaho having been originally a portion of Oregon, and Congress, in organizing it, having reserved the right to make such regulations respecting the persons and property of the Indians, as in the organization of Oregon territory, the act of Congress of June 5, 1850, and the act of June 30, 1834, so far as applicable, remain in force in this territory.—Pickett v. United States, 1 Idaho, 523.

Under act of Congress, June 30, 1834, section 25, providing that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country, the territory of Idaho is Indian country so far as the rights of the persons and property of the Indian tribes are concerned, and to that extent within the sole and exclusive jurisdiction of the United States.—Pickett v. United States, 1 Idaho, 523.

Under act of Congress, June 30, 1834, section 25, the district court of Idaho territory, exercising jurisdiction as a district court of the United States, has jurisdiction over a prosecution for the murder of an Indian woman, who was a member of the Nez Perce tribe of Indians.—Pickett v. United States, 1 Idaho, 523.

The act of Congress organizing the territory of Oregon reserved to the government of the United States the right to make any regulations respecting the person and property of the Indians, which it would have been competent to make had the act never been passed. Pickett v. United States, 1 Idaho, 523.

A district court has jurisdiction over Indian reservations in any organized county in this territory, and its process may run and be served there, if there be no treaty to the contrary with the Indians thereof.—Hyde v. Harkness, 1 Idaho, 536.

Settlers upon the reservation granted by treaty to the Nez Perce Indians and all other persons, except such as are permitted by treaty, who go thereon to occupy or possess any portion of the land embraced therein, are trespassers; and no agreement for the use and occupancy of any portion of said land between the plaintiff and another white person can be enforced.—Langford v. Monteith, 1 Idaho, 612.

The treaty between the United States and the Nez Perce tribe of Indians, concluded June 9, 1863, proclaimed April 20, 1867, reserved, for the sole use and occupation of said tribe, the territory or tract of country therein described.—Langford v. Monteith, 1 Idaho, 612.

None of the lands embraced within the boundaries of Idaho territory are excepted out of said territory by section 1 of the organic act, except such as, by the provisions of pre-existing treaties with Indian tribes, were not, without the consent of such Indian tribes, to be included within the limits of any state or territory.—Utah etc. Ry. Co. v. Fisher, 2 Idaho, 53, 3 Pac. 3.

At the time of the passage of the organic act of Idaho territory no treaty existed between the United States and any Indian tribe providing that the lands embraced within the Fort Hall Indian Reservation should not, without the consent of such tribe, be included within any state or territory; such lands, therefore, became part of Idaho territory upon the passage of the organic act of March 3, 1863, and have not since been withdrawn from or excepted out of such territory.—Utah etc. Ry. Co. v. Fisher, 2 Idaho, 53, 3 Pac. 3.

A complaint, in an action to quiet title under R. S. 4538 stated that plaintiff is the duly appointed, etc., guardian of F., an infant; that F. is an Indian, unmarried, not residing on any Indian reservation, and for whose tribe no reservation had been provided by treaty, act of Congress, or executive order, bringing said infant within the "General Allotment Act" of February 8, 1887 (24 Stats. 388) and amendments thereto approved February 28, 1891 (Stats. 794); that, by virtue of said act as amended, said infant, through his mother, located and took possession of certain unsurveyed and unappropriated government land and improved it; that his mother, in his behalf, filed in the proper land office an Indian allotment application for said land; that the lands are agricultural and grazing, and not mineral, lands; that defendant claims an interest therein without right and has ejected plaintiff therefrom and holds possession thereof. Held, not demurrable.—Fry v. Summers, 4 Idaho, 424, 39 Pac. 1118.

Under act of Congress, February 8, 1887, section 6, providing that on the completion of allotments and patenting of lands to the allottees, the allottees shall be entitled to the rights and privileges of citizenship, etc., Indians of the Nez Perce tribe who have received and accepted allotments of land and patents therefor, are entitled to institute and defend actions in the state courts.—Wa-La-Note-Tke-Tynin v. Carter, 6 Idaho, 85, 53 Pac. 106.

Indians' holding lands by allotment are entitled to bring suit for trespass thereon.—Carter v. Wann, 6 Idaho, 556, 57 Pac. 314.

Settlers upon Indian reservations, living thereon by sufferance only, are subject to the same rules as though they lived on the public domain.—Francis v. Green, 7 Idaho, 668, 65 Pac. 362.

The provisions of section 9 of the act of Congress of March 3, 1885, chapter 341 (23 Stats. at Large, 385), reserving to the general government exclusive jurisdiction to try all charges against Indians for crimes committed by them against the property or person of another Indian, embraced within the charges of murder, manslaughter, rape, arson, assault with intent to kill, burglary and larceny, do not apply to Indians whose reservation was thrown open, and who received allotments, under the provisions of the act of Congress of February 8, 1887, known as the Dawes act, prior to the amendment of that act by the act of Congress of May 8, 1906 (34 Stats. at Large, 182).—*State v. Lott*, 21 Idaho, 646, 123 Pac. 491.

Under the provisions of section 6 of the act of Congress of February 8, 1887, chapter 119 (24 Stat. 390), known as the Dawes act, upon the completion of allotments made under that act, and the patenting of the lands to the allottees by trust patents, each and every member of the respective bands or tribes of Indians to whom allotments are made "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside"; and the state courts accordingly have jurisdiction to try an Indian for any public offense, except the introduction of liquor into the Indian country, where such Indian has taken an allotment under the provisions of the Dawes act. *State v. Lott*, 21 Idaho, 646, 123 Pac. 491.

The Nez Perce Indians took their allotments under and in pursuance of the provisions of the act of Congress of February 8, 1887, known as the Dawes act (c. 119, 24 Stat. 390) and the Nez Perce Indian reservation was ceded to the United States government by treaty and agreement of May 1, 1893 (Act Aug. 15, 1894, c. 290, 28 Stats. at Large, 327); and the reservation was opened and allotments were made under that treaty, and in pursuance of and in conformity with the provisions of the Dawes act.—*State v. Lott*, 21 Idaho, 646, 123 Pac. 491.

The act of Congress of May 8, 1906, amending section 6 of the act of February 8, 1887, was not retroactive in its effect, and did not affect the jurisdiction of the state courts to try Indians, who had received their allotments under the Dawes act, and prior to the passage and approval of the amendatory act. *State v. Lott*, 21 Idaho, 646, 123 Pac. 491.

INDICTMENT AND INFORMATION.

- I. NECESSITY OF INDICTMENT.
- II. FINDING AND FILING OF INDICTMENT.
- III. FORMAL REQUISITES OF INDICTMENT.
- IV. FILING AND FORMAL REQUISITES OF INFORMATION.
- V. REQUISITES AND SUFFICIENCY OF ACCUSATION.
- VI. JOINDER OF PARTIES, OFFENSES AND COUNTS, DUPLICITY AND ELECTION.
- VII. MOTION TO QUASH OR DISMISS AND DEMURRER.
- VIII. AMENDMENT.
- IX. ISSUES, PROOF AND VARIANCE.
- X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.
- XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT.

See Grand Jury.

Indorsement of names of witnesses. See Criminal Law, XII, (A).

Information for disbarment of attorney. See Attorney and Client, I.

For particular offenses, see Counterfeiting; Homicide; Forgery; Libel and Slander; Perjury; Vagrancy; and titles of particular offenses.

Information to remove public officer. See Officers, I, (G).

Information for removal of member of county board. See Counties, II, (G), 2.

Preliminary complaints. See Criminal Law.

For violation of laws regulating or prohibiting liquors. See Intoxicating Liquors, VIII.

Under the search and seizure acts. See Intoxicating Liquors, IX.

I. NECESSITY OF INDICTMENT.

(No paragraphs.)

II. FINDING AND FILING OF INDICTMENT.

Preliminary examination as requisite to filing information and trial thereon. See Criminal Law, VIII, (A), (C).

No preliminary examination is necessary to the finding of an indictment.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

Defendant, with numerous others, was arrested by the military authorities, acting in

conjunction with the civil authorities, and detained until their connection with a riot, resulting in loss of life and property, could be ascertained. At the time the grand jury was impaneled, defendant and his counsel were present in court and informed of their right to challenge the panel or any individual juror, but failed to make such challenge. Defendant moved to set aside the indictment on the ground that the officer, who summoned the grand jury, had selected jurors, known to him to be prejudiced against defendant. The affidavit of the officer on the hearing of such motion denied these allegations. The motion was also based on the ground that the defendant had not been held to answer before the indictment as required by R. S. 7730. Held, that defendant was held to answer within the meaning of the statute, and that therefore the indictment should not be set aside on the ground that defendant had good ground for challenge to the panel or to any individual grand juror.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

R. S. 8212, subdivision 1, provides that the court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, when a person has been held to answer for a public offense if an indictment is not found against him at the next term of court at which he is held to answer. Held, that the loss of the complaint filed against defendant in the justice court and press of business on the part of the prosecuting attorney are not "good cause to the contrary" within the meaning of the statute, and hence that defendant should be discharged on habeas corpus on failure to find an indictment or file an information as required by statute.—*In re Jay*, 10 Idaho, 540, 79 Pac. 202; *In re Searles*, 10 Idaho, 542, 79 Pac. 1132.

Editorial Notes.

Indictment or information, loss of, effect and replacement of: 86 Am. Dec. 728.

III. FORMAL REQUISITES OF INDICTMENT.

The criminal practice act does not require the district attorney to sign indictments; nor does it prescribe a failure to sign as a ground for setting the indictment aside.—*People v. Butler*, 1 Idaho, 231.

An indictment containing the words, "Idaho Territory, Ada County," in the caption and title of the court and again as the place where the jury is impaneled and sworn, and specially charging the offense to have been committed in Ada county and further charging that the offense is against the laws of Idaho territory, etc., sufficiently states the venue.—*People v. Walters*, 1 Idaho, 271.

A failure to set forth the title of the action in an indictment is not fatal.—*People v. Walters*, 1 Idaho, 271.

Where an indictment concludes with "contra formam statuti" and no statute exists concerning the offense charged, yet if the facts alleged constitute a common-law offense, and the same be charged with certainty, the conclusion of the indictment will be treated as

surplusage, and the indictment be held good. *People v. Buchanan*, 1 Idaho, 681.

The rule of liberal construction of indictments and informations has been adopted in this state.—*State v. Squires*, 15 Idaho, 545, 98 Pac. 413; *State v. Caldwell*, 21 Idaho, 663, 123 Pac. 299.

Section 1 of article 5 of the constitution, which authorizes prosecutions "in the name of the people of the state of Idaho," is not violated by R. C. 7353, which directs that criminal actions shall be prosecuted in the name of the "State of Idaho," as a party plaintiff, and a prosecution by the "State of Idaho" as plaintiff is in conformity with the constitution and the statute.—*State v. Lockhart*, 18 Idaho, 730, 111 Pac. 853.

Editorial Notes.

Form and sufficiency of indictment or information: 3 Am. St. Rep. 279.

Sufficiency of contra pacem conclusion of indictment: 14 Ann. Cas. 413.

Necessity that indictment be brought into open court: 26 L. R. A., N. S., 683.

IV. FILING AND FORMAL REQUISITES OF INFORMATION.

Preliminary examination as requisite to filing information and trial thereon. See, also, Criminal Law, VIII, (A), (C).

It is not necessary that the information in a criminal case should set forth the fact of a preliminary examination having been held, though it would be better practice to aver the same or a waiver thereof.—*State v. Farris*, 5 Idaho, 666, 51 Pac. 772.

An information in a criminal case will not be quashed on the ground that the deposition of a witness taken at the preliminary examination fails to state the business or profession of the witness or his place of residence, in compliance with R. S. 7571 and 7576, where the witness testified that he was coroner of the county and a practicing physician therein.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

A motion to quash an information on the ground that it is signed by the "county attorney" instead of the "prosecuting attorney" is properly denied, the objection being technical.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

Where the court sustains a demurrer to an information and grants the prosecuting attorney leave to file a new information, no specific direction to file a new information is required by R. S. 7745-7747; and a writ of habeas corpus will not issue to release petitioner from a judgment of conviction under such new information.—*In re Pierce*, 8 Idaho, 183, 67 Pac. 316.

The inquisition of a coroner's jury is not a sufficient basis for an information by the public prosecutor.—*In re Sly*, 9 Idaho, 779, 76 Pac. 766.

Where defendant waives a preliminary examination, it is not necessary to hold another preliminary examination on account of the

loss of the complaint filed with the committing magistrate in order to enable the prosecuting attorney to file an information.—*In re Jay*, 10 Idaho, 540, 79 Pac. 202; *In re Searles*, 10 Idaho, 542, 79 Pac. 1132.

A prosecuting attorney has no right to file an information against anyone where the depositions taken at the preliminary examination (unless examination was waived) fail to disclose any reasonable or probable cause for believing the defendant guilty of an offense. *In re Knudtson*, 10 Idaho, 676, 79 Pac. 641.

Where the prosecuting attorney presents an information in open court to the clerk thereof, the district judge has no jurisdiction to direct the clerk not to file the same.—*State v. Quarles*, 13 Idaho, 252, 89 Pac. 636.

Where a defendant has been held to answer to the district court and no information has been filed and the court grants defendant's motion to dismiss during the absence of the prosecuting attorney, and on the following day the prosecuting attorney in open court presents an information against defendant, which the clerk refuses to file under directions of the district judge, a writ of mandate will issue against the clerk compelling him to file the information.—*State v. Quarles*, 13 Idaho, 252, 89 Pac. 636.

Under Const., article 1, section 8, and R. C. 7662, authorizing prosecutions on information of the public prosecutor after a commitment by a magistrate, and after preliminary examination, the prosecutor has no power or authority to file an information against an accused person until after such person has been committed by a magistrate, and he can file his information for the offense only for which the accused was committed by the magistrate.—*State v. McGreevey*, 17 Idaho, 453, 105 Pac. 1047.

Editorial Notes.

Necessity that criminal information filed by prosecuting attorney be under oath: 7 Ann. Cas. 983.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

Where there was no law defining the crime and imposing a penalty at the time the offense is alleged in the indictment to have been committed, time is material, and the indictment should be set aside.—*People v. Williams*, 1 Idaho, 85.

Indictments in matters of averment are sufficient if they allege all the acts or facts which have been used by the legislature in defining the particular offense charged.—*People v. Butler*, 1 Idaho, 231.

The words of an indictment, "in bodily fear and damage of his life, then and there feloniously did put," are equivalent to the words, "put his life in jeopardy."—*United States v. Mays*, 1 Idaho, 763.

An indictment must contain so many of the substantial words of the statute as shall enable the court to see on what statute it is

framed, and such other words as are necessary to a complete description of the offense; or words which are their equivalents or more than their equivalents in meaning.—*United States v. Mays*, 1 Idaho, 763.

An information stating in ordinary and concise language the commission of a crime is not demurrable.—*State v. Ellington*, 4 Idaho, 529, 43 Pac. 60; *State v. Dixon*, 7 Idaho, 518, 63 Pac. 801.

An indictment alleging that "on or about the twenty-sixth day of October, A. D. 1897, and before the finding and filing of this indictment," defendant committed the offense charged is sufficient under R. S. 7677-7679, stating the requisites of indictments.—*State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

An application for a bill of particulars is an appeal to the sound discretion of the court. The defendant is not entitled to it as of right.—*State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186.

An information or indictment charging a statutory offense in the language of the statute is sufficient without an allegation that it was committed willfully, unlawfully and knowingly.—*State v. Keller*, 8 Idaho, 699, 70 Pac. 1051.

An information charging the unlawful sale of intoxicating liquors, which concludes with the clause, "Contrary to the form, force and effect of the statutes in such cases made and provided and against the peace and dignity of the state of Idaho," is a sufficient allegation that the liquor was sold or disposed of contrary to law, whether it be the local option law or any other public statute.—*State v. Schmitz*, 19 Idaho, 566, 114 Pac. 1.

An information for robbery is sufficient, if it charges the offense substantially in the words of R. C. 6590, defining robbery.—*State v. Brill*, 21 Idaho, 269, 121 Pac. 79.

An indictment is sufficient if it describes the offense in the language of the statute by which it is created or defined, and the words employed make the charge clear to the common understanding.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

That a defendant, accused of making a false report of the condition of a state bank in violation of R. C. 7128, is unable, by reason of his long management of the bank and his participation in the making of many reports, to identify the particular report for the making of which he has been indicted is not ground for demurrer but should be reached by a demand for a bill of particulars.—*State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60.

Editorial Notes.

Indictment and information, charge of crime, when may be in the language of the statute: 94 Am. Dec. 253.

Sufficiency of indictment charging commission of offense "on or about" certain date: 7 Ann. Cas. 775.

Charging commission of offense at an impossible date: 2 L. R. A., N. S., 251.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

Under criminal practice act, section 251, providing that "no distinction shall exist between an accessory before the fact and a principal," etc., an indictment charging five persons with murder in one count, and four of the same persons with being accessories before the fact in another count, is not vitiated by reason of the second count which will be considered simply as surplusage.—*People v. Ah Hop*, 1 Idaho, 698.

Under R. S. 7681, providing that the indictment must charge but one offense, but the same offense may be set forth in different forms and under different counts, an indictment charging one defendant as principal and the other as an accessory before the fact charges but one offense.—*Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39.

In an information charging murder in the first degree, the prosecutor may charge the same offense in two counts; one count alleging the murder to have been committed willfully, deliberately, and with malice aforethought, and the other count charging that the murder was committed in the perpetration of, or attempt to perpetrate, robbery. In the latter case, proof that the murder was committed in the perpetration of, or attempt to perpetrate, robbery brings the case within the definition of "murder in the first degree," as contained in R. C. 6562, and such proof supplies the place of proof of deliberation and premeditation.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

Editorial Notes.

Joinder of two or more offenses in one indictment: 58 Am. Dec. 238; 9 L. R. A. 182.

Joinder of charges of rape and incest: 41 Am. Rep. 249.

Election between two or more counts in indictment, prosecutor, when will be compelled to make: 92 Am. Dec. 660.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

Defects in signature or other formal requisites.

See ante, IV.

Waiver of defects. See post, XI.

For the purposes of a motion to set aside an indictment, the facts stated in the indictment are to be taken as true.—*People v. Williams*, 1 Idaho, 85.

A motion to set aside an indictment, based on objections going to the merits of the case, can be made at any time either before or after judgment.—*People v. Williams*, 1 Idaho, 85.

An objection to an indictment that it sets forth no sufficient charge of a criminal offense should be sustained only when the insufficiency is so palpable as clearly to satisfy the mind of the judge that a verdict thereon would not authorize the judgment.—*People v. Nash*, 1 Idaho, 206.

The objection that an indictment charges two offenses must be taken by demurrer.—*People v. Nash*, 1 Idaho, 206.

The statute having prescribed the grounds upon which a motion to set aside an indictment may be made, all other grounds are excluded.—*People v. Butler*, 1 Idaho, 231.

Under criminal practice act, section 426, an objection to an indictment "that it does not substantially conform to section 234" cannot be taken advantage of upon a motion in arrest of judgment, but must be made by demurrer under section 285 as limited by section 293.—*People v. Stapleton*, 2 Idaho, 47, 3 Pac. 6.

Where depositions are read before the grand jury, and the persons who made them personally appear and testify before the grand jury and the record does not show that the indictment was found or predicated in whole or in part upon such depositions, there is no error in refusing to set aside the indictment on the ground that it was found upon incompetent and illegal evidence.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

Where, in a criminal case, it is not claimed that any prejudice was done to the appellant either at the preliminary examination or at the trial, a technical objection on a motion to quash the information will be overruled on appeal.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

A motion to set aside an information on the ground that an accomplice, called as a witness by the prosecution, refused to answer certain questions on cross-examination at the preliminary examination on the ground that such answers might tend to incriminate the witness, was properly denied.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

Where a complaint was filed before a magistrate, charging the defendant in the name of Luis Trespi, and such defendant was committed under the name of Lewis Uterspi and an information was filed in the district court by the prosecuting attorney, charging said defendant with the same crime in the name of Luis Yturaspe, and upon arraignment in the district court, as provided by law, he answered that Luis Yturaspe was his correct name, and it appears from the record that the person against whom the information was filed is the same person who was examined before the committing magistrate and committed, and that the offense was the same, the information should not be quashed upon the ground that the defendant never had a preliminary examination.—*State v. Yturaspe*, 22 Idaho, 360, 125 Pac. 802.

Editorial Notes.

Time and method of objecting to indictment on ground of duplicity: 10 Ann. Cas. 1004.

VIII. AMENDMENT.

(No paragraphs.)

IX. ISSUES, PROOF AND VARIANCE.

Under indictment for murder. See Homicide, VI.

Where an information charges that the property alleged to have been stolen belonged to C. W. Dunham and the proof showed that

it belonged to Charles Dunham and there is nothing to show that C. W. Dunham and Charles Dunham are not one and the same person, the variance is not fatal.—*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.

Where it is alleged in the information that the stolen property is owned by a certain person and the evidence shows that such person owns only a half interest therein, such variance is not fatal, and does not entitle defendant to an acquittal.—*State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

Editorial Notes.

Necessity of proving unnecessary allegations in indictment: 4 Ann. Cas. 756; 13 Ann. Cas. 311.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

Judgment where defendant found guilty of assault with deadly weapon under indictment of assault to commit murder. See *Assault and Battery*.

Where the evidence shows a case of murder in the first degree, and the jury, under proper instructions, returns a verdict of manslaughter, the verdict will not be disturbed.—*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272.

Where the evidence would warrant a conviction of murder in the first degree, the fact that a less degree was found by the jury cannot be urged as a reason for setting aside the verdict.—*State v. Hardy*, 4 Idaho, 478, 42 Pac. 507.

Under R. S. 7926, providing that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, the jury may find defendant guilty of manslaughter under an indictment charging him with murder in the first degree.—*In re Alcorn*, 7 Idaho, 101, 60 Pac. 561; *State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

The crime of assault with a deadly weapon or instrument is not necessarily included in the statutory definition of murder, and, unless the information charging murder also alleges an assault, the defendant cannot be convicted of an assault with a deadly weapon or instrument, or an assault, where the information does not contain an allegation that the murder was committed by an assault with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury.—*In re McLeod*, 23 Idaho, 257, 128 Pac. 1106.

Where an information is filed against a defendant, charging such defendant with the crime of murder, and such information charges the defendant with willfully, unlawfully, feloniously, and with malice aforethought killing and murdering one George Guay, a human being, and there is no allegation as to the manner or means of the killing, the defendant can only be convicted upon said charge of the crime of murder, which includes murder in the first degree, murder in the second degree, and manslaughter.—*In re McLeod*, 23 Idaho, 257, 128 Pac. 1106.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDED BY VERDICT.

After pleading to an indictment, and the setting of the case for trial, it is too late to move to quash or set aside the indictment. *People v. Butler*, 1 Idaho, 231.

A motion to quash or set aside an information or indictment on the ground that the law had not been complied with in the arrest and preliminary examination of the defendant, must be made before plea or trial, or it will be deemed waived.—*State v. Clark*, 4 Idaho, 7, 35 Pac. 710; *State v. Collins*, 4 Idaho, 184, 38 Pac. 38.

A motion to quash the information, on the ground that no preliminary examination had been had comes too late after the plea of defendant has been entered.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

INFANTS.

See *Guardian and Ward*; *Parent and Child*.

Habeas corpus proceedings. See *Habeas Corpus*.

Temporary order for care and custody of infant pending application for writ of habeas corpus.

See *Habeas Corpus*, II.

Act providing for the care of delinquent children not violation of due process. See *Constitutional Law*, XI.

Assisting juvenile delinquent to escape, criminal liability. See *Escape*.

Action by Indian infant to quiet title. See *Indians*.

Enticing child away as criminal offense. See *Kidnaping*.

Admissibility of evidence to show earning capacity of minor. See *Damages*, VII.

Action by parent for death of minor child. See *Death*.

Necessity of serving notice of appeal on guardian ad litem in appeal from order confirming sale of real estate. See *Executors and Administrators*, VIII.

By R. S. 2473, 2483, 2534, jurisdiction of the care and custody of infant children is committed to the district courts and the judges thereof.—*In re Miller*, 4 Idaho, 711, 43 Pac. 870.

Under R. S. 5669, 4095, 4096, relating to the appointment of an attorney and guardian ad litem for minors, etc., a nonresident may be appointed guardian ad litem for minor heirs in a will contest, though such minor heirs already have a resident general guardian.—*Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 473.

Laws 1905, page 106, entitled "An act to provide for the care of delinquent children," is not a penal or criminal statute, but a reformatory and charitable statute.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563; *In re Small*, 19 Idaho, 1, 116 Pac. 118.

An order of the probate court, under Laws 1905, page 106, directing that a delinquent child be sent to the State Industrial Training School, is not binding on the parent or guardian unless he is made a party to the proceeding in the probate court, and in such case, if the order runs against the parent or guardian,

or in any way affects his rights as natural or legal guardian, he is given the right of appeal under R. S. 4831.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

Laws 1905, page 106, entitled "An act to provide for the care of delinquent children," does not confer jurisdiction on the probate court in excess of or in conflict with the jurisdiction conferred by Const., article 5, section 21, which prescribes the extent of jurisdiction of probate courts.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

The finding or decree of the probate court in a proceeding against a delinquent child under Laws 1905, page 106, simply establishes the status and condition of the child and the existing necessity for granting it the protection, nurture and aid of the state, and in no respect does it determine or adjudicate any right of the parent or guardian.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

Laws 1905, page 106, entitled "An act to provide for the care of delinquent children," is not a criminal or penal statute, its purpose being rather to prevent the prosecution and conviction of minors under sixteen years of age on misdemeanor charges and to confer a benefit both upon the child and the community in the way of surrounding the child with better and more elevating influences and of educating and training them in the direction of good citizenship.—*In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

The order or decree committing a delinquent child to the Industrial Training School under Laws 1905, page 106, should adjudge both that the child is a delinquent, within the meaning of that term as defined in the act, and that he is without the care and protection of a parent or guardian, or that the parent or guardian is neglecting and failing to discharge the duties he owes to the child. *In re Sharp*, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563.

Title by adverse possession cannot be acquired against minors during minority.—*Harris v. McCrary*, 17 Idaho, 300, 105 Pac. 558.

Editorial Notes.

Statute of limitations, when does not operate against infants: 36 Am. Dec. 68.

Crime, responsibility of infants for: 70 Am. Dec. 496.

Equity, power of over their estates: 98 Am. Dec. 733.

Guardian ad litem, rights, powers, and duties of: 97 Am. St. Rep. 995; 16 L. R. A. 507.

Necessity for appointment of guardian ad litem when infant defendant has general or natural guardian: Ann. Cas. 1912D, 363.

Religious belief as defense to criminal prosecution for failure to furnish med-

ical attendance to another: Ann. Cas. 1913B, 1221.

Denial of custody of child to parent for its well-being: 41 L. R. A., N. S., 564.

INHERITANCE.

See Descent and Distribution.

Rights of aliens. See Aliens.

Inheritance tax. See Taxation.

INJUNCTION.

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(B) Grounds of Relief.

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IV.

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Right to appeal from restraining order in divorce. See Divorce, IV, (G).

Right of appeal from order modifying temporary injunction. See Appeal and Error, III, (E).

— From order dissolving temporary injunction. See Appeal and Error, III, (E).

Stay pending appeal. See Appeal and Error, IX.

Temporary order not authorized pending order of supreme court allowing amendment. See Appeal and Error, XVII, (A).

I. NATURE AND GROUNDS IN GENERAL.**(A) NATURE AND FORM OF REMEDY.**

Under Const., article 5, section 1, abolishing the distinction between actions at law and suits in equity, and R. S. 4288, providing when an injunction may be granted, the remedy of injunction is no longer a matter of exclusive equity jurisdiction, but has come to be largely a matter of right.—*Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67.

R. S. 4288, providing when injunctions may be granted, is liberally construed.—*Shields v. Johnson*, 10 Idaho, 454, 79 Pac. 394.

Under R. C. 4287, an injunction is a writ or order requiring a person to refrain from a particular act, not a writ commanding a person to do a certain act.—*Brinton v. Steele*, 19 Idaho, 71, 112 Pac. 319.

The writ of injunction is preventive in its nature and is invoked for the purpose of restraining and preventing the execution of a threatened and imminent, unperformed and unexecuted act, and to avert a nonexistent injury.—*Fischer v. Davis* (on rehearing), 19 Idaho, 493, 116 Pac. 412.

Plaintiff, a riparian proprietor, sought a permanent injunction, restraining a riparian owner on the opposite side of the stream from constructing and maintaining a dam or breakwater. On appeal it was held that the facts did not warrant the granting of such injunction. Held, not to mean that defendants were thereby relieved from liability arising from injury which might result to plaintiff or any riparian owner if the dam or breakwater should occasion such injury nor does it mean that an injunction cannot issue whenever it is clearly shown that injury will result therefrom.—*Boise Dev. Co. v. Idaho Trust etc. Co.*, 24 Idaho, 36, 133 Pac. 916.

Editorial Notes.

Injunctive relief as affected by comparative injury to parties: Ann. Cas. 1913A, 248; 14 Ann. Cas. 19; 31 L. R. A., N. S., 881.

Right to injunctive relief where complainant has remedy by force: 16 Ann. Cas. 730.

(B) GROUNDS OF RELIEF.

Though the appeal from any order, decision or action of the county board provided for by R. S. 1776 may impose great inconvenience and may involve numerous suits, such matters cannot be urged as a reason for the interposition of equity.—*Picotte v. Watt*, 3 Idaho, 447, 31 Pac. 805.

Under R. S. 4287, defining an injunction as a writ or order requiring a person to refrain from a particular act, a writ of injunction to enjoin a sale for taxes will not lie where the sale has already taken place.—*Wilson v. Boise City*, 7 Idaho, 69, 60 Pac. 84.

Under R. S. 4288, providing when injunctions may be granted, injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, al-

though the injury is not irreparable and plaintiff may have other remedies, since a party need not wait till his property has been damaged and destroyed and his premises encroached upon to the extent of his own ouster and then resort to an action at law for damages.—*Meyer v. First Nat. Bk.*, 10 Idaho, 175, 77 Pac. 334.

The fact that plaintiff has a plain, speedy and adequate remedy at law is not sufficient to prevent plaintiff from obtaining an injunction.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

Editorial Notes.

Irreparable injury, what is within the meaning of the law of injunction: 1 Am. St. Rep. 374.

Injunctions as remedy for past injuries: Ann. Cas. 1913D, 968.

II. SUBJECTS OF PROTECTION AND RELIEF.

See Taxation, VIII, (C), IX.

To abate nuisance. See Nuisances.

(A) ACTIONS AND OTHER LEGAL PROCEEDINGS.

An injunction will not lie to prohibit a person from bringing an action to test his right to property, even though such right has been adjudged against him in an action to which he was not a party.—*Ray v. Ray*, 1 Idaho, 566.

Under the Code of Procedure, a defendant may not bring a separate suit in equity to enjoin the original action at law when his complaint consists of matter defensive to such original action.—*Utah & N. Ry. Co. v. Crawford*, 1 Idaho, 770.

Where the payment of a judgment for taxes is secured by an undertaking on appeal, an injunction ought not to be granted to prevent the removal of the property.—*People v. Preston*, 1 Idaho, 374.

Editorial Notes.

Injunction against pleading the statute of limitations: 51 Am. Dec. 700; 75 Am. Dec. 84.

Injunction against the prosecution of an action in another state: 56 Am. Rep. 663; 59 Am. St. Rep. 880; Ann. Cas. 1913B, 204; 10 Ann. Cas. 26; 16 Ann. Cas. 673; 21 L. R. A. 71; 25 L. R. A., N. S., 268.

Injunction against execution sales or other proceedings under final process: 30 L. R. A. 99.

Injunction against judgment: 30 L. R. A. 560; 31 L. R. A. 200, 747.

(B) PROPERTY, CONVEYANCES AND ENCUMBRANCES.

Restraining foreclosure proceedings. See Chattel Mortgages, IX.

Right of wife to enjoin sale of separate property under execution against husband. See Husband and Wife, V, (C).

In action to quiet title. See Quieting Title, II.

Where a party alleges that acts are being committed and threatened to be continued in violation of his rights, which will cause waste, great or irreparable injury, he is entitled under R. S. 4288 to a writ restraining the commission of such acts, particularly where the subject matter of the litigation is a mine and the act complained of is the removal of the ore therefrom, by underground workings, which would render the mine worthless.—*Gilpin v. Sierra Nevada etc. Co.*, 2 Idaho, 696, 23 Pac. 547, 1014.

In an action to restrain the removal of logs cut on lands claimed by plaintiff, the fact that defendants are solvent and that plaintiff has a remedy at law either in replevin or in action for damages will not prevent the granting of an injunction.—*Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67.

A complaint alleging irreparable injury to growing crops and that the damage thereto could not be justly estimated is sufficient to authorize an injunction under R. S. 4288, though plaintiff does not allege the insolvency of defendants or that he has no adequate remedy at law.—*Wilson v. Eagleson*, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613.

Where the grantor of land places a deed therefor in escrow and on payment of the balance due on the escrow, the grantor refuses to surrender possession of the premises, the grantees are not thereby entitled to an injunction restraining the grantor from drawing the purchase money from the bank holding the escrow until the termination of an action for damages for unlawfully withholding possession.—*Williamson v. Moore*, 10 Idaho, 749, 80 Pac. 27.

The practice of courts is to be liberal in granting injunctive relief in mining litigation, so that neither party may get the advantage during the litigation by force or violence.—*Safford v. Fleming*, 13 Idaho, 271, 89 Pac. 827.

A person has no vested right to sell intoxicating liquors, and a license authorizing sales to be made confers no property right upon the holder of such license; and the fact that prosecutions may be waged against the holder would not invade or destroy any property right, and would not authorize an injunction to issue restraining prosecutions, upon the ground that the holder of such license would suffer irreparable injury.—*Nims v. Gilmore*, 17 Idaho, 609, 107 Pac. 79.

Editorial Notes.

Injunction against trespasses on real estate: 11 Am. Dec. 498; 53 Am. Rep. 346; 99 Am. St. Rep. 731; 13 L. R. A., N. S., 173; 21 L. R. A., N. S., 417.

Injunction as remedy for wrongful diversion of watercourse: Ann. Cas. 1912D, 13.

(C) CONTRACTS.

(No paragraphs.)

(D) CORPORATE FRANCHISES, MANAGEMENT AND DEALINGS.

To restrain sale of corporate stock. See Corporations, IV, (D), V, (A).

Where a railroad company prays for a perpetual injunction against another railroad, enjoining the entering upon its right of way and for a decree of title, and it appears at the time of the trial that defendant has completed its line of road over the disputed ground, and is in the actual use and occupation of the same, a perpetual injunction was properly refused, but the court should not have passed upon the title, but left plaintiff to its action at law.—*Washington etc. Co. v. Coeur d'Alene Ry.*, 2 Idaho, 580, 21 Pac. 562.

(E) PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

Citizens, who are residents, electors and taxpayers of a county may sue to enjoin the removal of county records from a place alleged to be the county seat to a place claiming to be legally selected as such county seat and to test the legality of such selection, where there is no plain, speedy and adequate remedy at law.—*Doan v. Commrs. Logan County*, 3 Idaho, 26 Pac. 167.

An injunction will not issue upon the application of a person holding a license authorizing such person to sell and dispose of intoxicating liquors in a county, to restrain the prosecuting attorney from enforcing the local option statute in said county, upon the ground that such statute has not been legally adopted by the electors of said county.—*Nims v. Gilmore*, 17 Idaho, 609, 107 Pac. 79.

Editorial Notes.

Injunction against sale of property for illegal taxes: 69 Am. Dec. 198; 49 Am. Rep. 287; 23 Am. Rep. 622; 53 Am. Rep. 110.

Injunction to restrain the collection of taxes and assessments: 69 Am. Dec. 198; 22 L. R. A. 699.

Injunction against illegal acts of municipal and other public corporations: 2 Am. St. Rep. 92.

Injunction against enactment of void municipal ordinances: 36 Am. St. Rep. 449; Ann. Cas. 1913E, 96.

Injunction against enforcement of void municipal ordinances: 118 Am. St. Rep. 372.

Right of individual to enjoin acts of public officials: 3 Ann. Cas. 1013; 15 Ann. Cas. 1173.

Injunction by taxpayer against unlawful expenditures by municipality: 36 L. R. A., N. S., 1.

(F) PUBLIC WELFARE, PROPERTY AND RIGHTS.

(No paragraphs.)

(G) PERSONAL RIGHTS AND DUTIES.**(No paragraphs.)****(H) CRIMINAL ACTS, CONSPIRACIES AND PROSECUTIONS.****Restraint enforcement of local option statute for illegality of act. See ante, II, (E).****As interfering with property right. See ante, II, (E).**

A court of equity has no jurisdiction to restrain or prevent crime, or to enforce a moral duty, except so far as the same is connected with the rights of property.—*McGinnis v. Friedman*, 2 Idaho, 393, 17 Pac. 635.

Editorial Notes.

Injunction against crimes and criminal prosecutions: 35 Am. St. Rep. 670; 1 Ann. Cas. 12; 19 Ann. Cas. 459.

III. ACTIONS FOR INJUNCTIONS.

The question of nonjoinder of parties plaintiff is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury.—*Gilpin v. Sierra Nevada etc. Co.*, 2 Idaho, 696, 23 Pac. 547, 1014.

Where a complaint prays for an injunction and for damages, the proper procedure is to try the equitable part of the action and then, if a jury is demanded, submit the question of damages to the jury at the same term; and the question of damages should not be postponed until a subsequent term.—*Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891.

Where, in an action for an injunction, some of the allegations of the complaint are positive and others are made on information and belief, and the court permits the plaintiffs to file affidavits showing the sources of information and the basis of belief, an injunction may be granted if the facts warrant it.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

Under R. S. 4288, providing when an injunction may be granted, the fact that the equities of the complaint are all denied by the answer will not prevent the granting of an injunction.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.**(A) GROUNDS AND PROCEEDINGS TO PROCURE.**

An undertaking for an injunction is sufficient without the signature of the plaintiff in the action.—*Pence v. Durbin*, 1 Idaho, 550.

Under our statute in a bond or undertaking for an injunction for \$2,000 or less, a surety cannot justify in a sum less than that named as a penalty in the bond or undertaking.—*Dangel v. Levy*, 1 Idaho, 722.

It is incumbent on the party seeking relief by interlocutory injunction to show some clear, legal or equitable right, and a well-grounded apprehension of immediate injury to those rights.—*McGinnis v. Friedman*, 2 Idaho, 393, 17 Pac. 635.

Under R. S. 4297, prescribing the proceedings on the hearing of an application for an injunction by an order to show cause, it is only where the party opposing the motion or required to respond to the order to show cause has by notice required the moving party to produce the affiants of his affidavits, at the hearing for cross-examination, that such opposing party is authorized or required to produce witnesses upon the hearing.—*Raft River etc. Co. v. Langford*, 6 Idaho, 30, 51 Pac. 1027.

Where an order to show cause why an injunction should not issue is apparently heard by consent or agreement of the parties before the judge at chambers, without any attempt to comply with R. S. 4297, which prescribes the proceedings on the hearing of such application on motion, the prevailing party is entitled to tax as costs the fees of his witnesses.—*Raft River etc. Co. v. Langford*, 6 Idaho, 30, 51 Pac. 1027.

Act of March 8, 1895, section 5, makes it the duty of the court reporter to furnish on the application of any party to a suit in which a stenographic record has been made, a typewritten copy of the record, or any part thereof, on payment of his fees therefor, to be paid by the party requesting the same and to be taxed as costs in the case against the party finally defeated in the action. Held, that the stenographic record of proceedings before the judge at chambers upon a motion to show cause was properly charged for by the appellant prevailing, such record being necessary for the proper presentation of his appeal.—*Raft River etc. Co. v. Langford*, 6 Idaho, 30, 51 Pac. 1027.

Under R. S. 4293, providing that an injunction to suspend the general and ordinary business of a corporation cannot be granted without due notice, an injunction to restrain the collection of taxes to be applied in payment of the construction of services should not be granted without notice.—*Wilson v. Boise City*, 7 Idaho, 69, 60 Pac. 84.

Under R. S. 4288, providing when an injunction may be granted, a temporary injunction may be granted to restrain a trespasser from removing timber cut upon land claimed by plaintiff, pending an action to establish plaintiff's title.—*Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67.

An undertaking given on procuring an injunction is not invalid for failure to comply with R. S. 4934, requiring the sureties thereon to make affidavit that they are residents and householders or freeholders within the territory, etc., since such affidavit is no part of the undertaking.—*Wilson v. Eaglesen*, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613.

A complaint for an injunction alleged that plaintiff had under the provisions of his lease sublet two of his office rooms, that thereafter plaintiff and the sublessee had opened their offices for business, that the rents were paid as they became due, that the original lessor had thereafter sold the premises to the defendant National Bank, that the defendant V., under contract with the bank, began to make changes and repairs about the building

and in doing so tore down and destroyed the partition between plaintiff and the adjoining rooms and injured and damaged some of the personal property and office furniture of the plaintiffs, that excavations were made in front of plaintiffs' offices, rendering them inaccessible to their patrons and clients, that defendant V. had commenced to construct a large brick wall which he threatened to build into and through the offices of plaintiffs, rendering them unfit for occupation, that defendant bank had threatened to oust and eject plaintiffs from their rooms, and that they were willfully and maliciously committing various trespasses for the purpose of annoying plaintiffs and driving them from their rooms, that said acts were done in pursuance of a conspiracy between the defendants, and that either defendant V. or the bank officials had caused plaintiffs' water supply to be shut off. Held, that the complaint stated a cause of action and on its face entitled plaintiffs to a temporary injunction against defendant V.—*Meyer v. First Nat. Bk.*, 10 Idaho, 175, 77 Pac. 334.

An undertaking must be given before granting a temporary injunction.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

Plaintiffs alleged that they had leased certain land and farmed and cultivated it, that defendants entered and plowed up a part thereof, and that at the time of the commencement of the action, defendants were cutting and removing plaintiffs' crops to their damage in the sum of \$2,000. Plaintiffs also filed affidavits that defendants were wholly insolvent. Defendants claimed that they entered the premises after a breach of the terms of the lease by the plaintiff and in pursuance of a stipulation contained in the lease. They also filed affidavits tending to show that they were able to respond in damages in at least the sum of \$500. Held, that there was no abuse of discretion in granting a temporary injunction to hold the property in statu quo pending the litigation, on the delivery of the requisite bond by plaintiffs.—*Shields v. Johnson*, 10 Idaho, 454, 79 Pac. 394.

Under R. S. 4289, where an injunction is granted on the complaint alone, it must be granted at the time the summons issues, and it cannot be granted thereafter on the complaint alone.—*Powell v. Springston Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

In an action to determine the right of possession and ownership of certain mining ground, the complaint and affidavit of plaintiff showed that defendants had threatened to assault plaintiffs and their employees if they appeared upon or undertook to do any work on such mining claim. These allegations were denied by defendants. Held, that an injunction pendente lite should be granted restraining defendants from interfering with plaintiff in the performance of any necessary location work on said claim.—*Safford v. Fleming*, 13 Idaho, 271, 89 Pac. 827.

Under R. S. 4291, it is error to grant a temporary injunction without requiring a proper undertaking.—*Wiles v. Northern Star Min. Co.*, 13 Idaho, 326, 89 Pac. 1053.

Where an affidavit is made for the purpose of procuring an injunction, it should be made by one who knows the facts, and if the affidavit is made by the attorney on information and belief, he should show the sources of his information and belief and the reasons why the affidavit is not made by the party who personally knows the facts.—*Wiles v. Northern Star Min. Co.*, 13 Idaho, 326, 89 Pac. 1053.

The granting of an injunction is a matter of judicial discretion, and the granting of a preliminary restraining order ex parte rests still more largely in the discretion of the court or judge.—*Roberts v. Kartzke*, 18 Idaho, 552, 111 Pac. 1.

The granting of a preliminary restraining order during the pendency of an action is in the sound discretion of the court.—*Angell v. Continental Oil Co.*, 19 Idaho, 746, 115 Pac. 692.

In a controversy between opposing factions of a religious organization, plaintiffs obtained an ex parte injunction restraining defendants from using a church, which was thereafter dissolved on motion of defendants. Plaintiffs appealed and at the same time gave notice of a second like application. On the return day defendants answered and also asked for a temporary injunction restraining plaintiffs from interfering with their possession of the church. The trial court thereupon fixed certain times at which each faction could use the church without interference from the other. Held, that the trial court had jurisdiction to make the order.—*Wayne v. Alspach*, 20 Idaho, 144, 116 Pac. 1033.

As a general proposition, a mandatory injunction will not lie to compel the destruction of buildings or structures prior to a hearing and determination of the case on its merits. *Ryan v. Weiser Valley etc. Co.*, 20 Idaho, 288, 118 Pac. 769.

When a restraining order or an injunction is sought upon the complaint itself, before it has been filed, and the judge makes an order directing the writ to issue, such practice is regular and not in conflict with our statutes. *Elmore County etc. Assn. v. Stockslager*, 22 Idaho, 420, 126 Pac. 616.

Where the complaint alleges, in an action to recover personal property, that the plaintiff is the owner and entitled to the possession of the property, and the defendant denies the allegations of the complaint, and the defendant claims the right to possession under a levy of execution, in an action against a stranger to the present action, the complaint states a cause of action; and, upon such complaint, the plaintiff is entitled to a temporary injunction restraining the sale pending the trial of the case upon the merits. *McMahon v. Cooper*, 23 Idaho, 413, 130 Pac. 456.

The general rule adopted by courts in granting an injunction pendente lite is more liberal than is applied upon the trial of the cause upon its merits.—*Boise Dev. Co. v. Idaho Trust etc. Bank*, 24 Idaho, 36, 133 Pac. 916.

Editorial Notes.

Right to grant temporary injunction before institution of action: Ann. Cas. 1913E, 462.

Mandatory injunction: 20 Am. Dec. 389.

Right to preliminary injunction which would have effect of transferring possession of property from defendant to plaintiff: 39 L. R. A., N. S., 31.

(B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.

In a suit for an injunction the rule that defendant is entitled to a dissolution thereof on denial of the equities of the complaint will not apply if facts are admitted which qualify a general denial, or if the denial be evasively made, or if, on examination of the circumstances, the court deems that the facts warrant the continuance of the injunction.—*Oro Fino Mining Co. v. Cullen*, 1 Idaho, 113.

A party denying the allegations of the bill in equity, and desiring to procure a dissolution of the injunction on the ground that the equities of the bill are denied, must directly and unequivocally deny every material allegation of such bill; he must not undertake to set up new facts or to confess and avoid.—*Oro Fino Mining Co. v. Cullen*, 1 Idaho, 113.

Where the whole equity of the complaint is denied by the answer, the defendant is entitled to a dissolution of the injunction pendente lite until the plaintiff's title is established by proper evidence on the hearing of the cause.—*Oro Fino Mining Co. v. Cullen*, 1 Idaho, 113.

Under R. S. 4295 no notice is required on application to dissolve a temporary injunction, where such application is based on the papers on which the injunction issued and no counter-affidavits can be used in opposition to such motion; but where such motion is based on new pleadings or affidavits, notice must be given and affidavits in opposition to such motion should be considered when offered.—*Thayer v. Bellamy*, 9 Idaho, 1, 71 Pac. 544.

Action was brought to restrain a foreign corporation from building a dam. No service was made on the corporation, but their contractors in charge of the work were served with notice of the injunction issued. The contractors moved to dissolve the injunction, their affidavits showing that the damage therefrom would result solely in stopping the work. Held, that the motion should be denied, the contractor having his remedy for damages against his employer for injuries resulting from the injunction.—*Smith v. Alberta etc. Co.*, 9 Idaho, 399, 74 Pac. 1071.

Under R. S. 4295, providing when an injunction may be vacated on motion, when an adverse party moves to dissolve a temporary injunction upon the papers on which it was granted, no notice is required to be given to the party who obtained the injunction.—*Meyer v. First Nat. Bk.*, 10 Idaho, 175, 77 Pac. 334.

Where a temporary injunction is continued on condition that plaintiffs file an undertaking in a specified sum, there is no injunction pending if plaintiffs fail to file the under-

taking.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

The failure to give a bond at the time a temporary injunction is issued will not prevent the judge or court from granting a temporary injunction on the hearing of an order to show cause made at the same time as the original temporary injunction.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

Where the district judge grants a temporary injunction at the time the summons issues, and thereby directs defendant to appear at a specified time and show cause why the injunction should not be continued pendente lite, and the sheriff is unable to find any agent of defendant on whom process may be served and returns the writ unserved, and the judge thereupon issues a second order in the same form and of the same effect, fixing the return day at later date, which order is likewise not served for the same reason, and a third order is issued fixing the return date still later, and the last order is duly served, the fact that no affidavits were filed prior to issuance of the second and third orders is not ground for dissolving the injunction as being in violation of R. S. 4289. *Powell v. Springston Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

Where a railway company built its railroad across land belonging to the United States, and was operating the same as a part of its railway system, and thereafter a mining claim is located on said right of way, and it is made to appear by the complaint and an affidavit filed on behalf of the company that the owners of such mining claim are working the same in a manner that interferes with the railroad company and its employees in operating its railway, and it appears from the answer and cross-complaint of the defendants that they claim that the railway company acquired by reason of its being within a forest reserve, and the court grants an injunction pendente lite, ousting the mining claimants from the possession of said land and enjoining them from in any manner interfering with the railroad company in its possession of said land, held, that such injunction must be modified to the extent and in a manner to permit the mining claimants to retain such possession of said claim as will in no manner interfere with the railroad company in its occupation and possession of said land, and in the operation and conduct of its railroad business, until the final determination of the action.—*Chicago, M. & P. S. Ry. Co. v. Ferrell*, 20 Idaho, 680, 119 Pac. 703.

Editorial Notes.

Attorney's fees, on the dissolution of injunction: 77 Am. Dec. 158; Ann. Cas. 1912D, 715; 8 Ann. Cas. 712; 13 Ann. Cas. 202; 16 L. R. A., N. S., 50; 33 L. R. A., N. S., 844.

Order made on motion to dissolve temporary injunction as final or interlocutory: Ann. Cas. 1912C, 898.

V. PERMANENT INJUNCTION AND OTHER RELIEF.

An injunction cannot be granted in futuro or on condition that no appeal is taken from

such order.—Porter v. Speno, 13 Idaho, 600, 92 Pac. 367.

On an application to enforce an injunction, a court has the authority to deny such application and make an order suspending the operation of the injunction pending an appeal. Waters v. Dunn, 18 Idaho, 450, 110 Pac. 258.

VI. WRIT, ORDER OR DECREE, SERVICE AND ENFORCEMENT.

An order reciting that sufficient grounds exist for an injunction and enjoining defendants from doing certain acts contained the provision "the injunction will not be in effect until the expiration of thirty days from the filing of this order, and will be then in effect if no appeal is then perfected to the supreme court." Held, that this is not an order granting an injunction and an appeal therefrom will be dismissed on motion.—Porter v. Speno, 13 Idaho, 600, 92 Pac. 367.

The injunctive remedy to prevent the continuance of the diversion of the water of a stream to the detriment of a prior appropriator of the waters thereof operates in personam, and where personal service has been had upon the defendant in the action for injunction, the court has jurisdiction to award the injunctive relief, and such decree is entitled to full faith and credit in the courts of every other state.—Taylor v. Hulett, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37.

The fact that a defendant against whom a writ of injunction is ordered goes beyond the jurisdiction of the state, and cannot be reached by the courts in order to punish him for contempt, does not avoid the judgment and decree, but the same may be enforced by going into the state where defendant can be personally served and on the decree of this court obtaining an injunction of like effect.—Taylor v. Hulett, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37.

The order directing the writ of injunction to issue is not the writ.—Elmore County etc. Assn. v. Stockslager, 22 Idaho, 420, 126 Pac. 616.

Editorial Notes.

Injunction, when becomes binding on the enjoined parties: 55 Am. Dec. 722.

VII. VIOLATION AND PUNISHMENT.

(No paragraphs.)

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

Causes of action growing directly out of the breach of an undertaking for an injunction can be the subject of but one action.—Pence v. Durbin, 1 Idaho, 550.

A complaint on an injunction bond alleging that plaintiff was damaged by the injunction "in the sum of \$300, cash paid B. for legal services; in the sum of \$200, cash paid E. for legal services," etc., is not demurrable on the ground that several causes of action are improperly united.—Dangel v. Levy, 1 Idaho, 722.

Where an undertaking for an injunction was executed and delivered after an erasure had been made, it cannot be presumed that the obligee was a party to such alteration or erasure.—Dangel v. Levy, 1 Idaho, 722.

A complaint in an action on an injunction bond, reciting that the principal and sureties "do jointly and severally undertake, etc., that in case the said injunction shall issue the said principal will pay such damages," etc., need not allege the insolvency of the principal, since the obligation to answer in damages, by the sureties on the bond, was not dependent on the insolvency of the principal but became absolute by the terms thereof when the court should finally decide that plaintiff was not entitled to an injunction.—Dangel v. Levy, 1 Idaho, 722.

It is no defense to a suit on an injunction bond that the injunction suit was brought against the wrong parties.—Boise City v. Randall, 8 Idaho, 119, 66 Pac. 938.

It is no defense to a suit on an injunction bond that the suit in which the bond was given was not a suit in which an injunction should issue.—Boise City v. Randall, 8 Idaho, 119, 66 Pac. 938.

Where a suit is brought against the mayor and common council of a city to restrain the letting of a contract and the suit is thereafter dismissed by plaintiff, the city is authorized by R. S. 4090 to bring an action on the injunction bond, as it is the real party in interest.—Boise City v. Randall, 8 Idaho, 119, 66 Pac. 938.

Where a claim is made against the sureties on an injunction bond for costs, damages or counsel fees on breach of the bond, the sureties are entitled to their day in court and the right to defend against the demand, and it is error for the court or judge thereof to summarily enter judgment against the sureties on the dissolution of the injunction.—Dougal v. Eby, 11 Idaho, 789, 85 Pac. 102.

To collect attorney's fees on an injunction bond given under R. S. 4291, the services must have been performed principally and mainly in procuring the dissolution of the injunction, and the fact that the services rendered inured to the benefit of the main case and resulted in a final disposition of the action on its merits, cannot defeat the right to recover attorney's fees for the services rendered on account of the injunction.—Miller v. Donovan, 13 Idaho, 735, 13 Ann. Cas. 259, 92 Pac. 992.

Where an injunction was dissolved on motion on the ground that the complaint did not state facts sufficient to constitute a cause of action and at the same time a general demurrer was sustained and the action dismissed, and the plaintiff appealed, services rendered by the attorney in the appellate court in a successful endeavor to sustain the judgment of the lower court are properly allowable in a suit on the injunction bond.—Miller v. Donovan, 13 Idaho, 735, 13 Ann. Cas. 259, 92 Pac. 992.

Editorial Notes.

Recovery on injunction bond for damages sustained after injunction made permanent: Ann. Cas. 1913C, 1277.

IX. WRONGFUL INJUNCTION.

Where no bond or undertaking is required on the issuance of an injunction, there can be no liability for damages sustained on account of the injunction, unless the injunction was obtained maliciously and without probable cause.—*Doyle v. City of Sandpoint*, 18 Idaho, 654, Ann. Cas. 1912A, 210, 112 Pac. 204.

Editorial Notes.

Liability of municipality for wrongful injunction: Ann. Cas. 1912A, 212.

INQUEST.

Evidence at coroner's inquest, admissibility. See *Homicide*, VII, (D).

INSANE PERSONS.

Temporary mental disability. See *Contracts*; *Deeds*; and other specific heads.

Testamentary capacity. See *Wills*.

Competency as witnesses. See *Witnesses*, II.

Insanity at the time of commission of offense, as defense in a prosecution therefor. See *Criminal Law*.

Opinion evidence as to sanity. See *Criminal Law*; *Evidence*.

Instruction as to expert witness. See *Deeds*, IV.

Competency of grantor affecting validity of deeds. See *Deeds*, I, (E).

Defense of alcoholic insanity. See *Homicide*, IV.

Burden of proof as to insanity. See *Homicide*, VII, (A).

An insane person may not disaffirm his contract without returning the consideration. *Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

The contract of an insane person is voidable, not void.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

The right to avoid a contract made by an insane person can only be exercised by the insane person, his guardian or legal representatives and other parties to the contract who are of sound mind are not affected until it is avoided by the person entitled to disaffirm it.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

A contract made by a person, not entirely without understanding, is voidable, but not void.—*Ratliff v. Baltzer's Admr.*, 13 Idaho, 152, 89 Pac. 71.

Where a person is not entirely without understanding, and makes a contract, comprehending its full force and effect, and no fraud or deceit has been practiced on him, such contract will not be rescinded under R. S. 2411.—*Ratliff v. Baltzer's Admr.*, 13 Idaho, 152, 89 Pac. 71; *Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441.

The evidence of a layman or nonexpert witness is equally as competent as the evidence of an expert witness on the question of the sanity of a person or his incompetency to transact business at the time of the transaction in question.—*Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441.

Editorial Notes.

Contracts of insane persons and when and how may be avoided: 15 Am. Dec. 361.

Who deemed to be insane persons: 29 Am. Dec. 38.

Contracts of insane persons, when void: 21 Am. Rep. 29; 71 Am. St. Rep. 425.

Power of guardian to ratify conveyance of ward: Ann. Cas. 1912D, 704.

Validity of deeds of incompetent persons: 19 L. R. A. 489.

INSOLVENCY.

Of banks. See *Banks and Banking*, II.

Of corporations. See *Corporations*, VIII; XII, (J).

Voluntary assignments for benefit of creditors. See *Assignments for Benefit of Creditors*.

Bankruptcy under general bankrupt laws. See *Bankruptcy*.

Power of judge at chambers to allow attorney's fees against insolvent estate. See *Judges*.

A petition in insolvency should show the date of the debts, as those which existed prior to the passage of the insolvent debtor's act are not affected by it.—*Goodell v. His Creditors*, 1 Idaho, 215.

Attorneys for the assignee of an insolvent estate filed a claim for services rendered in an action in the United States court. Held, that such claim was under the control of, and should be settled by the state court and not by the United States court.—*Bank of Genesee v. Denning*, 5 Idaho, 482, 51 Pac. 406.

Reasonable and necessary attorney's fees incurred in protecting an insolvent estate should be allowed to the assignee thereof, on his application, and not to the attorney.—*Bank of Genesee v. Denning*, 5 Idaho, 482, 51 Pac. 406; *Gaffney v. Piper*, 5 Idaho, 490, 51 Pac. 99.

Orders allowing attorney's fees for services rendered the assignee of an insolvent debtor, made on ex parte application without notice to the creditors or to the assignee, either in open court or at chambers, are unauthorized. In re *Bank of Genesee v. Denning*, 5 Idaho, 482, 51 Pac. 406; *Gaffney v. Piper*, 5 Idaho, 490, 51 Pac. 99.

Under R. S. 4963, providing that the application for writ of review must be made on affidavit by the party beneficially interested, an insolvent against whom an order is made to account for certain property may bring certiorari to review such order on the ground that the court had no jurisdiction to make it.—*Madison v. Piper*, 6 Idaho, 137, 53 Pac. 395.

R. S. 5911 provides that when a creditor has a mortgage on real or personal property of the insolvent debtor, he must be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by sale thereof, to be made in such manner as the court or judge may direct, or a creditor may be allowed to prove his whole claim if he releases or conveys his claim on the property to the assignee. Held, that where a creditor of an insolvent debtor, whose claim was secured by mortgage, failed to present his claim in the insolvency proceeding and thereafter made application to have the debtor

examined, on oath, in relation to a part of the mortgaged property, and the court on such examination found that the debtor had disposed of a part of such property, the court had no jurisdiction to make an order requiring the debtor to account to the mortgagee for such property.—*Madison v. Piper*, 6 Idaho, 137, 53 Pac. 395.

Promissory notes, assigned to a nonresident as collateral security, before maturity and for a valuable consideration, are not barred by the discharge of the maker thereof in insolvency proceedings, unless the holder thereof has submitted himself to the jurisdiction of the court in which such insolvency proceedings were instituted.—*Security Savings etc. Co. v. Rogers*, 6 Idaho, 526, 57 Pac. 316.

The insolvency laws of a state have no extraterritorial operation, and cannot operate on nonresidents, unless they submit themselves to the jurisdiction of such laws.—*Security Savings etc. Co. v. Rogers*, 6 Idaho, 526, 57 Pac. 316.

Where obligations have been incurred in this state, and the creditor is seeking to enforce the obligation under the laws of this jurisdiction, and he establishes the inability of the debtor to respond so far as his property or assets within the state are concerned, a prima facie case of insolvency of such debtor is shown.—*California etc. Min. Co. v. Manley*, 10 Idaho, 786, 81 Pac. 50.

Editorial Notes.

- Insolvency, discharge in, what demands may be affected by: 23 Am. Dec. 347.
- Nonresidents, whether affected by discharges granted in insolvency: 15 Am. St. Rep. 212; 62 Am. St. Rep. 233.

INSURANCE.

- I. CONTROL AND REGULATION IN GENERAL.
- II. INSURANCE COMPANIES.
- III. INSURANCE AGENTS AND BROKERS.
- IV. INSURABLE INTEREST.
- V. THE CONTRACT IN GENERAL.
- VI. PREMIUMS, DUES AND ASSESSMENTS.
- VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.
- VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.
- IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.
- X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.
- XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.
- XII. RISKS AND CAUSES OF LOSS.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

XIV. NOTICE AND PROOF OF LOSS.

XV. ADJUSTMENT OF LOSS.

XVI. RIGHT TO PROCEEDS.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

XVIII. ACTIONS ON POLICIES.

XIX. REINSURANCE.

XX. MUTUAL BENEFIT INSURANCE.

Raising questions of limitations on appeal, but not in trial court. See *Appeal and Error*, V, (A).

Evidence not admissible to show defendant protected by casualty insurance. See *Master and Servant*, III, (H).

Beneficial association. See *Associations*.

Taxation of capital stock or property of insurance companies. See *Taxation*.

I. CONTROL AND REGULATION IN GENERAL.

Taxation of insurance company. See *Taxation*, III, (B).

A license granted to an insurance company to do business in this state does not authorize it to engage in the business of loaning money in the state.—*State v. Union Central Life Ins. Co.*, 8 Idaho, 240, 67 Pac. 647.

Laws 1903, pages 74–81, providing for the organization of mutual insurance companies to insure against loss by fire, lightning, fidelity of persons, etc., does not render such companies subject to the provisions of the law of 1901, so as to be required to pay two per cent on the net earnings of such companies under the provisions of the law of 1901. *Idaho Mut. Co-op. Ins. Co. v. Myer*, 10 Idaho, 294, 77 Pac. 628.

It is within the power of the legislature of this state to enact a statute which prescribes the conditions upon which life insurance companies may do business within the state, and to prescribe the form and conditions of the policies issued by such companies.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

Laws 1911, chapter 228, page 732, section 42, subdivisions 1, 7 and 10, which regulate and fix the rate of interest to be charged by life insurance companies doing business within the state, upon loans of money upon the policy and forbearances in the collection of dues upon the policy, are provisions which are required to be made a part of the policy of life insurance, and are not independent conditions or agreements.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

Where a policy of life insurance makes one of the conditions of the policy that the company will loan money upon the policy issued by the company, at a fixed rate of interest and upon indulgences and forbearances, the company cannot successfully contend that such part of the agreement thus made is not a part of the insurance policy, and therefore the company issuing the same is not governed by a statute regulating the right to do business within the state by such insurance com-

pany.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

The requirement of Laws 1911, chapter 228, page 732, that a life insurance policy shall contain as a part of the policy a table of cash, paid-up, and extended insurance options available under the policy for a period up to the age of ninety-six years, is not an unfair or unreasonable requirement, and may be enforced by the insurance commissioner of the state.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

Whether or not loaning money on life insurance policies is peculiar to life insurance companies will not render the provisions of a statute void, which require life insurance companies to make such provisions a condition in the policy of insurance issued by a life insurance company as a condition for such insurance companies doing business in the state.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

The form of policy involved in this case and presented by plaintiff to the defendant, for approval, and upon which permission to do business is asked, in its terms contains the provisions required by Laws 1911, chapter 228, page 732, except the rate of interest is designated to be six per cent, instead of five per cent as designated in the statute, and these conditions and privileges are granted by the company to the insured and are an integral and essential part of the contract of insurance made between the company and the insured.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

The fact that other states have passed laws regulating the doing of life insurance business within such states, which are different from the laws of the state of Idaho, is no reason for this court to hold that a regulation made by the legislature of the state of Idaho is unconstitutional, unfair, or unreasonable.—*Continental Life etc. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81.

II. INSURANCE COMPANIES.

Act authorizing mutual companies for fire, tornado, etc., insurance not class legislation. See Constitutional Law.

Regulation of foreign insurance companies. See ante, I.

III. INSURANCE AGENTS AND BROKERS.

Agents of mutual benefit insurance associations. See post, XX.

Estoppel of insurer by acts, conduct, or statements of agent. See post, XI.

Knowledge of agent as imputable to companies. See post, V, XI.

Extending credit for premium. See post, VI.

Agent of noncomplying foreign insurance company held not an innocent purchaser of premium note. See Bills and Notes, V, (D).

Where an agent of a fire insurance company, with authority to write policies, makes an agreement with an insured that he will write a policy of insurance, and look after it, and continue it during the life of a loan made to the insured, and the policy is written and left with the agent for safekeeping, such

agent has authority to renew said policy and continue the insurance, and, when a new policy is issued and retained by the agent for safekeeping, it is a valid policy, and binds the fire insurance company until canceled.—*Marysville Mer. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

Editorial Notes.

Right of insurance agent to commissions on renewal premiums after termination of agency: *Ann. Cas. 1912A*, 529.

Construction of clause in standard fire insurance policy providing that agent must have written authority: *Ann. Cas. 1912C*, 367.

Who is agent of insurance company so as to make his knowledge imputable to company: *Ann. Cas. 1913A*, 849.

Insurance broker as agent for insured: 38 L. R. A., N. S., 614.

IV. INSURABLE INTEREST.

Mutual benefit insurance. See post, XX.

V. THE CONTRACT IN GENERAL.

Forfeiture for breach of condition. See post, X.

Form of policy as affecting right of foreign insurance companies to do business in state. See ante, I.

Plaintiff applied to defendant's agent for fire insurance and received from the agent a receipt, acknowledging the receipt of the application, "subject to the approval of C., Manager," also the receipt of one note and \$15 in cash, all to be returned if policy is not issued. The receipt, signed by the agent, also provided that "if policy is not received within thirty days from the date of this receipt, report that fact to C., manager," etc. Within thirty days, C. notified the agent by letter that the company declined the risk, returning to him the application and premium. Plaintiff testified that neither the application nor premium had been returned to him; nor had he ever notified the manager of the non-receipt of the policy. The property was destroyed by fire about seven weeks after the date of application. Held, not to show a contract of insurance.—*Easley v. New Zealand Ins. Co.*, 5 Idaho, 593, 51 Pac. 418.

Where an insurance policy provides that it shall be avoided if the property be encumbered, if the title of the insured be other than "unconditional and sole ownership" or if the subject of insurance be a building on ground not owned by the insured in fee simple, such conditions are conditions precedent to be performed or made to exist prior to the consummation of the contract and delivery of the policy, but the fact of the delivery of the policy raises the prima facie presumption that those facts were all found by the insurer to exist before the policy was delivered.—*Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 10 Ann. Cas. 328, 8 L. R. A., N. S., 903, 88 Pac. 245.

Whatever knowledge an insurance adjuster obtains within the scope of his authority as adjuster, with reference to a breach of conditions precedent in the policy, will be im-

puted to the company.—*Allen v. Phoenix Assur. Co.*, 14 Idaho, 728, 95 Pac. 829.

Where an application for an insurance policy contains certain questions, some of which are answered and others not, and the policy is written, based on that application, which is the only information the insurer has, the application becomes a part of the contract and the insurer is bound by the conditions and provisions thereof to the same extent and with the same effect as is the insured by the terms and conditions of the policy.—*Allen v. Phoenix Assur. Co.*, 14 Idaho, 728, 95 Pac. 829.

An insurance company, which accepts an application from a soliciting agent, not in its regular employ, and receives the premium for the policy through said agent, and writes and delivers the policy on such application and the payment of the premium, thereby makes such person its agent for the purpose of receiving applications for insurance and is bound by his acts; and his knowledge of the risk and conditions relating to the insurance will be imputed to the company.—*Allen v. Phoenix Assur. Co.*, 14 Idaho, 728, 95 Pac. 829.

Where an agent for a fire insurance company has power to issue and renew policies, and is intrusted with forms of policies to be written, issued, and delivered, after being signed by such agent, and such agent instructs a clerk to issue a policy, and the policy is issued and left with the bank, of which said agent is cashier, for safekeeping in accordance with an agreement with the insured, the contract of insurance becomes complete and effective, and the actual personal delivery of such policy to the insured is not required, as the possession of the person with whom such policy is to be left for safekeeping under such agreement between the agent and the insured is equivalent to the possession of the insured.—*Marysville Merc. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

Where a local agent of a fire insurance company has power to write, issue, and sign insurance policies, and is furnished by the company with forms of policies to be written and to be signed by the agent, full power is conferred upon such agent to write, issue, and deliver policies of insurance upon application, and such policies become effective upon the writing and delivery by such agent, unless the company cancels such policies, and the authority of such agent extends to renewals of policies previously issued upon request of the insured, and they become effective upon the expiration of the original policy.—*Marysville Merc. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

The covenant in an employer's liability insurance policy "to pay the expense of litigation," and, also, "the company will, at its own cost, defend such suit in the name and on behalf of the assured," are clear and express promises, and an agreement on the part of the insurance company that the company will pay the costs incurred in defending a suit for damages against the assured, where payment of the sum insured is refused by the insurance company.—*Coast Lumber Co. v.*

Aetna Life Ins. Co., 22 Idaho, 264, 125 Pac. 185.

Editorial Notes.

Insurance against fire, change of title, sale by one partner to another, whether amounts to: 49 Am. Rep. 22; 52 Am. Rep. 442.

Contract of insurance, when complete: 69 Am. St. Rep. 143.

Delivery and acceptance of policy: 138 Am. St. Rep. 29.

Rule that doubtful terms in insurance policy must be construed favorably to insured as applicable to standard policy: Ann. Cas. 1913E, 287.

VI. PREMIUMS, DUES AND ASSESSMENTS.

The payment of premium upon an insurance policy at the time the policy is delivered is not a condition precedent to the existence of a policy of insurance, as the company may, through its agent, extend credit for the premium, and, if this is done, the contract of insurance will be binding upon the company without the actual payment of the premium. *Marysville Merc. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

Editorial Notes.

Act of God as excuse for failure to pay fire insurance premium: Ann. Cas. 1912B, 375.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

Assignment of policy as collateral security as forfeiture of policy. See post, X.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

(No paragraphs.)

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(No paragraphs.)

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

Necessity of pleading breach of condition. See post, XV.

Estoppel or waiver of right to avoid or forfeit policy. See post, XI.

A fire insurance policy on plaintiff's flouring-mill provided that the policy "shall be void if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." Owing to the freezing of water during the winter months the mill could not operate. The machinery remained in the building and the building in possession of the owners. The policy prohibited the operation of the mill after 10 o'clock at night

judgments.—*Bashor v. Beloit*, 20 Idaho, 592, 119 Pac. 55.

Under R. C. 1537, subd. 4, seven per cent interest is allowed for money due on judgments, and under the provisions of R. C. 1538 all money judgments bear interest at the rate of seven per cent per annum until satisfied. Held, that the total amount of the judgment, including costs and interest due at the date of the judgment and included therein, bears seven per cent interest.—*Bashor v. Beloit*, 20 Idaho, 592, 119 Pac. 55.

Editorial Notes.

Interest, agreement to pay a higher rate after maturity or after a date specified: 63 Am. Dec. 438.

Interest, when allowable in the absence of an express contract: 28 Am. Rep. 314.

When continues at conventional rate after maturity: 30 Am. Rep. 47; 34 Am. Rep. 253; 47 Am. Rep. 70.

Compound interest, when not recoverable: 34 Am. Rep. 101.

Increase of interest after maturity, provisions for, when valid: 53 Am. Rep. 21; 91 Am. St. Rep. 584.

Acceptance of principal sum as affecting right to interest: 40 L. R. A., N. S., 588.

INTERNAL REVENUE.

Licenses under state laws. See Licenses.

License of particular occupations, etc., for purpose of regulation thereof. See *Hawkers and Peddlers*; *Intoxicating Liquors*; and titles of particular occupations, etc.

INTERNATIONAL LAW.

Rights and disabilities of aliens. See *Aliens*.

Treaties and conventions between nations. See *Treaties*; *Extradition*.

INTERPLEADER.

Interpleader incidental to other remedies. See *Attachment*; *Execution*.

Intervention and substitution of parties in general. See *Parties*, III.

Jurisdiction to order moneys or property held for third person to be deposited in court. See *Deposits in Court*.

Interpleader as waiver of right to lien. See *Mechanics' Liens*, VI.

INTERSTATE COMMERCE.

See *Commerce*.

INTOXICATING LIQUORS.

I. POWER TO CONTROL TRAFFIC.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

III. LOCAL OPTION.

IV. LICENSES AND TAXES.

V. REGULATIONS.

VI. OFFENSES.

VII. ACTIONS FOR PENALTIES.

VIII. CRIMINAL PROSECUTIONS.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

X. ABATEMENT AND INJUNCTION.

XI. CIVIL DAMAGE LAWS.

XII. RIGHTS OF PROPERTY AND CONTRACTS.

Judicial notice as to whether local option statute is in force. See *Criminal Law*, X, (A).

Intoxication connected with homicide cases. See *Homicide*.

Use of liquors by jurors in criminal prosecutions. See *Criminal Law*.

Grantor's intoxication as affecting validity of deed. See *Deeds*, I, (B).

Necessity of pleading intoxication of maker as defense to action on bank check. See *Bills and Notes*, VIII.

Defense of alcoholic insanity. See *Homicide*, IV.

Refusal of carrier to accept interstate shipment of liquor shipped into "dry" territory. See *Carriers*, II.

I. POWER TO CONTROL TRAFFIC.

The right to sell liquor is not an inherent right of the citizen.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27; *Mix v. Board of Commrs.*, 18 Idaho, 695, 112 Pac. 215.

The legislature has the authority, under its police power, to regulate the manufacture and sale of intoxicating liquors or to absolutely prohibit such manufacture or sale.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

A city may by ordinance prohibit females from entering places where intoxicating liquors are sold for immoral purposes.—*State v. Nelson*, 10 Idaho, 522, 109 Am. St. Rep. 226, 3 Ann. Cas. 322, 67 L. R. A. 808, 79 Pac. 79.

A city ordinance making it a misdemeanor for the proprietor of a place where intoxicating liquors are sold to permit any person or persons other than himself and family to enter such place during the hours when such place must be kept closed, as specified in the ordinance, is a reasonable regulation and not contrary to the provisions of the constitution

or general laws of the state.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

Laws 1899, page 193, section 73, subdivision 8, as amended by Laws 1907, page 518, grants to cities and villages the power and authority to "license, regulate and prohibit the selling or giving away of any intoxicating, malt, venous or fermented liquor." Const., article 12, section 2, provides that "any county or incorporated city or town may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Held, that, under its police power, a city or village may by ordinance prohibit the sale or giving away of intoxicating liquors within its limits.—*Gale v. City of Moscow*, 15 Idaho, 332, 97 Pac. 828.

Under the constitution of this state, no person has any vested right to engage in the sale of intoxicating liquor, and the regulation, control, or prohibition of the same is a proper exercise of the police power of the state; and in the exercise of such power the legislature may enact a statute licensing, regulating, or prohibiting such sale and disposition.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

Whenever the legislature enacts a general law declaring a state policy in regard to the regulation of the sale of intoxicating liquors, such law supersedes any special charter rights that cities within the state have been given in regard thereto.—*Mix v. Board of Commrs.*, 18 Idaho, 695, 112 Pac. 215.

Editorial Notes.

Regulation or prohibition of sales of intoxicating liquors by the state: 35 Am. Dec. 331; 2 Ann. Cas. 98; 15 L. R. A., N. S., 908.

Municipal corporations, power of to regulate the business of dealing in intoxicating liquors: 114 Am. St. Rep. 298.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

Power to control traffic in general. See ante, I.
Ordinance infringing on personal liberty. See Constitutional Law, V.

Ordinance requiring license fee as class legislation. See Constitutional Law, IX.

Ordinance regulating hours of sale as denying equal protection of laws. See Constitutional Law, X.

Ordinance regulating hours of closing as taking property without due process of law. See Constitutional Law, XI.

Validity and sufficiency of provisions in general. See Statutes, I, (B).

Local option statute as local or special legislation. See Statutes, II.

Subjects and titles of acts. See Statutes, III.

Subjects and titles of ordinances. See Municipal Corporations.

Amendment of statute. See Statutes, IV.

Concurrent and conflicting regulations by state and municipality. See ante, I.

Liquor laws as class legislation. See Constitutional Law, IX.

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Laws 1890-91, page 34, section 4, specifying \$500 as the amount to be paid for liquor licenses in any city, etc., where the total vote for governor at the last general election exceeded one hundred and fifty votes and \$300 per year in all other cities, etc., provides a reasonably fair and just standard for graduating liquor licenses and is a valid police regulation.—*State v. Doherty*, 3 Idaho, 384, 29 Pac. 855.

Laws 1890-91, page 34, section 4, specifying \$500 as the amount to be paid for liquor licenses, in any city, etc., where the total vote for governor at the last general election exceeded one hundred and fifty votes and \$300 per year in all other cities, etc., is not in conflict with Const., article 7, sections 2 and 5, requiring equality and uniformity of taxation upon the same class of subjects, since such act is a police regulation and not intended as a revenue measure, and the said constitutional provisions are not applicable to mere license taxes.—*State v. Doherty*, 3 Idaho, 384, 29 Pac. 855.

An ordinance providing a fine of not less than \$25 nor more than \$200, or imprisonment in the city jail for not less than ten days and not more than sixty days for violation of an ordinance prohibiting females from entering saloons, is not void as providing an excessive penalty.—*State v. Nelson*, 10 Idaho, 522, 109 Am. St. Rep. 226, 3 Ann. Cas. 322, 67 L. R. A. 808, 79 Pac. 79.

III. LOCAL OPTION.

Offense against the local option law. See post, VI.
Criminal prosecution for violation of local option law. See post, VIII.

Laws 1909, page 9, known as the "local option law," is constitutional.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71; *Nims v. Gilmore*, 17 Idaho, 609, 107 Pac. 79.

In a judicial proceeding involving the question as to whether or not a paper has been filed, where it appears that in fact the paper was filed with the proper officer, and that the officer indorsed thereon his official character as "clerk," instead of "auditor," it is not error to permit the indorsement to be corrected in accordance with the facts, and to show that the indorsement was made by the proper official.—*O'Connor v. Board of Commrs. of Bear Lake County*, 17 Idaho, 346, 105 Pac. 560.

Under the "local option law," Laws 1909, page 9, requiring a petition for an election to be filed with the county auditor, when the petition is presented to the proper official, at a proper time, with a request that such petition be filed, and tender of legal fee, if required, the petition, in contemplation of law, is filed. *O'Connor v. Board of Commrs. of Bear Lake Co.*, 17 Idaho, 346, 105 Pac. 560.

The local option statute (Laws 1909, p. 9) contains the provision, "In all matters and proceedings not herein otherwise specified, all the provisions . . . of the general election laws of the state shall apply and be observed, as far as the same are applicable," and thus adopts and makes a part of such statute only

such provisions of the general election law as are applicable, and does not render such statute uncertain or indefinite by reason of the fact that all of the provisions of the general election law cannot be made applicable to an election held under the local option statute.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 187 Pac. 71.

By construing into the local option statute (Laws 1909, p. 9), such provisions of the general election law as are applicable, registration begins after the notice of election has been posted at such time as the registrar may determine, and, when no earlier time is fixed, on the first Saturday after such notice is given; and the registration continues from the time it commences up until and including the Saturday next preceding the time of holding such election, and registration may be had upon such days and at such times as are fixed by the registrar and upon the Saturday fixed by the law; and on any other day except holidays during said time of registration when application is made at the place of registration, and the registration ends on the Saturday next preceding the holding of such election, and is to be made in the manner governing registration for general elections.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

Under Laws 1909, page 12, section 9, all persons who registered for the last preceding general election are declared to be properly registered for an election held under the statute, and such electors are not required to re-register in order to vote at a special election held under the local option statute; and all persons not so registered may register for the special election according to the statute relating to registration.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

The fact that other persons hold licenses, issued prior to the passage of the local option statute, which permit them to sell and dispose of intoxicating liquors, does not prevent the local option statute from operating after its adoption, as provided therein, and prohibiting the sale and disposition of intoxicating liquors by all other persons.—*State v. Jordan*, 19 Idaho, 192, 112 Pac. 1049.

The provision in the local option statute "that no license issued prior to the passage of this act should be terminated or in any manner affected by this act, or by any election held hereunder" (Laws 1909, p. 12, sec. 8), does not prevent the creation of a county into a prohibition district upon the holding of an election, and the declaring of the result, as provided in said act.—*State v. Jordan*, 19 Idaho, 192, 112 Pac. 1049.

Editorial Notes.

Local option laws, constitutionality of: 114 Am. St. Rep. 317; 1 L. R. A., N. S., 483.

IV. LICENSES AND TAXES.

Liability of sheriff's surety to pay over liquor license tax. See *Sheriffs and Constables*, IV.

Power to control traffic in general. See ante, I.

Ordinance requiring license fee as class legislation. See *Constitutional Law*, IX.

Pleading and proof as to license. See post, VIII.

The taking out of a license to sell intoxicating liquors creates no contract between the holder of the license and the people.—*People v. Griffin*, 1 Idaho, 476.

Laws 1895, page 82, section 4, provides that the amount to be paid by each applicant for a liquor license shall be \$500 for each year in any city, town, village or hamlet, where, at the last general election next preceding the date of the application for license, the total vote for governor exceeded one hundred and fifty votes, and \$300 per year in all other cities, towns, villages or hamlets. Held, that the polling list is the only evidence available or permissible to establish the facts required by the statute upon which to fix or base the amount of license to be required.—*Normoyle v. Latah County*, 5 Idaho, 19, 46 Pac. 831.

Laws 1895, page 82, section 4, provides that the amount to be paid by each applicant for a liquor license shall be \$500 for each year in any city, town, village or hamlet, where, at the last general election next preceding the date of the application for license, the total vote for governor exceeded one hundred and fifty votes, and \$300 per year in all other cities, towns, villages or hamlets. Held, that in a precinct having only one polling place and including within its limits an incorporated town, city or village, the number of votes cast in such precinct is the criterion governing the amount of the license.—*Normoyle v. Latah Co.*, 5 Idaho, 19, 46 Pac. 831.

The action of the board of commissioners in refusing a license to an applicant to sell liquors not to be drank in or about the premises where sold, cannot be interfered with or controlled by writ of mandate.—*I. A. West & Co. v. Board of Commrs.*, 14 Idaho, 353, 94 Pac. 445.

Laws 1891, page 33, repealing R. S. 1648, requires applications for license to sell intoxicating liquors to be made to the board of county commissioners, and provides that they shall grant a license on giving the bond required. Laws 1895, page 82, added to Laws 1891, page 33, another section, section 23, which authorized the issuing of a license to persons selling liquors not to be drank in, on or about the premises where sold. Laws 1899, page 21, re-enacted Laws 1895, page 82. Laws 1901, page 13, amended Laws 1891, page 33, sections 4, 13, as amended by Laws 1899, page 21, the only change being in relation to the amount of the license fee and the period for which the same might be issued. Section 23 as found in the aforesaid acts of 1895, 1899, 1901, does not state by whom the license therein mentioned shall be issued. Held, that the legislative intent was to vest in the board of county commissioners the exclusive authority to grant licenses for the sale of intoxicating liquors to persons selling liquors not to be drank in or about premises where sold.—*I. A. West & Co. v. Board of Commrs.*, 14 Idaho, 353, 94 Pac. 445.

Under Pocatello ordinances, section 115, providing that no license for the sale of intoxicating liquors shall be issued except on a petition signed by a majority of the property owners and tenants thereof, residing in

the half-block where such business is to be carried on, a complaint for a writ of mandate to compel the issuance of a license is demurrable where it fails to show compliance with such ordinance.—*Perkins v. Loux*, 14 Idaho, 607, 95 Pac. 694.

Laws 1907, page 509, section 73, provides: "In addition to the power hereinbefore granted to cities and villages under the provisions of this chapter, any city or village may by ordinance or by-law"; and then follows section 15, subdivision 8, "license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor." A city ordinance required the application for a license to retail liquor to be made by petition, and that upon granting the license petitioned for, the applicant shall pay the license fee. Held, that the city council had a reasonable discretion in the matter of granting a license.—*Perkins v. Loux*, 14 Idaho, 607, 95 Pac. 694.

A license authorizing the sale of intoxicating liquors issued by the board of county commissioners is subject to the power and authority of any city or village to prohibit by proper ordinance or resolution the sale of intoxicating liquors within such jurisdiction, and one who procures a county and state license takes it subject to the provisions of the law granting the power of prohibition to the various municipalities of the state.—*Gale v. City of Moscow*, 15 Idaho, 332, 97 Pac. 828.

Under the ordinances of Boise City, regulating applications for license to sell intoxicating liquors, the applicant is not entitled to a hearing upon such application, and the ordinance leaves entirely to the council the method or means by which they may satisfy themselves as to the fitness or qualification of the applicant to receive a license.—*Darby v. Pence*, 17 Idaho, 697, 27 L. R. A., N. S., 1194, 107 Pac. 484.

Where, under the ordinances of Boise City, the common council of said city have rejected an application for a license to sell intoxicating liquors, upon the ground that the applicant is an unfit person to carry on such business, such action of the council will not be reviewed by the court upon an application for a writ of mandate, even though it is alleged in such application that the applicant was a person of good moral character and fit to carry on such business.—*Darby v. Pence*, 17 Idaho, 697, 27 L. R. A., N. S., 1194, 107 Pac. 484.

Boise City ordinance, section 466, providing "The common council shall, if the applicant for a license is, in the opinion of the council, a proper person to carry on a liquor business, as mentioned in the ordinances of Boise City, make an order that the city clerk issue a license to such person or persons upon the payment to him of the sum required for the particular kind of license applied for," confers upon the council the right and power to determine the qualification or fitness of an applicant to receive a license, and the action of such council in such matter cannot be controlled by writ of mandate.—*Darby v. Pence*, 17 Idaho, 697, 27 L. R. A., N. S., 1194, 107 Pac. 484.

Under R. C. 1835, where a person engages in the business of selling intoxicating liquors and fails or neglects to take out a license, an action may be maintained against him by the state for the recovery of the license tax.—*State v. Wall*, 18 Idaho, 300, 109 Pac. 724; *State v. Cambridge Club*, *Youngblood et al.*, 18 Idaho, 307, 109 Pac. 726.

The license tax required to be paid before a person may engage in the business of selling intoxicating liquors is not imposed as a penalty, but is a debt due the county or state for doing or conducting the business. The penalty for doing such business without a license is made a misdemeanor.—*State v. Wall*, 18 Idaho, 300, 109 Pac. 724.

The word "person," as used in R. C. 1506, rendering it unlawful for any person to sell intoxicating liquors to be drunk on the premises where sold without having first procured a license, etc., includes corporations of all character and kinds, whether organized as such for profit, or social advantages without profit.—*Ada County v. Boise Commercial Club*, 20 Idaho, 421, 118 Pac. 1086.

Where a social club is organized as a corporation under the general laws of the state governing social and religious corporations, and keeps intoxicating liquors at the club-rooms, and delivers to members such quantity of liquor as the member may request, for which the member pays in cash or gives a card to have the same charged to his account, and thereafter pays such account, and pays or agrees to pay the price fixed by the club, the liquor being purchased to be drunk upon the premises, and such liquor being kept and sold as a mere incident to the general objects and purposes of the club, such club is subject to the provisions of R. C. 1506, and is required to procure a license.—*Ada County v. Boise Commercial Club*, 20 Idaho, 421, 118 Pac. 1086.

R. C. 1512 authorizes and empowers the board of county commissioners to revoke a license issued by them to sell intoxicating liquors, and this statute would be rendered nugatory, useless, and ineffective for any purpose if it should be held that the proviso to R. C. 1508, renders it mandatory upon the board to issue a license to sell intoxicating liquors within any incorporated city, and that no discretionary power rests in the board in such cases.—*Anderson v. Board of Commrs.*, 22 Idaho, 190, 125 Pac. 188.

The board of county commissioners exercise the higher and superior power in the matter of granting licenses to sell intoxicating liquors within an incorporated city, and, unless an applicant can procure a license from the board of county commissioners, he has no authority to sell within the boundaries of an incorporated city, and the municipal authorities have no power or right to grant a license to one who has not been able to procure a county license.—*Anderson v. Board of Commrs.*, 22 Idaho, 190, 125 Pac. 188.

R. C. 1508, providing "that when application is made for the sale of intoxicating liquors, for a place outside of any incorporated city, either upon their own motion or

upon objections duly filed upon the part of any citizen and resident of the precinct within which it is intended to carry on such sale, the county commissioners shall determine whether or not the granting of such license will be conducive to the best interests of the community," etc., should be construed as imposing a positive duty upon the board to make the investigations therein required in cases of applications to sell intoxicating liquors for any place outside of an incorporated city, and should not be construed as a limitation of the discretionary power of such board; the purpose of the proviso being to impose a special duty upon the board in exercising its discretion in certain cases rather than to limit its power and discretion in other cases.—*Anderson v. Board of Commrs.*, 22 Idaho, 190, 125 Pac. 188.

Statutes authorizing the licensing of the liquor traffic, and conferring upon the licensee the authority to retail intoxicating liquors, must be read and construed in the light of a grant rather than that of a limitation of a right, no one having an inherent, natural, or inalienable right to carry on the business of retailing intoxicating liquors. And one who claims the right or seeks to establish such right must point out in clear and unmistakable terms a legal grant of such right covering his specific case, and that he has complied with the terms of the statute granting such right.—*Anderson v. Board of Commrs.*, 22 Idaho, 190, 125 Pac. 188.

Where a board of county commissioners grant or refuse to grant a license to sell intoxicating liquors within the county, the proper remedy for an aggrieved party under R. C. 1508, is by appeal to the district court. *Anderson v. Board of Commrs.*, 22 Idaho, 200, 125 Pac. 193.

R. C. 1507, 1508, 1512, and 1513, when read and construed together, recognize the power of the board of county commissioners to grant or refuse an application for a license to sell intoxicating liquors at any place within the boundaries of the county, and authorize the board of commissioners to act upon all applications where they have been made at least twenty days before the meeting of the board at which action is to be taken; and in taking such action and granting or rejecting an application the board is vested with a discretionary power, and that discretion extends as well to applications made for license to sell within the boundaries of an incorporated city as to applications for license to sell in an unincorporated town or village or in a rural community.—*Anderson v. Board of Commrs.*, 22 Idaho, 190, 125 Pac. 188.

Upon an appeal from an order of the board of county commissioners, granting or refusing to grant a liquor license under R. C. 1508, the district court has jurisdiction to review any question involving the legality of the action of the board in passing on the application, and any question of law which may have been involved in the application and action taken thereon by such board; but the court has no jurisdiction or authority to examine or review the facts upon which the board exercised its discretion in determining

any one of the three questions which section 1508 requires the board to investigate and determine before granting or refusing such application. These questions involve the discretionary power of the board, and that discretion is not conferred upon the courts.—*Sullivan v. Board of Commrs.*, 22 Idaho, 202, 125 Pac. 191.

Under R. C. 1508, where an application is made for a license to sell intoxicating liquors at a place outside of an incorporated city, it is made the duty of the board of county commissioners to make the following investigation: First, "to determine whether or not the granting of such license would be conducive to the best interests of the community in which such saloon or business is proposed to be established"; second, to determine whether or not such applicant is a fit person to have such license and to carry on such business; and, third, to determine whether or not such place of sale and business would likely be conducted in a quiet, orderly, and peaceable manner, and, if the board finds in the negative on any one of these questions, it is made the positive duty of such board to deny the application.—*Sullivan v. Board of Commrs.*, 22 Idaho, 202, 125 Pac. 191.

There is no statute in Idaho and no provision in the charter of Boise City authorizing or requiring a return of the unearned portion of a license tax after a revocation or cancellation of the license or after the licensee ceases to exercise the privilege granted thereunder.—*Roberts v. City of Boise*, 23 Idaho, 716, 132 Pac. 306.

A liquor license tax voluntarily paid cannot be recovered back unless there is a statute which expressly authorizes such recovery. *Roberts v. City of Boise*, 23 Idaho, 716, 132 Pac. 306.

It is only where a license granted by a municipality becomes inoperative by the act of the municipality itself or by operation of law that the licensee may recover the unearned portion of his license tax.—*Roberts v. City of Boise*, 23 Idaho, 716, 132 Pac. 306.

One who applies for a liquor license and pays the license tax thereby applies for the exercise of a privilege or grant rather than the exercise of a natural right, and he does so with full knowledge of the condition of the law on the subject and of the power of the authorities granting such license to subsequently revoke the same and also of the absence of any law authorizing a return of any unearned portion of such tax.—*Roberts v. City of Boise*, 23 Idaho, 716, 132 Pac. 306.

Under Boise City charter, section 42, subdivision 8, as amended by Laws 1909, page 113, the city council have authority "to license, tax, regulate and restrain barkeepers, saloon keepers, dealers in and manufacturers of spirituous, vinous or malt liquors, . . . and to require bonds to be given by the proprietors of the business mentioned in this subdivision, with sufficient sureties, conditioned not to keep, allow or permit a disorderly house, and to cancel and revoke any such license, in their discretion," and under this provision of the charter the city coun-

cil may summarily revoke a license previously granted at their pleasure and without giving any reason therefor.—*Roberts v. City of Boise*, 23 Idaho, 716, 132 Pac. 306.

Editorial Notes.

Right to assign or transfer liquor license: Ann. Cas. 1913A, 461.

Petitioner or surety under liquor license law as "freeholder": Ann. Cas. 1913D, 334.

Right of liquor licensee to recover fee paid when license fails without his fault: 17 Ann. Cas. 187; 16 L. R. A., N. S., 512.

Consent of abutting owners to issuance of liquor license: 1 Ann. Cas. 60.

V. REGULATIONS.

Power to control traffic in general. See ante, I. Ordinance regulating hours of sale as denying equal protection of laws. See Constitutional Law, X.

Ordinance regulating hours of closing as taking property without due process of law. See Constitutional Law, XI.

Boise City ordinance No. 623 regulating the hours of sale of intoxicating liquors, providing for Sunday closing and fixing a penalty for sales during prohibited hours, applies to wholesale dealers in liquor as well as to retail dealers.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

Under Boise City charter, section 37, subdivision 4, granting the city the right to license, tax, regulate and restrain barkeepers, saloon-keepers, dealers in spirituous or malt liquors and places where such liquors are kept for sale, or in any manner disposed of, the city council has power and authority to enact ordinances making reasonable regulations therein for the sale of intoxicating liquors both at retail and wholesale.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

Boise City ordinance No. 623, regulating the hours in which intoxicating liquors shall be sold in said city and for Sunday closing, and providing for a penalty for a sale thereof during prohibited hours, in no manner conflicts with the general laws of the state.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

A city ordinance making it a misdemeanor for the proprietor of a place where intoxicating liquors are sold to permit any person or persons other than himself and family to enter such place during the hours when the sale of such liquors is prohibited by the ordinance, is a reasonable regulation and the city council had the power and authority to enact it.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

Boise City ordinance, section 466, making the council the judge of the fitness of an applicant to receive a license, and giving such council the right to refuse a license to all persons deemed by them unfit to carry on such business, thereby prohibits such persons from engaging in such business, but is not a pro-

hibition against the business.—*Darby v. Pence*, 17 Idaho, 697, 27 L. R. A., N. S., 1194, 107 Pac. 484.

Editorial Notes.

What is "hotel" within statute regulating sale of liquor: Ann. Cas. 1913B, 1030.

Meaning of term "school" or "school-house" within statute prohibiting sale of liquor within certain distance thereof: 16 Ann. Cas. 924.

Statutes permitting sale of liquor on Sunday in hotels to "guests," "travelers," "with meals," etc.: 17 Ann. Cas. 817.

Is one who obtains liquor for another, using the latter's money, guilty of selling same: 24 L. R. A., N. S., 268; 28 L. R. A., N. S., 334.

What amounts to retail sale as distinguished from wholesale: 32 L. R. A., N. S., 622.

VI. OFFENSES.

Under act of January 8, 1873, providing for the better observance of the Sabbath day, keeping a saloon open on Sunday and selling intoxicating liquor therein are separate offenses.—*People v. Griffin*, 1 Idaho, 476.

"Near beer," being a malt liquor, falls within the definition of Laws 1909, page 9, section 31, and is as a matter of law an intoxicating liquor.—*In re Lockman*, 18 Idaho, 465, 110 Pac. 253.

Where a commercial club is organized as a corporation "to advance by social intercourse and friendly exchange of views, the commercial prosperity and growth of Boise City and the state of Idaho; to encourage the establishment of manufactories and other industries; seek remunerative markets for home products; foster capital and protect labor, mutually interested in each other's welfare; collect and disseminate valuable agricultural, manufacturing, and commercial information; extend and develop trade, agricultural, merchandising, banking, mining, smelting, livestock and wool-growing pursuits, and to do any and all things necessary to promote the growth and development of Boise, and the state of Idaho"—and such club, by its rules and by-laws, maintains a stock of intoxicating liquors sufficient to fulfill the wants of its members and their guests, purchased by the club at wholesale prices, and supplied to the members and their guests exclusively, without pecuniary profit to the club, in small quantities or in individual drinks, to be consumed by such members and their guests within the clubrooms, merely as incidental to the main objects and purposes of the club, such distribution of liquors by such club is a sale within the meaning of the provisions of R. C. 1506.—*Ada County v. Boise Commercial Club*, 20 Idaho, 421, 118 Pac. 1086.

Where a social club is organized as a corporation and keeps in stock intoxicating liquors for disposition to its members and their guests for a consideration, as incidental to the main objects and purposes of the club,

the ownership and the property interest to such liquor is in the club and not in its members, until after the members have purchased such liquor for their own use.—*Ada County v. Boise Commercial Club*, 20 Idaho, 421, 118 Pac. 1086.

"Pure alcohol," as used in Local Option Act 15 (Laws 1909, p. 14), authorizing the sale of pure alcohol for medicinal purposes, upon the written application of the purchaser in form prescribed, consists of ninety-two and three-tenths per cent by weight of absolute ethyl alcohol, and about seven and seven-tenths per cent by weight of water.—*State v. Osmer*, 21 Idaho, 18, 120 Pac. 165.

Laws 1909, page 9, section 15, which requires a physician's prescription before a legal sale can be made applies to "intoxicating liquors" that are used as a beverage, and not to pure alcohol.—*State v. Osmer*, 21 Idaho, 18, 120 Pac. 165.

Under Laws 1909, page 9, section 15, a sale in prohibition districts of pure alcohol for medicinal, mechanical, manufacturing, or scientific purposes, may be legally made upon the written application of the purchaser, and pure alcohol may be sold for medicinal purposes without the prescription of a duly licensed physician of the state.—*State v. Osmer*, 21 Idaho, 18, 120 Pac. 165.

Editorial Notes.

What deemed to be intoxicating liquors: 53 Am. Rep. 86; 20 L. R. A. 645.

Sales of intoxicating liquors, what unlawful: 12 Am. St. Rep. 353.

Social clubs, distribution or sale by, when a violation of liquor laws: 24 Am. St. Rep. 35.

Application of statute regulating liquor traffic to bona fide social club distributing liquor to members: Ann. Cas. 1912A, 1088.

Liability of licensee for illegal sale of intoxicating liquors by his servant against instructions: Ann. Cas. 1912A, 1109.

Liability for violation of liquor law of person who acts as agent or messenger for purchaser: Ann. Cas. 1912C, 633; 24 L. R. A., N. S., 268.

Loan of intoxicating liquors as sale within purview of prohibitory statute: Ann. Cas. 1913A, 471.

Meaning of term "near beer": Ann. Cas. 1913D, 124.

VII. ACTIONS FOR PENALTIES.

(No paragraphs.)

VIII. CRIMINAL PROSECUTIONS.

Evidence of other offenses. See Criminal Law, X, (C).

Under Laws 1909, page 18, section 31, it is necessary for the state to prove the intoxicating quality of all mixtures and preparations used or intended to be used as beverages which do not fall within the enumerated class designated as "spirituous, vinous, malt, and

fermented liquors."—*In re Lockman*, 18 Idaho, 465, 110 Pac. 253.

Under the definition given in Laws 1909, page 9, section 31, "spirituous, vinous, malt, and fermented liquors" are declared as a matter of law to be intoxicating, and it is unnecessary for the state to prove that any liquor or beverage falling within the enumerated class will in fact produce intoxication.—*In re Lockman*, 18 Idaho, 465, 110 Pac. 253.

It is for the court to determine from the proof when the local option law becomes operative in any prohibition district created under its provisions, and the court is authorized to instruct the jury as to the date when such law becomes operative in such prohibition district.—*State v. Jordan*, 19 Idaho, 192, 112 Pac. 1049.

Under local option statute (Laws 1909, p. 9, sec. 12), it is not necessary for the prosecutor to allege, in his information for the violation of the local option statute, the facts showing that the required number of voters petitioned for the election, or that the election was held, or that a majority of the people voted in favor of prohibiting the sale of intoxicating liquors; nor is it necessary to allege or prove that the defendant did not have a license permitting him to sell or dispose of intoxicating liquors.—*State v. Schmitz*, 19 Idaho, 566, 114 Pac. 1.

Where it is sought to show that the deputy sheriff searched the premises of the defendant four days after the alleged unlawful sale of intoxicating liquors, and found no intoxicating liquors on the premises, it is not error for the court to exclude such evidence, as such evidence is immaterial and irrelevant. *State v. Silva*, 21 Idaho, 247, 120 Pac. 835.

The usual freight or waybill of a railroad company may be introduced in evidence to show that the defendants have received shipments of goods over a railway.—*State v. Silva*, 21 Idaho, 247, 120 Pac. 835.

An information charged that defendant at a time and place specified "committed the crime of selling intoxicating liquor without license in a prohibition district by then and there while the said county of Nez Perce was a prohibition district, willfully and unlawfully selling to M. one bottle of intoxicating liquor, to wit, whisky, without license so to do, contrary to the form of the statute in such case made and provided." Held, that the information was sufficient.—*State v. Caldwell*, 21 Idaho, 663, 123 Pac. 299.

Laws 1911, page 32, section 3, chapter 15, providing that, when the possession of intoxicating liquors is shown, such fact is "prima facie evidence that such intoxicating liquors are kept for sale," means that such prima facie presumption or prima facie evidence is sufficient to go to the jury to prove such facts, and that such possession will be sufficient to support a verdict on that particular fact; but it does not mean that such evidence is conclusive and binding upon the jury, and that it is their duty to bring in a verdict against the defendant, where such a prima facie case only is made, and it is error to instruct a jury that under such circum-

stances they should bring in a verdict of guilty.—State v. Adams, 22 Idaho, 485, 126 Pac. 401.

An instruction which tells the jury that "if, therefore, you should find from the evidence in this case, beyond a reasonable doubt, that intoxicating liquors were found at the place of business of the above-named defendant as alleged in the complaint, the burden of proof is on the defendant to prove that such intoxicating liquors were kept and used for a lawful purpose, and in the absence of any such proof on the part of the defendant showing that such intoxicating liquor, if any liquor was found at his place of business, was kept and used for a lawful purpose, then in that event you should find the defendant guilty," is erroneous and prejudicial to a defendant, in that it takes from the jury the right to consider and weigh the evidence for themselves, and determine its credibility, and the circumstances involved in the case and accompanying the possession of such intoxicating liquor.—State v. Adams, 22 Idaho, 485, 126 Pac. 401.

In a prosecution for maintaining a common nuisance by keeping intoxicating liquors in a prohibition district at any place other than a private dwelling-house, the possession of such liquors by one not having lawful authority to sell or dispose of the same is prima facie evidence that such liquors are kept for sale or disposition in violation of law, and the proof of such possession at any place other than in a private dwelling-house shifts the burden of proof to the defendant to show that his possession was lawful.—State v. Adams, 22 Idaho, 485, 126 Pac. 401.

Editorial Notes.

Place of sale of intoxicating liquors shipped C. O. D.: Ann. Cas. 1912D, 893; 2 L. R. A., N. S., 383; 24 L. R. A., N. S., 143.

Legality of sale of liquor by druggist as affected by element of intent or good faith: Ann. Cas. 1912D, 1345.

Burden of proof of right to sell in prosecution for illegal sale of liquor: Ann. Cas. 1913C, 626.

IX. SEARCHES, SEIZURES AND FORFEITURES.

In a prosecution under the search and seizure act, Laws 1911, page 31, evidence held sufficient to warrant the committing magistrate in binding defendant over to the district court for trial.—State v. Layman, 22 Idaho, 387, 125 Pac. 1042.

An information under Laws 1911, page 31, the "search and seizure act," is sufficient which charges that defendant "did then and there willfully, within a prohibition district, occupy, maintain and control a certain place where intoxicating liquors were sold, furnished, given away or otherwise disposed of in violation of law, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage and where intoxicating liquors were kept for sale, etc., in violation of law, etc.—State v. Layman, 22 Idaho, 387, 125 Pac. 1042.

Evidence in a prosecution for maintaining a common nuisance in violation of the liquor law held sufficient to support a verdict of guilty.—State v. Layman, 22 Idaho, 387, 125 Pac. 1042.

Editorial Notes.

Constitutionality of statutes providing for forfeiture or destruction of liquors illegally kept: 2 Ann. Cas. 245.

X. ABATEMENT AND INJUNCTION.

Injunction to restrain enforcement of local option statute. See Injunction, II, (E).

Nuisances in general. See Nuisance.

XI. CIVIL DAMAGE LAWS.

(No paragraphs.)

XII. RIGHTS OF PROPERTY AND CONTRACTS.

Right to sell liquor as inherent right of citizens. See ante, I.

IRRIGATION.

See Waters and Watercourses.

JAIL.

Attempt to burn. See Arson.

JEOPARDY.

Former jeopardy. See Criminal Law, VII.

JOINDER.

Of various causes of action. See Action, III.

JOINT CONTRACTS.

See Guaranty.

Liabilities of parties. See Contracts, II, (E).

Parties to action for breach. See Contracts, VI, (E).

Joint and several bond. See Bonds.

Joint and several recognizance. See Bail and Recognizance.

JOINT LIABILITY.

Joint liability for negligence. See Negligence, I.

On recognizance. See Bail and Recognizance.

Joint liability in action to foreclose mechanics' liens.

See Mechanics' Liens, VII.

Joint tort-feasors as proper parties defendant. See Parties, II.

Joint trespassers. See Trespass.

JOINT-STOCK COMPANIES.

See Associations.

Appeal by one member as inuring to benefit of the others. See Appeal and Error, VI.

Joint stock companies are legal under the common law and are not prohibited by the constitution and statutes of this state, provided they do not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships.—Spotswood v. Morris, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

As the constitution and statutes of this state do not prohibit the organization of joint-stock associations having transferable stock,

the common-law rule as to their legality prevails.—*Spotswood v. Morris*, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

A corporation cannot be formed by a private agreement between individuals, the franchise being possessed by the state; but joint-stock companies may be formed without regard to the statutes, and the promoters may choose to proceed solely upon their common-law rights and responsibilities.—*Spotswood v. Morris*, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

In joint-stock companies where the interest of the members is represented by transferable shares, a shareholder is not necessarily an agent of the company, and official position in the company indicates such powers only as are defined and granted in the articles of association, or as may be given by resolution of the shareholders or directors.—*Spotswood v. Morris*, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

In joint-stock companies the shareholders have no powers as agents, unless such powers are granted either expressly or by implication, or by acquiescence of such shareholders or association.—*Spotswood v. Morris*, 12 Idaho, 360, 6 L. R. A., N. S., 665, 85 Pac. 1094.

JUDGES.

I. APPOINTMENT, QUALIFICATION AND TENURE.

II. SPECIAL OR SUBSTITUTE JUDGES.

III. RIGHTS, POWERS, DUTIES AND LIABILITIES.

(A) In General.

(B) Compensation and Fees.

(C) Powers and Proceedings at Chambers or in Vacation.

IV. DISQUALIFICATION TO ACT.

Delegation of legislative power to judiciary. See Constitutional Law.

Justices of the peace. See Justices of the Peace.

Province of judge and jury. See Trial.

Trial to court. See Trial.

Probate judges, civil jurisdiction and proceedings. See Justices of the Peace.

Probate judges acting in probate and other matters. See Courts; Descent and Distribution; Guardian and Ward.

I. APPOINTMENT, QUALIFICATION AND TENURE.

Holding other office. See Officers.

Eligibility of member of legislature to appointment where office created during his term as legislator. See Officers.

Eligibility of member of legislature to hold office of probate judge, where salary increased by legislature. See Officers, I, (O).

Plaintiff was duly elected judge of the probate court of Logan county at the regular election held in 1890, but the legislature on March 3, 1891, and after he had taken office under his said election, passed an act changing Logan county to Lincoln county. Plaintiff was appointed by the governor, under the provisions of this act, probate judge of Lincoln county, and defendant, who was at the time clerk of the probate court of Logan

county under plaintiff, was appointed, by the commissioners of Logan county, probate judge of Logan county, said board refusing to recognize the act of March 3, 1891, as law. The supreme court of the state declared the act of March 3, 1891, unconstitutional. Thereupon plaintiff demanded possession of said office of probate judge of Logan county, which defendant refused to deliver. Held, in an action to recover possession of the office, that plaintiff was entitled thereto.—*Hampton v. Dilley*, 3 Idaho, 427, 31 Pac. 807.

A probate judge elected prior to the amendment of Const., article 18, section 6, separating the offices of probate judge and county superintendent of instruction, is entitled, ex officio, to act as such superintendent until an election is had for such office under a law providing for such election and until his term as probate judge expires.—*Blake v. Commrs. Ada County*, 5 Idaho, 163, 47 Pac. 734.

Under R. C. 317, providing that every civil office is declared vacant in case the incumbent ceases to reside in the district in which the duties of his office are to be exercised, the office of district judge becomes vacant upon the creation of an additional district in which no district judge resides.—*Knight v. Trigg*, 16 Idaho, 256, 100 Pac. 1060.

Const., article 5, section 19, provides that a vacancy in the office of the judge of a district court shall be filled in the manner provided by law. R. C. 320 provides that such vacancy shall be filled by appointment of the governor until the next general election. Laws 1909, page 194, section 2, providing for an election to fill the office of district judge for the newly created eighth judicial district, was declared void for uncertainty and indefiniteness. Held, that it was the duty of the governor to appoint a judge to fill the vacancy caused by the creation of a new judicial district.—*Knight v. Trigg*, 16 Idaho, 256, 100 Pac. 1060.

Under Const., article 5, section 11, it is within the power of the legislature to provide for the appointment or the election of more than one district judge for a judicial district when the business of such district requires.—*Streeter v. MacLane*, 19 Idaho, 229, 112 Pac. 1042.

Under Laws 1911, page 4, section 3, authorizing the appointment of an additional judge for the third judicial district "to hold office until the next general election for district judges and until his successor is elected and qualified," where the first appointee of the governor resigned his office before the next general election, and the governor made another and further appointment to fill the vacancy, such subsequent appointee takes the office subject to the same provisions as the original appointee, and will be entitled "to hold the office until the next general election for district judges and until his successor is elected and qualified."—*Joy v. Gifford*, 22 Idaho, 301, 125 Pac. 181.

II. SPECIAL OR SUBSTITUTE JUDGES.

Const., article 5, section 12, does not authorize the appointment of a nonresident of the

state as judge pro tem.—*Bramwell v. Guheen*, 3 Idaho, 347, 29 Pac. 110.

III. RIGHTS, POWERS, DUTIES AND LIABILITIES.

Jurisdiction to order clerk not to file information.

See *Indictment and Information*, IV.

Not liable for costs. See *Mandamus*, III.

(A) IN GENERAL.

Where the judge of one judicial district is called into another district to try a certain case, he may make all intermediate and ancillary orders necessary to a complete determination thereof and may grant orders extending the time for preparing statement and filing affidavits on motion for new trial. *Morris v. Lemp*, 13 Idaho, 116, 88 Pac. 761.

Where a judge of another district is called in to hear a case pursuant to the constitution and statutes, he has authority to pass upon a motion for a continuance.—*Ferguson v. McGuire*, 17 Idaho, 141, 104 Pac. 1028.

Under Const., article 5, section 12, and R. C. 3886, a district judge may hold court in any county of the state upon the request of the judge of the district in which such court is to be held.—*Ferguson v. McGuire*, 17 Idaho, 141, 104 Pac. 1028.

(B) COMPENSATION AND FEES.

Increase or reduction. See *Officers*.

Where the law under which the probate judge claimed fees and salary was repealed before the services sued for were performed, the claim was properly disallowed.—*Hart v. Boise County*, 2 Idaho, 376, 16 Pac. 552.

R. S. 3844 permits the probate judge to appoint a clerk or act as his own clerk. Const., article 18, sections 7, 8, provide that the probate judge, who is ex-officio county superintendent of public instruction, shall receive for his services not more than \$2,000, to be paid by fees or commissions, and that sums in excess thereof must be paid over to the county treasurer. Held, that the compensation for judge, whether the judge appoints a clerk or acts as his own clerk, cannot exceed \$2,000 in full for services as judge, clerk and superintendent of public instruction.—*County of Ada v. Ryals*, 4 Idaho, 365, 39 Pac. 556.

Under Const., article 18, section 7, and R. S. 2438, the probate judge must account to the county for each statutory fee received by him for solemnizing a marriage, but may retain for himself any gratuity received over the statutory fee of five dollars.—*Rhea v. Board of County Commrs.*, 12 Idaho, 455, 88 Pac. 89.

(C) POWERS AND PROCEEDINGS AT CHAMBERS OR IN VACATION.

Power of judge of chambers to make order drawing grand jury. See *Grand Jury*.

Powers and jurisdiction in habeas corpus proceedings. See *Habeas Corpus*, II.

A judge of a district court does not exceed his jurisdiction by issuing an order or writ

to enforce a judgment rendered by him at chambers.—*People v. Lindsay*, 1 Idaho, 394.

A district judge has no jurisdiction, under R. S. 3890-3910, to hear a proceeding for the condemnation of lands, or to enter judgment or decree therein at chambers.—*Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co.*, 3 Idaho, 263, 28 Pac. 394.

Judges at chambers can enter only such orders as are expressly authorized by law.—*Delano v. Board Commrs. Logan Co.*, 4 Idaho, 83, 35 Pac. 841.

Under R. S. 8151, as amended by 2 Sess. Laws, page 20, providing that when a defendant in a criminal case requires more than five witnesses the court "shall order a subpoena to issue for such of said witnesses as the court may deem material," it cannot enter an order in vacation.—*Delano v. Board Commrs. Logan Co.*, 4 Idaho, 83, 35 Pac. 841.

The district judge at chambers has no jurisdiction to make an order allowing claims for attorney's fees against an insolvent estate.—*Bank of Genesee v. Denning*, 5 Idaho, 482, 51 Pac. 406; *Gaffney v. Piper*, 5 Idaho, 490, 51 Pac. 99.

Under R. S. 3890 specifying the powers of a district judge at chambers, a district judge has power to issue a writ of review.—*Gans v. Steele*, 7 Idaho, 143, 61 Pac. 286.

A judge at chambers has the power to order the sale of property in the hands of a receiver, with instructions to the receiver to report the sale to the court for confirmation. *First Nat. Bank v. Bunting & Co.*, 7 Idaho, 387, 63 Pac. 694.

A judge at chambers has no authority to pass on a demurrer (but see *Laws 1905*, p. 7). *Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

IV. DISQUALIFICATION TO ACT.

A judge who is disqualified from acting as judge on the trial of a case pending in his court, is also disqualified from acting upon any preliminary motion calling for the exercise of judicial discretion in such action.—*Gordon v. Connor*, 5 Idaho, 673, 51 Pac. 747.

R. S. 3900, section 3, prohibiting a judge from acting when he has been attorney or counsel for either party in the proceeding, does not disqualify a judge from acting in an action to revive a judgment rendered in an action in which he appeared as counsel, the only issues being the regularity of the entry of judgment and the payment thereof and it being shown that the judge had not advised or appeared for either party after judgment.—*Stevens v. Hall*, 8 Idaho, 549, 69 Pac. 282.

Where, in an action to revive a judgment, the trial judge calls the attention of counsel to the fact that he has acted as attorney for one of the parties in the action in which such judgment was recorded, and the attorney for the plaintiff nevertheless urges the court to try the case, he cannot afterward complain of a refusal to change the venue of the case. *Stevens v. Hall*, 8 Idaho, 549, 69 Pac. 282.

A trial judge who is re-elected to succeed himself may render judgment on a trial had before him in his former term of office.—*Idaho Comstock etc. Co. v. Lund-trum*, 9 Idaho, 257, 74 Pac. 975.

Under Const., article 1, section 18, providing that courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property or character, and justice shall be administered without sale, denial, delay, or prejudice, as well as by the unwritten dictates of natural justice, the courts of the state of Idaho are commanded to administer justice without prejudice.—*Day v. Day*, 12 Idaho, 558, 10 Ann. Cas. 260, 86 Pac. 531.

Editorial Notes.

Disqualified judges, validity of judgment rendered by: 85 Am. Dec. 126.

Disqualified or unauthorized judges, agreements to try causes before, when invalid: 25 Am. Rep. 539.

Waiver of objection to disqualified judge: Ann. Cas. 1912A, 1072; 10 Ann. Cas. 969.

Power of disqualified judge to make formal orders or to perform ministerial acts: 5 Ann. Cas. 975.

Disqualification of judge who is resident or taxpayer in municipality which is party to proceedings before him: 6 Ann. Cas. 406.

Statutory disqualification of judge from having been counsel in the cause: 25 L. R. A., N. S., 114.

JUDGMENT.

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 - (A) Requisites and Validity.
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- (A) Domestic Judgments.
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XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

See Claim and Delivery, VI.

In actions by or against particular classes of persons. See Attorney and Client; Corporations; Executors and Administrators; Husband and Wife; Infants; Insane Persons; and other specific heads.

In criminal actions. See Criminal Law, and titles of specific crimes.

In particular civil actions or proceedings. See titles of specific heads, as Attachment; Divorce; Ejectment; and the like.

Of justices of the peace. See Justices of the Peace. In condemnation proceedings. See Eminent Domain, III.

In attachment and garnishment proceedings. See Attachment and Garnishment, VI.

Contribution between joint judgment debtors. See Contribution.

Jurisdiction of judge to issue order or writ to enforce judgment rendered at chambers. See Judges.

Jurisdiction of judge re-elected to render judgment on trial had in former term of office. See Judges.

Power of judge to revive judgment in case where he acted as counsel. See Judges.

Judgment on the pleading. See Pleading.

Rate of interest on judgments. See Interest.

I. NATURE AND ESSENTIALS IN GENERAL.

Subject matter and medium of payment. See post, VI, (A).

A judgment and execution on a void summons are void for want of jurisdiction of the defendants.—*Alexander v. Leland*, 1 Idaho, 425.

Judgment is a general term for adjudications of a court, and, in its broadest sense, includes decrees.—*Forsythe v. Richardson*, 1 Idaho, 459.

An order for the sale of real estate, under the provisions of the probate act, is a judgment in a new, separate and independent proceeding, depending for its validity upon the sufficiency of the facts alleged in the petition for the order.—*Ethell v. Nichols*, 1 Idaho, 741.

A personal judgment entered on service by publication is void.—Aulbach v. Dahler, 4 Idaho, 522, 43 Pac. 192.

A personal judgment cannot be rendered against a nonresident in the absence of personal service or personal appearance.—Kerns v. McAulay, 8 Idaho, 558, 69 Pac. 539.

A judgment rendered by a court which has no jurisdiction over property situated in this state is merely a judgment in personam and is only binding on those reached by personal service.—Schuler v. Ford, 10 Idaho, 739, 109 Am. St. Rep. 233, 3 Ann. Cas. 336, 80 Pac. 219.

Where a judgment-roll shows a personal judgment against a nonresident who has no property in the state on service by publication, the judgment is void.—O'Neill v. Potvin, 13 Idaho, 721, 93 Pac. 20.

Where the court has jurisdiction of the subject matter, and acquires jurisdiction of the person of the defendant by service of process, it is thereby vested with full power and authority to hear and determine all questions that occur in the case and are essential to determine the merits of the issues raised, and it likewise has authority and jurisdiction to make such orders and issue such writs and process as may be necessary and essential to carry the decree into effect and render it binding and operative.—Taylor v. Hulett, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37.

Editorial Notes.

Jurisdiction, judgments in excess of: 29 Am. St. Rep. 78.

Right of state to authorize entry of personal judgment on service of process on resident outside of state limits: Ann. Cas. 1912D, 695.

II. BY CONFESSION.

(No paragraphs.)

III. ON CONSENT, OFFER OR ADMISSION.

Stipulation for judgment in excess of amount demanded. See post, VI, (C).

IV. BY DEFAULT.

By default against garnishee. See Attachment and Garnishment, VI.

Review of order setting aside or refusing to set aside default. See Appeal and Error, XVI, (F), 7.

(A) REQUISITES AND VALIDITY.

Entry of final judgment by clerk on default. See Trover and Conversion.

Jurisdiction to enter default after remand, on removal to federal court. See Removal of Causes, VII.

Where a judgment is entered upon the default of the defendant, the recovery must follow the prayer of the complaint.—Lowe v. Turner, 1 Idaho, 107.

Where an order for publication of a summons has been duly made and the summons is served personally on a defendant out of

the state, the service does not become complete until the expiration of the time prescribed in the order of publication; and where such an order prescribes one month for such publication, the defendant served out of the state has one month and forty days from the date of such service in which to answer and a default judgment taken against him before the expiration of that time is erroneous.—Bowen v. Harper, 6 Idaho, 654, 59 Pac. 179.

In an action for treble damages for trespass under R. S. 4531, a defendant by defaulting admits the truth of an allegation in the complaint that the trespass was "without lawful authority."—Eklund v. B. R. Lewis Lumber Co., 13 Idaho, 581, 92 Pac. 532.

A defendant, who has filed a demurrer or motion addressed to the complaint, is not in default until after such demurrer and motion are disposed of.—Smith v. Clyne, 16 Idaho, 466, 101 Pac. 819.

The filing of a demurrer to a complaint presents an issue of law which the court is required to decide, and the defendant is not in default until such issue of law is disposed of; and it is error for the court to permit default to be entered or to enter judgment against the defendant until such demurrer is overruled.—Culver v. Mountain Home Electric Co., 17 Idaho, 669, 107 Pac. 65.

Where a defendant has been served by process, and within the time allowed for answer files a demurrer and thereafter withdraws the demurrer, and is given five days in which to further plead, and fails to make any further appearance within the time granted, he is thereafter in default, the same as he would have been had he not appeared within the time originally allowed under the statute after the service of summons, and the clerk of court may properly enter his default, and he is not entitled to any notice of application or motion for default.—Hall v. Whittier, 20 Idaho, 120, 116 Pac. 1031.

Under R. C. 4360, in an action to determine the priority and amount of water to which each party to the action is entitled, if default is taken against any of the parties, evidence must be taken to establish the material allegations of the complaint or cross-complaint.—Joyce v. Rubin, 23 Idaho, 296, 130 Pac. 793.

In an action for unliquidated damages, judgment cannot be entered on motion, even though no defense is disclosed by the answer, and unliquidated damages must be proved before judgment can be legally entered therefor.—Welch v. Bigger (on rehearing), 24 Idaho, 169, 133 Pac. 381.

Editorial Notes.

Process, effect of defects in the service of: 61 Am. St. Rep. 485.

Right to take judgment by default when motion by defendant is pending: Ann. Cas. 1913E, 331.

Validity of default judgment awarding relief beyond prayer of complaint: 11 Ann. Cas. 353; 11 L. R. A., N. S., 803.

(B) OPENING OR SETTING ASIDE DEFAULT.

Opening or vacating judgments in general. See post, IX.

Review of action of trial court. See Appeal and Error, XVI, (F), 7.

Under R. S. 4229, relating to the power and discretion of the court to grant amendments, etc., an application by the defendant to set aside a default judgment after the term at which such judgment was rendered must show mistake, inadvertence, surprise or excusable neglect on his part and must be accompanied by an affidavit of merits, showing facts which constitute a defense to plaintiff's cause of action.—*Holland Bank v. Lieuallen*, 6 Idaho, 127, 53 Pac. 398.

Where a party is deprived of a hearing on the trial of a case on account of a mistake in the transmission of a telegram from the judge as to when the case would be set for trial, there is no abuse of discretion in granting a motion to vacate the judgment and reinstate such party's complaint and answer in intervention.—*Thum v. Pyke*, 6 Idaho, 359, 55 Pac. 864.

In setting aside a default judgment, it is not necessary that the court should make findings.—*Pease v. Kootenai County*, 7 Idaho, 731, 65 Pac. 432.

The imposition of terms in setting aside a default judgment is within the discretion of the court.—*Pease v. Kootenai County*, 7 Idaho, 731, 65 Pac. 432.

Where the complaint fails to state a cause of action, it is not necessary that an affidavit of merits accompany an application to set aside a default judgment entered thereon by the clerk.—*Pease v. Kootenai County*, 7 Idaho, 731, 65 Pac. 432.

Under R. S. 4229, an application to set aside a default judgment must show that the default occurred through mistake, inadvertence, surprise or excusable neglect, and also must show sufficient facts from which it appears that defendant has a good defense.—*Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497.

On application to set aside a default, there must be a showing as to diligence or of surprise or excusable neglect.—*Eklund v. B. R. Lewis Lumber Co.*, 13 Idaho, 581, 92 Pac. 532.

Where a party plaintiff, in an action for a divorce and to enjoin the sale and disposition of the community property, applies to the district court, in an action then pending in said court wherein a third party is plaintiff and the defendant in the divorce proceeding is defendant, for leave to intervene in said action, and alleges as ground that the suit is collusive and fraudulent and without any foundation in fact, and if allowed to proceed to judgment will result in a sale of the property attached (which is community property), and the court inquires in the presence of counsel for plaintiff as to the time required to intervene and is advised by the applicant of the time required, and the petitioner relies upon the statements made by the court, as to the time during which no further proceedings will be taken in said suit, such facts are

sufficient to authorize a judgment entered by default before such time expires to be opened and set aside.—*Pittock v. Buck*, 15 Idaho, 47, 96 Pac. 212.

Where an application to open a default judgment is made on affidavits, the court will hear counter-affidavits only upon the question as to the excuse for permitting the default, but will not permit the facts stated in the defendant's affidavits, which constitute his defense to an action, to be rebutted by counter-affidavits.—*Beck v. Lavin* (on rehearing), 15 Idaho, 363, 97 Pac. 1028.

Under R. S. 4229, affidavits, on the motion to set aside a default judgment, must show that the default occurred through mistake, inadvertence or excusable neglect and that the defendant has a meritorious defense to the action.—*Beck v. Lavin*, 15 Idaho, 363, 97 Pac. 1028.

A litigant moving for relief under R. C. 4229, on the grounds of mistake, inadvertence, surprise or excusable neglect, must show that he has acted in good faith, and exercised due diligence in the prosecution and protection of his rights, such as an ordinary prudent man would exercise under similar conditions. *Council Improvement Co. v. Draper*, 16 Idaho, 541, 102 Pac. 7.

Where a party moves to vacate a judgment entered against him, in addition to showing that he has been taken by surprise, or that his inadvertence or neglect is excusable, he must also show that the judgment against him is probably erroneous, and that if he was permitted to properly present his case, he would likely be able to secure a judgment more favorable to his interests.—*Council Improvement Co. v. Draper*, 16 Idaho, 541, 102 Pac. 7.

To entitle a defendant to have a judgment opened upon the grounds of mistake, inadvertence, surprise, or excusable neglect, it is necessary to file an affidavit of merits or tender an answer showing that the defendant has a meritorious defense to such action, and it is not an abuse of legal discretion on the part of the trial court in overruling an application to open a default where it does not appear and is not shown that the defendant has a defense to said action.—*Culver v. Mountain Home Electric Co.*, 17 Idaho, 669, 107 Pac. 65.

To entitle a party to relief from a judgment or order entered by default, it is necessary that such person make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect, and in addition thereto that such person has a meritorious defense to such action.—*Harr v. Kight*, 18 Idaho, 53, 108 Pac. 539.

An application to open and set aside a default is addressed to the sound legal discretion of the court.—*Harr v. Kight*, 18 Idaho, 53, 108 Pac. 539.

Where a defendant has been sued in a state court and summons has been served upon him, and prior to the expiration of the time allowed by statute for him to answer, but without appearing or answering, he

files a petition for removal to the federal court, and the removal is ordered and the cause is thereafter remanded by the federal court on the ground that it was not removable from the state court, and in the meanwhile the defendant has allowed his time to elapse in which to appear or answer and he makes no appearance in the state court, and the clerk thereupon enters his default for failure to appear or answer, and the defendant thereafter moves to have the default vacated and the judgment set aside on the ground of his mistake, inadvertence, and excusable neglect, and sets up the foregoing facts and the further fact that he thought he would be given reasonable time in which to answer in the state court after the cause was remanded, and the district judge overrules such application, there was no abuse of the discretion vested in the trial court.—*Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89.

The showing of respondent in support of his motion to set aside the default and vacate the judgment, with regard to the circumstances of mistake, inadvertence, surprise, or excusable neglect, specified as grounds for such motion in R. C. 4229, is sufficient.—*Parsons v. Wrble*, 19 Idaho, 619, 634, 115 Pac. 813.

Where a defendant moves to vacate a judgment and set aside a default entered against him on account of "mistake and inadvertence," he must set forth the facts which he claims constitute the mistake or inadvertence and submit the same to the court, who must finally determine whether or not such facts constitute a mistake or an inadvertence, within the purview of the statute, sufficient to justify the granting of the relief sought.—*Hall v. Whittier*, 20 Idaho, 120, 116 Pac. 1031.

Where an application is made to set aside a judgment entered by default and permit an answer to be filed, if the facts disclosed by the showing involve purely a question of law, it will involve no discretion on the part of the court, and must be determined solely upon the question of law raised; but where it presents a question of fact as to the diligence of the party or his having been taken by surprise, or being mistaken in a matter of fact, the application will appeal to the discretion of the court.—*Humphreys v. Idaho Gold Mines etc. Co.*, 21 Idaho, 126, 120 Pac. 823.

Where a judgment has been entered by default, and a timely application is made to set aside the default and permit an answer to the merits to be filed, and such answer discloses upon its face a good and meritorious defense, as a general rule, if there be any reasonable doubt on the matter, it will be resolved in favor of granting the application and allowing a trial upon the merits of the case.—*Humphreys v. Idaho Gold Mines etc. Co.*, 21 Idaho, 126, 120 Pac. 823.

An action was commenced against a foreign corporation and summons was served upon B., as the statutory agent of defendant. B. did not notify the corporation or any officer thereof of the pendency of the action and took no steps to defend in the action, and a judgment by default was thereafter entered. The officers of the corporation subsequently

learned of the entry of judgment, and immediately moved to set aside the judgment and open the default, and asked leave to answer and accompanied such application with a showing to the effect that B. when he was appointed as statutory agent of the corporation, was a stockholder and an officer in the corporation, and that he thereafter sold his stock and ceased to be an officer of the corporation or in any way connected therewith, and that he thought he was no longer the statutory agent of the corporation, that he was confined to his home by sickness at the time service was made upon him, and that he took no steps to advise the corporation of the pendency of the action. The trial court upon such showing entered an order vacating and setting aside the judgment and default. Held, that there was no such abuse of the discretion of the trial court in granting the application as would require or justify a reversal of the order.—*Humphreys v. Idaho Gold Mines etc. Co.*, 21 Idaho, 126, 120 Pac. 823.

R. C. 4229 provides that, "when from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." Held, that where the service of summons is made upon the county auditor, and not upon an officer of a company, or its designated agent, such summons has not been "personally served" on the defendant, within the meaning of the term "personally served" as used in said section 4229.—*Brooks v. Orchard Land Co.*, 21 Idaho, 212, 121 Pac. 101.

Under R. C. 4229, where the defendant has not been personally served, and an application to set aside a default is made within a year, it is within the legal discretion of the court to grant such application and to open the default and permit the defendant to file an answer on the merits; and the court has jurisdiction to determine whether such application is sufficient or not.—*Brooks v. Orchard Land Co.*, 21 Idaho, 212, 121 Pac. 101.

Where it is claimed that a judgment was rendered without service of summons on the defendant and without his appearance, such defendant has the choice of two methods of attacking such judgment: First, by motion in such action to set aside the judgment; second, by a suit in equity to have the judgment set aside or the collection of the same enjoined.—*Bernhard v. Idaho Bank & Trust Co.*, 21 Idaho, 598, Ann. Cas. 1913E, 120, 123 Pac. 481.

The discretionary power of the trial judge, upon an application to open a default, means a sound and impartial discretion, and should be resolved, in case of doubt, in favor of the application.—*Hamilton v. Hamilton*, 21 Idaho, 672, 123 Pac. 630.

Affidavits filed on motion to open default in this case examined, and held that the trial judge did not err in refusing to open a default judgment upon the showing made in said

affidavits.—*Hamilton v. Hamilton*, 21 Idaho, 672, 123 Pac. 630.

The record in this case examined, and held, that the showing made to open the default and set aside the judgment was not sufficient to show mistake, inadvertence, surprise, or excusable neglect, but did show gross negligence on the part of both defendant and his attorney.—*Vollmer Clearwater Co. v. Grunewald*, 21 Idaho, 777, 124 Pac. 278.

Where an application is made to open a default and set aside a judgment, and the defendant in support of said motion presents and asks to have filed a verified answer, and the answer states a defense to the cause of action stated in the complaint, such answer is sufficient as an affidavit of merits.—*Vollmer Clearwater Co. v. Grunewald*, 21 Idaho, 777, 124 Pac. 278.

Where an application is made to open a default and set aside a judgment, and the merits of the defendant's defense to the action is set forth in an answer instead of such facts being stated in an affidavit, and such answer consists in denials and a cross-complaint, the cross-complaint will not be considered as a part of the answer stating the merits of the defense, inasmuch as the cross-complaint is an affirmative action alleged by the defendant against the plaintiff and affirmative relief is demanded.—*Vollmer Clearwater Co. v. Grunewald*, 21 Idaho, 777, 124 Pac. 278.

Editorial Notes.

Vacation and setting aside of judgments, statute authorizing when by default: 58 Am. Dec. 392.

Absolute right of defendant not personally served to have judgment opened and to defend: Ann. Cas. 1912A, 1164; 12 Ann. Cas. 992.

Who may have judgment against other parties set aside: 54 L. R. A. 758.

V. ON MOTION OR SUMMARY PROCEEDING.

Dismissal for failure to prosecute action. See Dismissal and Nonsuit.

Judgment on the pleadings. See Pleading.

On motion where unliquidated damages are claimed. See ante, IV, (A).

VI. ON TRIAL OF ISSUES.

(A) RENDITION, FORM AND REQUISITES IN GENERAL.

Verdict and findings in general. See Trial, IX.

Findings of fact and conclusions of law in trial to court. See Trial, X.

Act of December 3, 1864, commonly called the specific contract act, authorizing judgments other than in dollars and cents, conflicts with the act of Congress approved February 25, 1862, authorizing the issue of legal tender treasury notes, and is therefore void. *Betts v. Butler*, 1 Idaho, 165.

A judgment for gold coin is not void.—*Hazard v. Cole*, 1 Idaho, 276.

A gold coin judgment is not erroneous when the question is in issue whether the oral con-

tract sued on required payment in gold coin or currency.—*Emery v. Langley*, 1 Idaho, 694.

Where a party entitled to costs fails to file his memorandum thereof within the time prescribed by R. S. 4912, he waives his right thereto; and therefore, the fact that the costs do not appear in the record of judgment does not constitute an irregularity in such judgment.—*Cantwell v. McPherson*, 3 Idaho, 321, 29 Pac. 102.

It is not proper practice to refer to extraneous matters in the findings and judgment for definite description, or any other matter that should be continued therein; such matters should be incorporated in the findings and judgment.—*Murray v. Nixon*, 10 Idaho, 608, 79 Pac. 643.

A finding "that all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of defendant and against the plaintiff" is insufficient to support the judgment.—*Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490.

(B) PARTIES.

Where defendants were sued for damages to goods received by them under contract for carriage and the answer of two alleged that the third had no interest in the business, plaintiff on proving his case was entitled to judgment against the two, and they could not complain of the misjoinder.—*Bloomingtondale v. Du Rell*, 1 Idaho, 33.

Where several defendants are sued jointly and the allegations of the complaint are the same as to all the defendants, and the court sustains a demurrer of one of such defendants on the ground that the complaint does not state facts sufficient to constitute a cause of action, it is an error to enter judgment against the other defendants without first amending the complaint.—*Lowe v. Turner*, 1 Idaho, 107.

A judgment cannot be rendered against the property generally and against one of the owners thereof in an action clearly against all jointly.—*Lowe v. Turner*, 1 Idaho, 107.

Plaintiff sued three defendants on an alleged joint contract for labor and materials. The contract was made with defendant M. On the trial the other two defendants consented to the taking of judgment against them. A motion for nonsuit on the ground of variance between the pleading and proof, in that the evidence showed a contract with M. and not a joint contract, was denied. Held, properly denied under R. S. 4225 providing that variance between the pleading and proof shall not be deemed material unless it has actually misled the adverse party to his prejudice and under R. S. 4351, which provides that judgments may be given for or against one or more of several plaintiffs or defendants.—*Hewitt v. Maize*, 5 Idaho, 633, 51 Pac. 607.

When there are two defendants, and the judgment is against "said defendant," the judgment is void for uncertainty.—*Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.

In an action against several defendants for wrongful diversion of water, the jury

found for plaintiff and rendered a several verdict against each of the defendants. Held, that a several judgment only could be entered on such verdict and that a joint and several judgment was erroneous.—*Richards v. Scott*, 7 Idaho, 726, 65 Pac. 433.

(C) CONFORMITY TO PROCESS, PLEADINGS, PROOFS AND VERDICT OR FINDINGS.

Necessity of demanding interest. See *Interest*.

In default judgment. See *ante*, IV, (A).

A decree for specific performance in a suit to enforce a vendor's lien cannot be upheld.—*Hawkins v. Thurman*, 1 Idaho, 598.

Where a defendant stipulates that judgment may be entered for plaintiff for a sum greater than that demanded in the complaint a judgment for such sum is proper.—*Grete v. Knott*, 2 Idaho, 13, 3 Pac. 25.

Under R. S. 4353 providing that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue," the court may, when an answer is filed, grant any relief consistent with the case made by the complaint and embraced within the issues made, whether such relief be prayed for or not.—*Burke Land etc. Co. v. Wells, Fargo & Co.*, 7 Idaho, 42, 60 Pac. 87.

Under R. S. 4353, providing that the relief granted to plaintiff, if there be no answer, cannot exceed that which he shall have demanded in the complaint, a petition seeking to enjoin a sale of plaintiff's land for special taxes "and for such other and further relief as may be equitable," no answer having been filed and the sale having already taken place, will not authorize a judgment removing a cloud from plaintiff's title or setting aside the sale.—*Wilson v. Boise City*, 7 Idaho, 69, 60 Pac. 84.

In an action for foreclosure of a mortgage, where the answer raises no issue on any of the material allegations of the complaint, but sets up a counterclaim for damages arising out of the transaction for which the note and mortgage were given, the only issue to be tried by a jury is the amount of damages sustained by the defendant, and in such a case where the jury returns the following verdict: "We, the jury impaneled in the above-entitled cause, find for the defendant and assess his damages for the sum of \$—," it is error for the trial court to enter a judgment thereon in favor of the defendants for their costs in the action and dismissing the plaintiff's action. *Moore v. Evans*, 24 Idaho, 153, 132 Pac. 971.

(D) ARREST OF JUDGMENT.

An objection to a decree on the ground that it is not supported by the pleadings should be by motion in arrest of judgment after the motion for a new trial is disposed of.—*Taylor v. Peterson*, 1 Idaho, 513.

Editorial Notes.

Objections to evidence as ground for motion in arrest of judgment: *Ann. Cas.* 1913E, 72.

VII. ENTRY, RECORD AND DOCKETING.

Computation of days for pleading. See *Time*.

Effect of failure of clerk to enter judgment of dismissal on application therefor. See *Dismissal and Nonsuit*.

Under civil practice act, section 29, a judgment or order of the district court may be entered in vacation.—*Schenk v. Birdseye*, 2 Idaho, 141, 6 Pac. 128.

R. S. 4406 requiring a decision in writing to be filed within twenty days after the cause is submitted to the court on a question of fact, is directory and not mandatory.—*Idaho Comstock etc. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975.

After an order for a judgment has been made, it is the duty of the clerk to enter the judgment, and if he fails to do so either party can compel him to do so by writ of mandate. *Oliver v. Kootenai County*, 13 Idaho, 281, 90 Pac. 107.

Under R. C. 4406, upon a trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision.—*McGary v. Steele*, 20 Idaho, 753, 119 Pac. 448.

The failure of counsel to furnish the trial court with a brief is not a sufficient reason to justify the court in delaying a decision longer than the twenty day period prescribed by R. C. 4406.—*McGary v. Steele*, 20 Idaho, 753, 119 Pac. 448.

R. C. 2066, 2067, 3149, 3150, 3159, 3160, 3161, are recording statutes, and relate to the recording of a judgment in the recorder's office in accordance with R. C. 4454, and are for the purpose of giving notice to the world of such judgment as affecting the title to or possession of real property. The failure to record a judgment recovered in a court of competent jurisdiction having the effect of a lien on real property with the recorder does not prevent the judgment from becoming binding upon the property involved by such judgment, and also upon the parties to the suit and their privies, when entered as a judgment in a court of competent jurisdiction, and such a record of such judgment has the same actual and constructive notice to the parties and privies to the suit, and serves the same purpose as is provided by the recording statutes above cited.—*Smith v. Kessler*, 22 Idaho, 589, 127 Pac. 172.

Editorial Notes.

Nunc pro tunc entry of judgments: 4 Am. St. Rep. 828.

Entry or record: 28 L. R. A. 621.

VIII. AMENDMENT, CORRECTION AND REVIEW IN SAME COURT.

Correction of clerical mistake. See *Ejectment*.

A judgment for gold coin is subject to modification by the trial court.—*Hazard v. Cole*, 1 Idaho, 276.

Courts have full power during the term to alter, revise, revoke, annul, or amend their judgments and all other proceedings, and the rights of parties cannot be considered as fully settled until the judgments pass beyond the

control of the courts.—*Moore v. Taylor*, 1 Idaho, 630.

Where a judgment as entered is irregular as embracing too many parties, the proper practice is to move to correct it in the trial court.—*Fox v. West*, 1 Idaho, 782.

In a suit upon a note for \$400, judgment rendered for the amount in "clean Boise Basin gold dust at \$16 per ounce," being objectionable, should be corrected so as to stand for the specified amount in dollars generally.—*Betts v. Butler*, 1 Idaho, 185.

The judge of the district court may, upon motion for new trial on the ground of insufficient evidence to sustain the verdict, modify the judgment by striking out the name of one of the parties defendant, where several defendants are severally joined, and they deny both joint and several liability.—*Gaffney v. Hoyt*, 2 Idaho, 190, 10 Pac. 34.

It is not error for the court to vacate an order directing judgment to be entered for a certain amount, and thereafter render judgment for a different amount when the findings of fact warrant it.—*Curtis v. Walling*, 2 Idaho, 416, 18 Pac. 54.

Editorial Notes.

Amendments of judgments: 12 Am. Dec. 351; 62 Am. St. Rep. 233; 67 L. R. A. 179.

Amendment of judgments of after appeal: 14 Am. Dec. 516.

IX. OPENING OR VACATING.

Setting aside default. See ante, IV, (B).

Where the record affirmatively shows that the trial court had jurisdiction of the subject matter of the action and of the persons of the defendants, the remedy of the defendants, if the judgment was erroneous, was by appeal or motion for a new trial and not by a motion to set aside the judgment made more than six months after the rendition thereof.—*Bunnell etc. Inv. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767.

Under R. S. 4229, allowing relief in certain cases from judgments, etc., if application therefor be made within six months after adjournment of the term, a motion to set aside judgment need not be made within six months from the date of rendition thereof, but will be presumed to have been made in time if the record does not show the date of adjournment of the term.—*Kerns v. McAulay*, 8 Idaho, 558, 69 Pac. 539.

Under R. S. 4229, providing that relief may be had from a judgment on application made within a reasonable time, not exceeding six months after adjournment of the term, an order or judgment which is null and void may be set aside even though the term at which it was made has been adjourned for more than six months, and such order may be vacated on the court's own motion.—*Kerns v. Morgan*, 11 Idaho, 572, 83 Pac. 954.

Under R. S. 4229, a motion to relieve a party from a judgment in a case where the court had jurisdiction of the parties and the

subject matter, will be denied when made more than six months after the adjournment of the term at which the judgment was rendered.—*Vane v. Jones*, 13 Idaho, 21, 88 Pac. 1058.

The question of jurisdiction may be raised at any time under R. S. 4178, and if a judgment is void for want of jurisdiction, the question can be raised at any stage of the proceeding, and a motion to set aside the judgment on that ground is proper.—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

Plaintiff commences his action in ejectment to quiet title to a tract of land, alleging that he has been in possession of the same for a great number of years, and thereafter, when the case is called for trial, enters into a stipulation of facts upon which he claims his title and right of possession rests, and the case is held under advisement for a period of six months, and judgment is entered against him, and more than two months after the entry of judgment he applies to the court for an order vacating the same on the ground that he has discovered other and additional facts on which he could more successfully wage his action, and claims that the newly discovered facts consist chiefly in unrecorded deeds more than twenty years old, which are not produced in evidence, and where no fraud is shown on the part of his adversary. Held, that he has not proceeded with due diligence in the prosecution of his action, in gathering his evidence or in preparing his case, and that he has not been taken by surprise, and that his inadvertence, mistake or negligence is inexcusable, and that the judgment should not be vacated or set aside.—*Council Improvement Co. v. Draper*, 16 Idaho, 541, 102 Pac. 7.

R. C. 4229, which requires application for relief from a judgment to be made within six months after the adjournment of the term, does not apply to judgments and orders which are nullities and void from the beginning, and a motion to set aside and vacate a void judgment may be made at any time.—*Shumake v. Shumake*, 17 Idaho, 649, 107 Pac. 42.

Where a motion was made for a continuance and was denied, and no appeal was taken from the final judgment in the case, a court should not thereafter grant a motion made to vacate and set aside the judgment where the motion is based upon the same grounds and facts set forth in the motion for continuance, and where such motion is made after the time for appeal from the judgment has expired.—*Richards v. Richards*, 24 Idaho, 87, 132 Pac. 576.

Where there is no abuse of discretion on the part of the trial court in denying a continuance upon the showing made, there can be no abuse of discretion in subsequently denying a motion to vacate the judgment entered in the same case, where the motion to vacate is based upon the same showing and state of facts disclosed in the motion for continuance.—*Richards v. Richards*, 24 Idaho, 87, 132 Pac. 576.

Editorial Notes.

Power of courts to vacate judgments after the time specified in the statute

for granting relief therefrom: 52 Am. St. Rep. 795.

Vacating on motion, when not specially authorized by statute: 60 Am. St. Rep. 633.

Opening or vacating because of negligence or inadvertence of attorney: 80 Am. St. Rep. 264; 96 Am. St. Rep. 108.

X. EQUITABLE RELIEF.

(A) NATURE OF REMEDY AND GROUNDS.

A judgment can only be impeached in equity for fraud in its concoction, and in no case for mere irregularity.—Hazard v. Cole, 1 Idaho, 276.

Equity will not afford relief against a judgment at law on account of the negligence or unskillfulness of the party's attorney in defending the action wherein judgment was obtained.—Donovan v. Miller, 12 Idaho, 600, 9 L. R. A., N. S., 524, 10 Ann. Cas. 444, 88 Pac. 82.

A court of equity will not restrain the enforcement of a judgment at law on the ground of perjury or fraud in obtaining it, unless such fraud is extrinsic or collateral to the questions examined and determined in the action.—Donovan v. Miller, 12 Idaho, 600, 9 L. R. A., N. S., 524, 10 Ann. Cas. 444, 88 Pac. 82.

A court of equity will not restrain the enforcement of a judgment at law on the ground of want of consideration in the contract sued on or that it was against public policy, where the defendant, through negligence of his attorneys, failed to set up such defenses in the original action.—Donovan v. Miller, 12 Idaho, 600, 9 L. R. A., N. S., 524, 10 Ann. Cas. 444, 88 Pac. 82.

Where a judgment is regular on its face, and it is sought by a suit in equity to have it set aside or to enjoin the collection of it, in order to maintain such action the plaintiff must set up a good and meritorious defense to the original action.—Bernhard v. Idaho Bank & Trust Co., 21 Idaho, 598, Ann. Cas. 1913E, 120, 123 Pac. 481.

Editorial Notes.

Relief in equity from judgments: 19 Am. Dec. 603; 54 Am. St. Rep. 218.

Relief from judgments because obtained by perjury: 25 Am. St. Rep. 165; 3 Ann. Cas. 83; 10 Ann. Cas. 1107.

Equitable relief from judgments negligence as a bar to: 53 Am. St. Rep. 444.

(B) JURISDICTION AND PROCEEDINGS.

Defendants recovered judgment against certain persons, including the husband of plaintiff. Execution was issued and levied upon certain mining property of plaintiff "as community property," plaintiff claiming such property as his separate property. Plaintiff sued under R. S. 4538 to enjoin the sale and vacate the writ of execution as to such property. Held, that as plaintiff was not a party

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to the suits in which judgments were rendered, the decree should enjoin defendants from executing their judgments only as to plaintiff.—Young v. First Nat. Bk., 4 Idaho, 323, 39 Pac. 557.

Every presumption and intendment of law is in favor of the regularity of a judgment of a court of general jurisdiction, and to overcome such presumption, in a suit to have such judgment declared void, facts must be alleged and proven showing wherein the court failed to obtain jurisdiction to render the judgment which is so attacked.—Ollis v. Orr, 6 Idaho, 474, 56 Pac. 162.

In an action to have a judgment declared void, the complaint alleged that service was attempted by publication, that the affidavit on which said service was ordered "was insufficient, and the order is and was unauthorized and void." Held, that the allegations quoted were statements of legal conclusions and that the complaint therefor did not state a cause of action.—Ollis v. Orr, 6 Idaho, 474, 56 Pac. 162.

Editorial Notes.

Necessity that plaintiff in equitable action to set aside judgment should plead meritorious defense: Ann. Cas. 1913E, 124.

XI. COLLATERAL ATTACK.

(A) JUDGMENTS IMPEACHABLE COLLATERALLY.

A judgment which is void ab initio may be attacked collaterally, without appealing therefrom.—Leland v. Isenbeck, 1 Idaho, 469.

On a collateral attack, the validity of the judgment of a court of general jurisdiction is to be determined from the record alone, evidence aliunde being inadmissible.—McCornick v. Friedman, 7 Idaho, 686, 65 Pac. 440.

Upon a collateral attack, the judgment of a court of general jurisdiction, which has acquired jurisdiction of the parties and the subject matter, is not void for the reason that findings do not appear in the record or judgment-roll, unless such record affirmatively shows that such findings were not made and that they were not waived.—McCornick v. Friedman, 7 Idaho, 686, 65 Pac. 440.

Under Const., article 5, section 21, providing that the probate courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and appointment of guardians, the decree of a probate court, ordering the sale of property of an estate over which it had jurisdiction, cannot be collaterally attacked.—Clark v. Rossier, 10 Idaho, 348, 3 Ann. Cas. 231, 78 Pac. 358.

Editorial Notes.

Collateral attack upon judgments: 94 Am. Dec. 766; 23 Am. St. Rep. 104; 40 Am. St. Rep. 730.

Judgments which cannot be collaterally attacked for fraud not affecting the jurisdiction: 36 L. R. A., N. S., 980.

(B) GROUNDS.

In a collateral attack on a judgment of a court of general jurisdiction, the fact that the judgment is void must appear on the face of the record.—*O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

In a collateral attack on a default judgment obtained by service of summons by publication, the land of defendant being attached, the judgment will be held valid where the judgment-roll contains the papers specified in R. S. 4456, subdivision 1, which statute does not include as part of the judgment-roll the affidavit and order for publication.—*O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

Under the provisions of R. S. 4456, the default of the defendant in not answering should be indorsed upon the complaint; but if the clerk neglects to make such indorsement, it is a mere irregularity that cannot be taken advantage of in a collateral attack on the judgment; and especially is that true where the judgment recites the fact that the default of the defendant was duly entered.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

The proceedings of courts of general jurisdiction, where the summons is served by publication, are supported by the same presumptions as where the service is personally made, and can no more be avoided for mere errors and irregularities than can their other orders and judgments.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

A stranger to a judgment in a court of record is not prohibited from impeaching the judgment in a collateral proceeding, but in order to do so, he must show that he has rights and claims and interests which would be prejudiced or injuriously affected by the enforcement of the judgment that accrued prior to its rendition.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Where a judgment is rendered in a court of competent jurisdiction determining the title to land as between K. and I., and it was alleged in the complaint that K. was the owner in fee of said land and that I. had no right, title, or interest in or to said land, it was the duty of I. to set forth whatever right, interest or claim he had, if any, and, upon his failure to allege or assert any right, title or interest under a tax deed held by said I. at the time said action was commenced, I. is bound by the judgment, and he cannot thereafter in an action involving the title, where he is made a party, assert such right, after such judgment was entered, as he is not in possession of or the owner of any right, title or interest in or to such property, unless such right be one acquired by I. subsequent to the entry of such judgment.—*Smith v. Kessler*, 22 Idaho, 589, 127 Pac. 172.

Editorial Notes.

Collateral attack because court exceeded its jurisdiction: 29 Am. St. Rep. 78.

Collateral attack upon judgments because founded on false return of process: 19 Am. Dec. 137.

Collateral attack upon judgments for loss of jurisdiction occurring pendente lite: 17 Am. St. Rep. 143.

Collateral attack upon judgments because not within any of the issues: 38 Am. St. Rep. 752.

Collateral attack for fraud: 36 L. R. A., N. S., 980.

(C) PROCEEDINGS.

In an action to quiet title, defendant rested his claim of title on the validity of a judgment of the district court, which plaintiff claimed to be void for failure to serve defendant therein with summons. Held, a collateral attack on the judgment under the rule that an attack on a judgment is collateral if the action or proceeding has an independent purpose and contemplates some other relief or result than the mere setting aside of the judgment, although the setting aside of the judgment may be necessary to secure such independent purpose.—*O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

In a collateral attack on a judgment of a court of general jurisdiction, the only evidence admissible in support of such attack is the judgment-roll.—*O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

Of judgment granting injunction. See Injunction.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

A judgment sustaining a demurrer to a complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action is in no sense a judgment on the merits so as to constitute an order or judgment dismissing such complaint a bar to a good complaint for the same cause of action. *Lockett v. Lindsay*, 1 Idaho, 324.

A judgment against a petitioner to intervene, disallowing such petition or dismissing the same because an answer or cross-bill is not filed within the time prescribed by the order allowing intervention, will not support the plea of *res adjudicata*, as the judgment is only a judgment of nonsuit.—*Keane v. Pittsburg Lead Mining Co.*, 17 Idaho, 179, 105 Pac. 60.

A bill was filed in the circuit court of the United States by a municipal corporation against M., who was maintaining and operating a waterworks system within the municipality, praying that the court "fix and promulgate reasonable rates and charges for water to be furnished by the defendant under his franchise to the plaintiff and its inhabitants, . . . and that the defendant be restrained and enjoined from making, fixing or promulgating any other rate or rates" greater than or different from those fixed by the court, and the court, after hearing the case argued on demurrer to the petition, entered an order and judgment sustaining the demur-

rer and dismissing the bill on the ground that the court was "without jurisdiction to fix and promulgate the water rates and charges which defendant shall have the right to collect," and thereafter the municipality filed its complaint in the state court, setting forth that the water rates charged by the defendant are unreasonable and unjust, and that it has appointed commissioners in conformity with R. C. 2839, and that the defendant has neglected and refused to appoint like commissioners in conformity with the statute and prays that the court issue a writ, commanding and compelling the defendant to appoint commissioners in conformity with said statute. Held, that the judgment of the United States circuit court was not res adjudicata so as to bar the prosecution and maintenance of the subsequent action in the state court.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

Where the defendant interposes a motion to set aside a judgment, submits the same to the court for determination, and the court denies the motion, and no appeal is taken from the order denying the motion, the decision of the court thereon is final and res adjudicata and is a bar to an independent action to cancel or set aside such judgment.—*Bernhard v. Idaho Bank & Trust Co.*, 21 Idaho, 598, Ann. Cas. 1913E, 120, 123 Pac. 481.

Where, in a suit by a riparian proprietor against his neighbors for an injunction to restrain the obstruction of the stream, defendants also filed a cross-bill for an injunction and to recover damages, and the court found that neither party had sustained any damage and dismissed the suit, the judgment was no bar to a subsequent action to recover damages sustained by plaintiff since the trial. *Fischer v. Davis* (on rehearing), 24 Idaho, 216, 133 Pac. 910.

Editorial Notes.

Merger of one judgment into another: 92 Am. St. Rep. 778.

Merger, recovery against one joint tortfeasor: 92 Am. St. Rep. 835.

Waiving tort and suing in assumpsit as res judicata: Ann. Cas. 1913D, 238.

Judgment or decree on merits rendered on demurrer as constituting former adjudication: Ann. Cas. 1913A, 541.

XIV. CONCLUSIVENESS OF ADJUDICATION.

Judgment in action by husband and wife not res judicata in separate action for injuries to husband. See Carriers, IV.

(A) JUDGMENTS CONCLUSIVE IN GENERAL.

To make the matter res adjudicata, it is immaterial that the question alleged to have been settled by a former adjudication was determined in a different kind of proceeding or a different form of action from that in which the estoppel is claimed; the test being, Was the question actually and directly in issue and judicially determined in the former

suit between the same parties or their privies by a court of competent jurisdiction?—*Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

Editorial Notes.

Conclusiveness of judgments in other actions involving the same question: 38 Am. Rep. 778.

Conclusiveness of judgments, elements necessary to in another action: 8 Am. St. Rep. 229.

Conclusiveness of adjudications on demurrer: 44 Am. St. Rep. 566.

(B) PERSONS CONCLUDED.

A person in possession of land under a contract of purchase is not in privity with his grantor so as to be bound by a judgment in an action commenced against his grantor affecting the land, instituted subsequent to the contract to purchase.—*Schuler v. Ford*, 10 Idaho, 739, 109 Am. St. Rep. 233, 3 Ann. Cas. 336, 80 Pac. 219.

Every person is privy to a judgment or decree who claims an interest in an estate, which interest has been acquired by conveyance from a party to such judgment or decree subsequent to the commencement of the action in which the judgment or decree was entered.—*Shephard v. Coeur d'Alene Lumber Co.*, 16 Idaho, 293, 101 Pac. 591.

Every person is a privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action, and privity to the judgment in such case implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action.—*Smith v. Kessler*, 22 Idaho, 589, 127 Pac. 172.

Editorial Notes.

Warrantors, when bound by judgments against grantees: 43 Am. Dec. 569.

Judgments against principals, when bind agents, sureties or indemnitors: 83 Am. Dec. 380; 33 Am. Rep. 802; 40 L. R. A., N. S., 698.

Judgments against tenant, when bind landlord: 95 Am. Dec. 473.

Judgments against tenant, effect of as res judicata: 112 Am. St. Rep. 21.

Conclusiveness of judgments is restricted to the party in the capacity in which he sued or defended: 7 Am. St. Rep. 175.

Conclusiveness of judgments against holders of unrecorded deeds: 31 Am. St. Rep. 217.

Conclusiveness against purchaser of land of judgment against vendor brought after purchase: 3 Ann. Cas. 339.

Person not a party or privy conducting defense: 37 L. R. A. 963.

(C) MATTERS CONCLUDED.

In an action to enjoin a sale under a decree of foreclosure of a lien, it was shown that defendants in the foreclosure suit had filed an answer alleging title to certain personal property in the plaintiff in the present action, but that the court refused to consider that question on objection by the plaintiff in that action, who is defendant herein. Held, that the prior action was not a bar to plaintiff's right to set up his title to certain personal property attempted to be sold under the decree.—*Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974.

Where a record shows that a demand for damages should have been litigated in a former action between the same parties, a motion for nonsuit on that ground should be sustained.—*Shields v. Johnson*, 12 Idaho, 329, 85 Pac. 972.

A decree in an action between D. and J., adjudicating the respective rights and priorities of the parties to the waters of a certain stream for the irrigation of their respective ranches then owned and occupied by them, is not res adjudicata or binding upon D. as to his right to use certain of the waters of the same stream upon another tract of land as appurtenant thereto, which is purchased and acquired by D. from a stranger to the action subsequent to the trial and decree in the action between D. and J.—*Josslyn v. Daly*, 15 Idaho, 137, 96 Pac. 568.

Where a petition to intervene is filed, and the prayer of such petition is granted upon condition that the petitioner file an answer or cross-bill within a fixed time, and he fails to file such answer or cross-bill, and judgment pro confesso is entered against him, the effect of such judgment is only to preclude his right to intervene, but does not conclude him upon any matter which might have been put in issue by such answer or cross-bill.—*Keane v. Pittsburg Lead Mining Co.*, 17 Idaho, 179, 105 Pac. 60.

A former judgment, adjudging that a certain private road has been dedicated to the public, is res judicata as between the parties to such action.—*Waldron v. Jenkins*, 18 Idaho, 616, 111 Pac. 745.

Where a case was dismissed and disposed of on the ground that the court had no jurisdiction to hear and determine the matter involved, such court was without jurisdiction to determine or pass upon any question raised by the pleadings except the question alone of the court's jurisdiction; and any further finding or holding by the court with reference to the matters pleaded is not binding in a subsequent action between the same parties and cannot become res adjudicata.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

In a contest between A. and B. in the probate court over appointment to administer the estate of M., A. was appointed administratrix on account of the showing made that B. had been engaged with M. in a partnership business, and after the estate was finally administered, and upon final decree of distribution, the probate court entered a judg-

ment and decree distributing an undivided one-half interest in certain real estate, standing on the records in the name of B., and such decree of distribution was based upon the ground that B. and M. had been partners in business. Held, that such order of appointment and decree of distribution cannot be successfully pleaded as res adjudicata so as to estop B. from asserting his exclusive right of sole ownership to such property in an action to quiet his title to the property which was attempted to be distributed by the decree of distribution.—*Miller v. Mitcham*, 21 Idaho, 741, 123 Pac. 941.

Editorial Notes.

Conclusiveness in an action of account as a bar to subsequent actions for items omitted: 78 Am. Dec. 769.

Conclusiveness of judgments, what facts are not res judicata though apparently found by the court: 96 Am. Dec. 775.

Conclusiveness of judgments, proof that matter is res judicata: 44 Am. St. Rep. 562.

Conclusive effect of judgment on which action to set aside conveyance as fraudulent is based: 67 L. R. A. 593.

(D) JUDGMENTS IN PARTICULAR CLASSES OF ACTIONS AND PROCEEDINGS.

Where K. brings an action to quiet title to real property, and alleges ownership, and it is also alleged that I. claims right, title or interest in said property, and at the time such action is commenced I. is the owner and holder by assignment of a tax sale certificate, and I. fails to set up in said action his right, title or interest by reason of his tax certificate, and a judgment is rendered in said action quieting the title in K. as against I., I. has no title, right or claim under said tax title which can be assigned to S. and thereafter asserted in an action adverse to the rights of K.—*Smith v. Kessler*, 22 Idaho, 589, 127 Pac. 172.

Editorial Notes.

Conclusiveness of judgments, instances of: 14 Am. St. Rep. 250; 15 Am. St. Rep. 142.

XV. LIEN.

Under Civ. Prac. Act, section 210, providing that "a transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county," etc., it is not necessary, in order to create a lien upon the estate of the judgment debtor, that the certified transcript be recorded; and therefore, where the proper transcript was filed, and the recorder in transcribing it on his records made a clerical mistake in the initial letter of the Christian name of the judgment debtor, such error did not affect the lien of the judgment.—*Moore v. Taylor*, 1 Idaho, 630.

A judgment lien is a vested right of property, and cannot be satisfied except by payment or release.—*Smith v. Richards*, 2 Idaho, 498, 21 Pac. 419.

The lien of a judgment in a suit in which land has been attached relates back to the date of the levy of the attachment.—*First Nat. Bk. v. Lieuallen*, 4 Idaho, 431, 39 Pac. 1108.

Editorial Notes.

Lien, estates and interests affected by: 93 Am. Dec. 345; 117 Am. St. Rep. 776.

Interest in real property undisclosed by record as subject to lien of docketed judgment: *Ann. Cas.* 1912D, 988.

XVI. JUDGMENTS IN REM.

A judgment was rendered in another state on partnership notes and the partnership property sold, the proceeds being applied on the judgment. One of the partners was personally served in the state in which the action was brought, the other partner, a resident of this state, was served by publication. Held, that such judgment was a judgment in rem and was not a bar to an action in this state on the original obligation.—*First Nat. Bk. v. Grignon*, 7 Idaho, 646, 65 Pac. 365.

Where constructive service of summons has been had by publication against a nonresident defendant, and property within the state has been attached under a writ of attachment regularly issued in conformity with the requirements of the statute, the jurisdiction of the court attaches in rem to the extent of the property attached; and a judgment entered under the constructive service of summons is valid and binding to the extent of the rem.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

Editorial Notes.

Judgments in rem and their effect as res judicata: 75 Am. Dec. 720.

XVII. FOREIGN JUDGMENTS.

Action on foreign judgment. See post, **XXI**.

Foreign judgment as judgment in rem. See ante, **XVI**.

Admissibility and sufficiency of certification or exemplification of foreign judgment. See *Evidence*, **X**, (B).

A decree of a court of equity of another state, having jurisdiction of the parties, is binding on them, and if it affects title to property in this state, such decree will be given force by the courts of this state.—*Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 96 Am. St. Rep. 290, 59 Pac. 533.

Article 4, section 1, of the federal constitution, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, does not prevent inquiry into the jurisdiction of a court of a sister state to render a judgment, sought to be made effective by proceedings in this state.—*Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157.

Where a judgment was obtained in another state against a corporation and it is shown that service of summons was had upon a former secretary of the corporation and that

plaintiff knew that the person served was not an officer of the corporation at the time of the service of such summons, the judgment is void and cannot be enforced in this state. *Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157.

A judgment was obtained against C. and others in Nebraska in 1895. C. moved to Idaho in 1897 and continued to reside here till the commencement of this action. No part of the judgment was ever paid and it became dormant in 1900. C. was in Nebraska in 1905, when service of a motion for review was had on him and thereafter in October, 1905, C. appeared by attorney in the Nebraska court and an order was made reviving the judgment. Held, that the order of revivor had the effect of giving new life to the judgment and continuing it in force, and that the order of revivor would have the same effect in this state.—*Leman v. Cunningham*, 12 Idaho, 135, 85 Pac. 212.

The judgment and decree of the supreme court of the state of Utah, adjudging and decreeing a marriage performed in that state to be valid, in an action involving the validity of such marriage, controls and governs this court, in an action in this state between the same parties involving the validity of such marriage and the marriage status of the parties thereto.—*Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

The courts of Utah, having decided that a divorce granted by the Mormon church was illegal and void, and did not terminate the marriage relation between the parties thereto, in an action involving the validity of said divorce, fixed and determined the status of such parties, and such decision controls and governs the courts of this state in an action involving the validity of such divorce.—*Hilton v. Stewart*, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

Where a death has been wrongfully caused in this state, the prosecution of an action therefor under R. C. 4100 in a foreign state for the benefit and in behalf of a part only of those who are "heirs" under the laws of the state of Idaho, is not a bar to a subsequent action in this state by such heir as was not represented in the action in the foreign jurisdiction, and to deny the right of such a judgment entered in a foreign jurisdiction to bar and preclude an omitted and nonrepresented heir to thereafter prosecute an action in this state does not deny such full faith and credit to such foreign judgment as is commanded by U. S. Const., article 4, section 1 and U. S. Rev. Stats. 1905 (U. S. Comp. Stats. 1901, p. 677).—*Whitley v. Spokane Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

A recovery in a foreign state under the death statute of Idaho, authorizing such an action for a wrongful death in this state, does not bar a recovery in this state by anyone who is an heir under the laws of Idaho, and who was barred from participating as an heir under the laws of the foreign state, and who was not represented in the action wherein the recovery was had.—*Whitley v. Spokane etc. Ry. Co.*, 23 Idaho, 642, 132 Pac. 121.

In an action for wrongfully causing the death of plaintiff's son, certain judgments in favor of the son's wife as administratrix were pleaded in defense. Held, that neither of the judgments pleaded in this case constitutes a bar to the right of recovery in this action. The Tennessee judgment would not be a bar to a right of recovery in that state, on the ground a recovery had once been had, but simply for the reason that the court there holds that no recovery at all could be had in that state by the respondent herein, Mary Elizabeth Whitley, or for her use or benefit. This is because she was not under the laws of Tennessee an heir of the decedent. The Washington judgment would be no bar in that state to a further prosecution by Mary Elizabeth Whitley, for the reason that the court of Tennessee wherein the administratrix obtained her appointment and official existence holds that the administratrix alone was the sole heir of the decedent, and that she had no authority to and did not represent Mary Elizabeth Whitley in the prosecution of the death claim in the Washington court.—Whitley v. Spokane etc. Ry. Co., 23 Idaho, 642, 132 Pac. 121.

Editorial Notes.

Foreign judgments effect of: 7 Am. Dec. 324; 94 Am. St. Rep. 532.

Foreign judgments, whether merge the cause of action: 38 Am. Rep. 667.

Foreign judgments in rem: 94 Am. St. Rep. 550.

Judgments of sister states, effect of: 2 Am. Dec. 42; 26 Am. Dec. 27; 103 Am. St. Rep. 304.

Unfavorable judgment in action against joint tort-feasor in one state as bar to action against other tort-feasor in another state: Ann. Cas. 1913E, 882.

Foreign judgments in rem: 20 L. R. A. 668; 32 L. R. A. 236.

Right to resist sister state judgment on ground of fraud: 32 L. R. A., N. S., 905.

XVIII. ASSIGNMENT.

See post, XX.

XIX. SUSPENSION, ENFORCEMENT AND REVIVAL.

Creditor's bill against judgment debtor. See Creditor's Suit.

Relief by bill of review. See Equity, III.

Waiver of disqualification of judge in action to revive judgment. See Judges, IV.

A court of equity has no power to confirm or enforce a void judgment by a subsequent proceeding instituted for that purpose.—Ray v. Ray, 1 Idaho, 566.

W. mortgaged lands on which he had made entry and final proof under the desert land laws of the United States. The mortgage was foreclosed and at the sale thereunder the assignee of the mortgage purchased the land. Prior to said sale, said desert entry was contested in the proper land office and the entry canceled. Held, that under R. S. 4498, the plaintiff was entitled to file his petition to revive the judgment entered on the foreclosure

of the mortgage.—Cantwell v. McPherson, 3 Idaho, 321, 29 Pac. 102.

A cause of action to revive an original judgment under R. S. 4498, which declares that if the purchaser of real property sold on execution fails to recover possession thereof "because the property sold was not subject to execution and sale," does not accrue until that fact is known to the purchaser.—Cantwell v. McPherson, 3 Idaho, 721, 34 Pac. 1095.

A proceeding to revive an original judgment under R. S. 4498, which declares that if the purchaser of real estate sold on execution fails to recover possession thereof "in consequence of some irregularity in the proceedings concerning the sale," does not accrue until the period of redemption has expired and will be barred within three years under R. S. 4054.—Cantwell v. McPherson, 3 Idaho, 721, 34 Pac. 1095.

Under R. S. 4611, abolishing the writ of scire facias, and R. S. 4020, providing that there shall be but one form of civil action, an action brought to revive a judgment is a new action and not a proceeding in the original action to revive such judgment.—Stevens v. Hall, 8 Idaho, 549, 69 Pac. 282.

A judgment was obtained against C. and others in Nebraska in 1895. C. moved to Idaho in 1897, and continued to reside here till the commencement of this action. No part of the judgment was ever paid and it became dormant in 1900. C. was in Nebraska in 1905, when service of a motion for revivor was had on him, and thereafter in October, 1905, C. appeared by attorney in the Nebraska court and an order was made reviving the judgment. Held, that the order of revivor had the effect of giving new life to the judgment and continuing it in force, and that R. S. 4051, limiting an action on a judgment of any state or territory within the United States to six years, begins to run from the date of the judgment.—Leman v. Cunningham, 12 Idaho, 135, 85 Pac. 212.

Under the laws of this state, there is one method of procedure for keeping alive a judgment for the recovery of money, and that is by bringing an action thereon within six years from the entry of said judgment; and there are two methods of keeping judgments, other than for the recovery of money, alive: (1) By action on the judgment within six years; (2) by supplemental proceedings under R. C. 4474.—Bashor v. Beloit, 20 Idaho, 592, 119 Pac. 55.

The legislature has the power to limit the time in which an action may be brought upon a judgment to revive it, and to limit the time in which execution may issue for the enforcement of a judgment, and it may extend the time for the commencement of an action to revive a judgment beyond the period of time allowed by law for the issuance of an execution to enforce such judgment.—Bashor v. Beloit, 20 Idaho, 592, 119 Pac. 55.

Editorial Notes.

Death of judgment debtor, effect of upon subsequent enforcement of judgment: 65 Am. Dec. 123.

Scire facias to revive judgments: 94 Am. Dec. 222.

XX. PAYMENT, SATISFACTION, MERGER AND DISCHARGE.

Setoff pro tanto of former judgment for costs. See Costs, VIII.

Defendant obtained a judgment for costs against plaintiff and assigned the judgment to her attorney. At the request of plaintiff's attorney, the assignee sent a receipt to a bank in another state with instructions to receive the money for him and deliver the receipt. The plaintiff paid the money into the bank and filed the receipt in the action. Plaintiff then sued the assignee in said other state to recover a debt alleged to be due to it from the assignee, and garnished the money in the hands of the bank. On motion of the assignee, the receipt was struck from the files and execution ordered to issue on the judgment. Held, that the order was erroneous as the payment to the bank satisfied the judgment.—*Vermont Loan etc. Co. v. McGregor*, 6 Idaho, 134, 53 Pac. 399.

Defendant obtained a judgment for costs against plaintiff and assigned the judgment to her attorney. At the request of plaintiff's attorney, the assignee sent a receipt to a bank in another state with instructions to receive the money for him and deliver the receipt. The plaintiff paid the money into the bank and filed the receipt in the action. Plaintiff immediately sued the assignee in said other state to recover a debt alleged to be due to it from the assignee and garnished the money in the hands of the bank. On motion of the assignee, the receipt was struck from the files and execution issued on the judgment. Held, that the judgment was satisfied by payment to the bank, and that the courts of said other state were the proper forum in which to try the question of the assignee's indebtedness to plaintiff.—*Vermont Loan etc. Co. v. McGregor*, 6 Idaho, 134, 53 Pac. 399.

Where a motion is made to set aside the satisfaction of a judgment made by the clerk under R. S. 4461 on the ground that the showing required by the statute had not been made, and the debtor on the hearing makes a showing that he has in fact paid the judgment, the court should hear and consider such showing and the evidence in support thereof, and either deny the motion, or vacate such satisfaction or make an order directing the entry of satisfaction of the judgment.—*Lindsay v. Oregon etc. R. R. Co.*, 13 Idaho, 477, 12 L. R. A., N. S., 184, 90 Pac. 984.

Editorial Notes.

Satisfaction of judgments, vacating when title of purchaser at execution sale fails: 53 Am. Dec. 701.

XXI. ACTIONS ON JUDGMENTS.**(A) DOMESTIC JUDGMENTS.**

The right to commence and maintain an action on a judgment in this state is not dependent upon the right to issue an execution for the enforcement of such judgment, but is dependent upon and governed by the provisions of the statute, limiting the time in which an action may be brought upon a judgment.—*Bashor v. Beloit*, 20 Idaho, 592, 119 Pac. 55.

Under the common law, the owner of a judgment may bring an action on it as a debt of record in any court of competent jurisdiction and prosecute the same to final judgment, notwithstanding his right to issue execution on the original judgment remained unimpaired, and notwithstanding the time for issuing an execution thereon had expired.—*Bashor v. Beloit*, 20 Idaho, 592, 119 Pac. 55.

Under R. C. 4051, an action may be maintained on a domestic judgment, if commenced within six years after the entry of such judgment.—*Bashor v. Beloit*, 20 Idaho, 592, 119 Pac. 55.

(B) FOREIGN JUDGMENTS.

A complaint in a suit on a foreign judgment, which alleges that defendant had been personally served by summons in the city court of Brooklyn, New York, that he appeared in said action by counsel, that thereafter judgment was duly given, and that the court rendering the judgment was a court of record, and that, under the laws of the state of New York, it had jurisdiction of the subject matter of the action, is sufficient.—*Schenk v. Birdseye*, 2 Idaho, 141, 6 Pac. 128.

Editorial Notes.

Necessity of alleging, in action based on foreign judgment of divorce, that court had jurisdiction: *Ann. Cas.* 1913B, 1193.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

Finding on defense of former adjudication unnecessary where court finds against plaintiff on merits. See *Divorce*, IV, (B).

JUDICIAL NOTICE.

See *Evidence*, I.

JUDICIAL SALES.

Sales in particular classes of proceedings or under particular writ. See *Attachment and Garnishment*; *Execution*; *Mortgages*; *Executors and Administrators*; *Receivers*; *Partition*; *Taxation*; and other specific heads.

Sales under execution. See *Execution*, VII.

The filing of a certificate of sale of real estate by the officer making the same, and in the manner prescribed by statute, imparts to all the world constructive notice of the estate acquired by the purchaser under it, as well as of the fact of sale and its legal consequences.—*Hazard v. Cole*, 1 Idaho, 276.

The proper remedy to set aside a judicial sale which has been wrongfully made, prior to the execution of the sheriff's deed, is by motion in the principal action, notice of which should be served on the adverse party and upon the purchaser.—*Woody v. Jameson*, 5 Idaho, 466, 50 Pac. 1008.

To entitle the purchaser under a judicial sale to a writ of assistance, he must show a valid judgment.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

One who has acquiesced in an irregularity in the conduct of a judicial sale at the time

thereof, and does not show affirmatively that he has been injured thereby, should not afterward be heard to question its validity on the ground of such irregularity.—*In re Great Western Beet Sugar Co.*, 22 Idaho, 328, 125 Pac. 799.

In order to justify setting aside a judicial sale on behalf of one attacking it on the ground of alleged irregularities in the conduct of such sale, the person attacking such sale should allege and establish injury to himself resulting from the irregularities complained of.—*In re Great Western Beet Sugar Co.*, 22 Idaho, 328, 125 Pac. 799.

Editorial Notes.

Whether, when and how a purchaser at judicial sales may object to title: 135 Am. St. Rep. 917.

Belief of purchaser on annulling sale: 69 L. R. A. 33.

JURISDICTION.

Nature, extent, and exercise of jurisdiction in general. See Courts, I.

JURY.

- I. NATURE AND CONSTITUTION OF JURIES.
- II. RIGHT TO TRIAL BY JURY.
- III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.
- IV. SUMMONING, ATTENDANCE, DISCHARGE AND COMPENSATION.
- V. COMPETENCY OF JURORS, CHALLENGES AND OBJECTIONS.
 - (A) Competency in General.
 - (B) Challenges, Exceptions and Objections.
- VI. IMPANELING FOR TRIAL AND OATH.

See Grand Jury.

Custody, conduct and deliberation of jury in civil cases. See Trial.

— In criminal cases. See Criminal Law, XII, (J).

Adoption of findings of jury in equity cases. See Equity, V.

Instructions in civil actions. See Trial.

— In criminal prosecutions. See Criminal Law.

Province of court and jury. See Trial.

— In criminal actions. See Criminal Law.

Certiorari to review action of court in quashing jury panel. See Certiorari.

Failure to object to trial of equity action by jury. See Appeal and Error, V, (B).

Expense of shavng jurors while confined not a county charge. See Counties, III, (C).

I. NATURE AND CONSTITUTION OF JURIES.

(No paragraphs.)

II. RIGHT TO TRIAL BY JURY.

- Right of court to send action at law to referee. See Reference.
- Submission of issues to jury in equity. See Equity, V.

Waiver of objection to trial of adverse suit by jury.—*Burke v. McDonald*, 2 Idaho, 339, 13 Pac. 351.

An action under act of January 30, 1885, to try title to an office to which there are several claimants, is one of legal and not of equitable cognizance, and the parties are entitled to trial by jury.—*People v. Havird*, 2 Idaho, 531, 25 Pac. 294.

The provisions of the federal constitution relative to trials by jury have no application to state courts.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

In an action to foreclose a mortgage given to secure money borrowed, money due for services rendered and money paid out by plaintiff for defendant, the answer denied any indebtedness thereunder except for the money borrowed, which was claimed to have been paid and the payment of which was admitted by plaintiff. Held, that there was no error in "committing the cause for trial as a law case," since, even if it were an equity case, the court could call a jury to try the issue of fact raised by the pleadings.—*Montandon v. Wingert*, 5 Idaho, 185, 47 Pac. 614.

In a suit by a mortgagor under R. S. 3364 to recover the statutory penalty for failure to satisfy of record a mortgage, which has been fully paid, either party has a right to trial by jury.—*Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779.

In equitable actions, neither party is entitled to a trial by jury as a matter of right. *Christensen v. Hollingsworth*, 6 Idaho, 87, 53 Pac. 211; *Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542.

Const., article 1, section 7, provides, inter alia, that the right of trial by jury shall remain inviolate. Const., article 5, section 1, provides that "the distinction between actions at law and suits in equity, and the forms of all actions and suits, are hereby prohibited," etc. Held, that the guaranty that the right of trial by jury shall remain inviolate was not intended to extend the right of trial by jury to equity cases, but simply to secure that right as it existed at the date of the adoption of the constitution.—*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

R. S. 4369, declaring, inter alia, that in actions to recover specific personal property, an issue of fact must be tried by a jury, refers to an action at law, the distinction between law and equity being recognized in the section.—*Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542.

A litigant cannot be required to deposit jurors' fees as a condition precedent to his right to trial by jury.—*Randall v. Kelsey*, 7 Idaho, 168, 61 Pac. 515.

Where, in a will contest, written demand for a jury is filed in the probate court and thereafter on appeal filed with the other papers in the district court, no further demand for a jury is necessary in the district court, though R. S. 5308 requires a trial by the court if no written request for a jury

is made three days prior to the day set for hearing.—*Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 473.

Where, in a suit to foreclose a laborer's lien, defendants filed a counterclaim for damages due to plaintiff's unskillfulness in performing the work for which the lien was claimed, and ten days after the jury had been discharged for the term defendants demanded a trial by jury, not on their claim for damages, but on the ground that there were no facts shown creating any lien on the property, there was no error in refusing a trial by jury. *Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218.

In an action to quiet title, neither party is entitled to a jury trial as a matter of right.—*Shields v. Johnson*, 10 Idaho, 476, 3 Ann. Cas. 245, 79 Pac. 391.

Where there is a complaint in equity and a cross-complaint at law, either party has a right to have the questions in the law action determined by the jury, and the court of its own volition may submit certain questions involved in the equity action to the jury.—*Sandstrom v. Smith*, 12 Idaho, 446, 86 Pac. 416.

Where a party stipulates and agrees to the appointment of a referee to take testimony and report the same to the court and makes no demand for a jury, he will be deemed by such act to have waived a jury, even though the case were properly triable to a jury.—*Lindstrom v. Hope Lbr. Co.*, 12 Idaho, 714, 88 Pac. 92.

Under R. S. 4982, where issues of fact are made by a return to an alternative writ of mandate, neither party is entitled to a trial by jury as a matter of right, the submission to a jury being within the discretion of the court.—*Nelson v. Steele*, 12 Idaho, 762, 88 Pac. 195.

Const., article 1, section 7, which provides that "the right of trial by jury shall remain inviolate," has reference to the right of jury trial as the same existed at the time of the adoption of the constitution, and therefore does not guarantee to the citizen the right of trial by jury in condemnation proceedings in the exercise of the right of eminent domain pursuant to Const., article 1, section 14.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

The right of trial by jury in proceedings for condemnation of property to a public use does not exist as a constitutional right unless the constitution itself contains a specific grant and guaranty of such right.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

At common law, a proceeding for condemnation of property to a public use was inquisitorial and ex parte, and was instituted at the instance of the sovereign, and the fixing or assessing damages to be paid for the taking was merely for the purpose of satisfying the sovereign conscience, and a trial by jury was not recognized in such proceedings. *Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

At the time of the adoption of the constitution, the exercise of the right of eminent domain was recognized and existed as a "special proceeding of a civil nature," and was not classed or recognized as an action at law.—*Portneuf Irr. Co., Ltd., v. Budge*, 16 Idaho, 116, 18 Ann. Cas. 674, 100 Pac. 1046.

In a proceeding under the statute in condemnation primarily the right of trial by jury is accorded equally to both parties to the action. As a substitute therefor, there is accorded to the plaintiff the right of having commissioners appointed to assess the damages that will be sustained by the defendant, and if the plaintiff pays such award and the defendant accepts the same the right of trial by jury is ended. If, on the other hand, the plaintiff pays the award and the defendant refuses to accept it, the plaintiff may no longer demand a jury, but the defendant may still demand a jury to assess the damages that he will sustain. If, however, the defendant accepts the award, he waives the right of trial by jury and the litigation thereby ends.—*Pyle v. Woods*, 18 Idaho, 674, 111 Pac. 746.

Under Const., article 1, section 7, the right of trial by jury is reserved to the citizens of the state as it existed and was permitted under the common law, and such right is retained in all cases which were triable by jury under the common law, and limits the power of the court and of the citizens to a waiver of a jury trial to criminal cases not amounting to a felony, and then only by consent of both parties expressed in open court. Held, that the word "trial," as used in said section, means an issue of fact presented by a plea of the accused, and the court is without jurisdiction to try such issue of fact, if the charge be a felony, and there can be no conviction except upon trial by jury; but where the accused, with full knowledge of his constitutional rights, enters a plea of guilty, and presents no issue of fact for trial, there can be no trial, and the conviction is the accused's admission, and takes the place of a verdict of a jury.—*In re Dawson*, 20 Idaho, 178, 117 Pac. 696.

A person charged with contempt is not entitled to a jury trial, and the statutes regarding informations, indictments, and the trial of criminal cases are not applicable to contempt proceedings.—*McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954.

Editorial Notes.

Legislature, power of to regulate or dispen-
 sence with trial by jury: 48 Am. Dec.
 185; 58 Am. Dec. 791.

Jury trial, conditions and restrictions
 which may be imposed upon: 98 Am.
 St. Rep. 538.

Right to jury trial in action to foreclose
 mechanic's lien: Ann. Cas. 1913B, 283.

Right to jury trial in action to declare
 resulting trust: Ann. Cas. 1913C, 153.

Right to jury trial in election contest:
 Ann. Cas. 1913C, 161.

Right to jury trial in action at law where
 equitable defense is interposed: Ann.
 Cas. 1913D, 168.

Right to jury trial in contempt proceedings: Ann. Cas. 1913D, 458.

Right to jury trial in disbarment proceedings: Ann. Cas. 1913D, 1162.

Right to jury trial in action to recover on lost instrument: Ann. Cas. 1912D, 246.

General scope of constitutional provisions guaranteeing right of trial by jury: 1 Ann. Cas. 703.

Right to jury trial in actions to quiet title: 3 Ann. Cas. 248; 18 Ann. Cas. 245.

Right to jury trial in quo warranto proceedings: 5 Ann. Cas. 640.

Right to jury trial in eminent domain proceedings: 18 Ann. Cas. 680.

Denial of jury trial simply because matters in issue are complicated: 39 L. R. A., N. S., 45.

III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

R. S. 3941, 3942, provide that jurors must be citizens of the United States and electors of the county. R. S. 500, 501, require that electors, besides having certain qualifications, must not be members of any "organization which teaches its adherents to commit the crime of bigamy or polygamy." Held, that a member of the so-called Mormon Church cannot be a juror.—Territory v. Nelson, 2 Idaho, 651, 23 Pac. 116; Territory v. Evans, 2 Idaho, 651, 23 Pac. 232.

Editorial Notes.

Juror as "freeholder": Ann. Cas. 1913D, 331.

IV. SUMMONING, ATTENDANCE, DISCHARGE AND COMPENSATION.

It is error for the court to draw a jury from a list prepared by the judge and sheriff until the regular panel is exhausted; and that fact must appear from the record.—People v. Dunn, 1 Idaho, 74.

A jury summoned under the laws of the territory from the county in which the district court is being held for the transaction of business under the territorial laws, may be adopted by the court for the transaction of business and the disposition of cases arising under the laws of the United States, since such jury is, in every respect from the vicinage, being drawn from the district within which the crime was committed, although the commission of the crime took place in another county of the district.—United States v. Mays, 1 Idaho, 763.

No provision having been made by the legislature of the territory for selecting or summoning jurors for the trial of cases arising under the constitution or laws of the United States, or in which the United States is a party, it is proper to issue the venire in a criminal case arising under United States laws to the United States marshal and that the jurors be summoned from the body of the district under open venire.—United States v. Mays, 1 Idaho, 763; United States v.

Kuntze, 2 Idaho, 480, 21 Pac. 407; United States v. Cozzens, 2 Idaho, 486, 21 Pac. 409.

An elisor appointed to execute process and orders of the court is invested with the powers, duties and responsibilities of the sheriff in the performance of those duties, and is therefore entitled to the compensation allowed to the sheriff for the performance thereof.—Griffith v. Montandon, 4 Idaho, 75, 35 Pac. 704.

Where an application of defendant in a criminal case for the appointment of an elisor to take charge of the jury does not come within the provisions of R. S. 1887, providing for the appointment of elisors, the discretion of the trial court in refusing such appointment will not be disturbed on appeal.—State v. Hendel, 4 Idaho, 88, 35 Pac. 836.

Under R. S. 3961, the court may, for good cause, discharge regularly drawn and summoned jurors, and order open venire for jurors to try causes at the term for which such discharged jurors were regularly drawn.—Simmons v. Cunningham, 4 Idaho, 426, 39 Pac. 1109.

Laws 1899, page 335, amending R. S. 3952, does not repeal nor is it in conflict with R. S. 3961, relating to the summoning of jurors.—In re Corcoran, 6 Idaho, 657, 59 Pac. 18.

Under R. S. 1776, amended by Laws 1899, page 248, any taxpayer of the county has the right to appeal from an order of the board of county commissioners in selecting and listing names of persons to serve as jurors.—Heitman v. Morgan, 10 Idaho, 562, 79 Pac. 225.

Where it appears that the sheriff is disqualified from serving any process in his county, it is error to permit one of his deputies to serve such process.—State v. Barber, 13 Idaho, 65, 88 Pac. 418.

V. COMPETENCY OF JURORS, CHALLENGES AND OBJECTIONS.

(A) COMPETENCY IN GENERAL.

Review of court's discretion in passing on juror's competency. See Criminal Law, XV, (G), 3.

Under R. S. 7836, providing that "in a challenge for actual bias, it must be alleged that the juror is biased against the party challenging," a challenge for actual bias on the ground that the juror was prejudiced against the attorney of the defendant should not be sustained.—State v. Gordon, 5 Idaho, 297, 48 Pac. 1061.

Under R. S. 7834, subdivision 2, providing that in criminal cases a challenge for implied bias may be taken on the ground of "standing in the relation of attorney and client," a challenge may be taken to a juror when such juror is a client of the opposing counsel.—State v. McGraw, 6 Idaho, 635, 59 Pac. 178.

Where, in a will contest, a juror testifies on his voir dire that he believed that the testator was of sound mind, a challenge to such juror is properly sustained.—Pine v. Callahan, 8 Idaho, 684, 71 Pac. 473.

In answer to a question as to whether he had any bias or prejudice which would prevent him from sitting and trying the case

fairly and impartially, a juror said: "I am afraid I have a little prejudice, I don't know that I have any grounds for it much—any grounds of prejudice. I don't want to sit on the jury. The prejudice does not exist against any of the parties named." Held, that a challenge to such juror was properly overruled.—*Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 473.

Under R. C. 4380, subdivision 3, disqualifying a person from acting as a juror in a case where the juror is "united in business with either party" to the action, where a person has an agreement with one of the parties to the action, whereby one is sinking an artesian well and the other is contingently liable for a part payment of the expense thereof upon failure to procure water, and has signed and executed a promissory note or contract to that effect, such person as a juror and the party litigant are "united in business" within the meaning of the above statute.—*Hall v. Chattin*, 17 Idaho, 664, 106 Pac. 1132.

Facts of this case examined and considered, and held that under the evidence the jurors did not stand in the relation of debtors to the defendant within the meaning of R. C. 4380.—*Hall v. Chattin*, 17 Idaho, 664, 106 Pac. 1132.

Defendant was charged with violation of the local option statute. A juror on his voir dire admitted that while serving as a juror on a former trial of another charge against defendant he had heard a witness testify that defendant had made the sale of liquor with which he was charged in the present case, but such juror stated that he could give defendant a fair and impartial trial and would be uninfluenced by any evidence he had heard at the former trial. Held, that there was no error in overruling a challenge to such juror. *State v. Caldwell*, 21 Idaho, 663, 123 Pac. 299.

Where the whole examination of a juror on his voir dire shows that he was so biased and prejudiced against persons charged with the violation of the local option law that he could not give them a fair and impartial trial, it was error in such a prosecution to deny a challenge to such juror.—*State v. Caldwell*, 21 Idaho, 663, 123 Pac. 299.

(B) CHALLENGES, EXCEPTIONS AND OBJECTIONS.

Challenges to grand juror. See Grand Jury.

In a criminal action the court may require the parties to exercise all their challenges peremptorily, or for cause, and the juror, if accepted, be sworn to try the cause as each juror appears and before another is called, or may, in its discretion, allow the clerk to draw from the box twelve names before any challenges are interposed and after these are examined for cause and passed upon draw others to take the place of those excused and allow the parties to examine and pass upon all thus called before exercising their peremptory challenges, provided that, in case of recess or adjournment, the peremptory challenges be exercised as to those passed and accepted at the time of such recess or adjournment, and those not excused be sworn

to try the cause and these placed under control of the court.—*People v. Kuok Wah Choi*, 2 Idaho, 90, 6 Pac. 112.

The intentional omission of the sheriff to summon a juror duly drawn is a good cause of challenge to the panel of the trial jury.—*People v. Armstrong*, 2 Idaho, 298, 13 Pac. 342.

An exception to a challenge in our criminal practice is practically a demurrer thereto, and admits the facts stated therein.—*People v. Armstrong*, 2 Idaho, 298, 13 Pac. 342.

Where there are several parties on a side in an action, the legislature did not intend that each individual should have four peremptory challenges, but that they should join and have one set on either side.—*United States v. Alexander*, 2 Idaho, 386, 17 Pac. 746.

Where a juror who is incompetent under the statute swears falsely upon examination on his voir dire, and thereby compels the plaintiff to exhaust one of his peremptory challenges, to exclude him, and before the jury is completed plaintiff discovers that said juror was incompetent, and offers to make proof thereof, he should be permitted to do so, and upon satisfactory proof being made, his peremptory challenge should be restored to him.—*Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98.

Where a plaintiff is compelled to use a peremptory challenge to exclude a juror who is incompetent under the statute, and before the jury is completed the plaintiff desires to use a peremptory challenge and cannot do so because his peremptory challenges have been exhausted, plaintiff should be granted a new trial.—*Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98.

In the impaneling of a trial jury in a criminal case, where the defendant has double the number of peremptory challenges given the state and the state makes the first challenge, the defense is required to make two challenges before the state is required to make the next peremptory challenge.—*State v. Browne*, 4 Idaho, 723, 44 Pac. 552.

Where defendant exercised but three of the ten peremptory challenges allowed him by statute, the fact that the district attorney, in making challenges for implied bias, did not state the specific ground of such challenges was not prejudicial to defendant.—*State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.

In challenging a juror for implied bias, the specific ground of challenge should be stated. *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.

In impaneling a trial jury in a criminal case, it is not error to permit the district attorney to exhaust his challenges for cause to each juror before passing such juror to the defense.—*State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.

Where defendant in a criminal case has not exhausted his peremptory challenges before accepting the jury, he cannot complain of error of the trial court in sustaining a challenge to a juror.—*State v. McGraw*, 6 Idaho, 635, 59 Pac. 178.

Where a party to an action accepts a jury while he yet has peremptory challenges which he has not exercised, he cannot complain, after verdict, that women were drawn and summoned on the regular panel, the record showing that no woman served on the jury rendering the verdict.—*Knollen v. Jones*, 7 Idaho, 466, 63 Pac. 638.

The court has discretion to permit the prosecuting attorney to exercise his right of peremptory challenge at any time before the jury are sworn and to permit the waiver of a peremptory challenge to be withdrawn for that purpose.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

Where no appeal has been taken from an order of the board of county commissioners selecting and listing names of persons to serve as jurors under R. S. 3947, 3948, such appeal being authorized by R. S. 1776, as amended by Laws 1899, page 248, and no direct attack has been made on the ground of fraud in the selection, the district court has no jurisdiction to quash a panel and discharge a jury on motion of the prosecuting attorney where such motion is not made in any case pending and no litigant is complaining and neither the commissioners nor the county is made a party to the proceeding.—*Heitman v. Morgan*, 10 Idaho, 562, 79 Pac. 225.

Where a jury has been improperly summoned, or for any reason is an unlawful jury, the exercise by the defendant of all his peremptory challenges will not cure the defect of irregularity, nor will the defendant in such case be compelled to exercise all his peremptory challenges.—*State v. Barber*, 13 Idaho, 65, 88 Pac. 418.

Under R. C. 7824, 7834, a challenge to the special panel may be taken for the implied bias of the officer summoning the same, when it appears that he is a witness for the prosecution.—*State v. Jordan*, 19 Idaho, 192, 112 Pac. 1049.

Editorial Notes.

Challenge of jurors on account of preconceived opinion: 36 Am. Dec. 521.

Voir dire, examination of jurors upon: 23 Am. Dec. 128.

Bias, or prejudice, or interest which disqualifies juror: 9 Am. St. Rep. 744.

Voir dire, right of counsel to examine juror upon to determine whether to exercise right of peremptory challenge: 109 Am. St. Rep. 563.

Prejudice against capital punishment as constituting disqualification of juror in criminal case: Ann. Cas. 1912A, 786.

Relationship to witness as constituting disqualification of juror: Ann. Cas. 1912B, 1060.

Sympathy for plaintiff in action for personal injuries as bias sufficient to constitute disqualification of juror: Ann. Cas. 1912B, 1183.

Sympathy for laboring men generally as sufficient ground for challenge of juror for cause: Ann. Cas. 1913A, 1279.

Right to interpose challenge to array of jurors in absence of statute: Ann. Cas. 1912A, 1137.

Opinions gained from newspapers as disqualifying juror in criminal case: 35 L. R. A., N. S., 988.

VI. IMPANELING FOR TRIAL AND OATH.

(No paragraphs.)

JUSTICES OF THE PEACE.

I. APPOINTMENT, QUALIFICATION AND TENURE.

II. RIGHTS, DUTIES AND LIABILITIES.

III. CIVIL JURISDICTION AND AUTHORITY.

IV. PROCEDURE IN CIVIL CASES.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

1. Appellate Jurisdiction.
2. Decisions Reviewable.
3. Requisites and Proceedings for Transfer in General.
4. Undertakings and Liabilities Thereon.
5. Trial of Cause Anew and Proceedings Therein.
6. Review.
7. Determination and Disposition of Cause.

(B) Certiorari.

I. APPOINTMENT, QUALIFICATION AND TENURE.

R. S. 1769, sections 2, 3, give the board of county commissioners power to divide the counties into precincts, school, road and other districts required by law, to change the same and create others, and to establish, abolish and change election precincts. R. S. 466, re-enacted by Laws 1891, page 60, provides that there shall be elected two justices of the peace and one constable for each justice precinct of each county. R. S. 1813 provides that the officers of precincts are two justices of the peace and one constable, etc. Held, that a justice's precinct may include one or more election precincts, but an election precinct cannot include more than one justice's precinct.—*State ex rel. Griffith v. Vineyard*, 9 Idaho, 134, 72 Pac. 824.

Under the foregoing laws, held, that where the board of county commissioners divided the county into election precincts and failed to establish any justice's precincts, an election of two justices and one constable in each election precinct was sufficient compliance with the law to establish such election precincts as justice's precincts.—*State ex rel. Griffith v. Vineyard*, 9 Idaho, 134, 72 Pac. 824.

Const., article 5, section 22, provides that in each county of this state there shall be elected justices of the peace as prescribed by law. R. S. 1759, sections 2, 3, empower the board of county commissioners to divide the county into justice's precincts. R. S. 1813 provides that "the officers of precincts are

two justices, one constable," etc. Laws 1891, page 60, section 11, provides that at general elections there shall be elected in each justice's precinct, except wards in incorporated cities, two justices of the peace. Held, that the latter statute has no application to the formation of justice's precincts and does not constitute each ward of a city a justice's precinct, so as to prohibit the creation of justices' precincts within incorporated cities by the board of county commissioners.—*Johnston v. Savidge*, 11 Idaho, 204, 81 Pac. 616.

II. RIGHTS, DUTIES AND LIABILITIES.

Right of justice of the peace to bind county for keeping of person who is an indigent sick person. See Paupers.

III. CIVIL JURISDICTION AND AUTHORITY.

Power of probate court in contempt proceedings against witness on application of commissioner taking depositions. See Contempt.

Justification of bail bond before notary. See Bail and Recognizance.

Jurisdiction in criminal actions. See Criminal Law, IV.

Const., article 5, section 22, provides that justices of the peace shall have such jurisdiction as may be conferred by law, but they shall not have jurisdiction of any cause wherein the value of the property or the amount in controversy exceeds the sum of \$300, exclusive of interest. Held, not to extend the jurisdiction of justices of the peace to the sum of \$300, exclusive of interest, but that it merely prohibited the legislature from fixing said jurisdiction beyond the sum of \$300 exclusive of interest.—*Quayle v. Glenn*, 6 Idaho, 549, 57 Pac. 308.

United States Rev. Stats. 1927 provides that justices of the peace in the territories of Idaho, etc., shall not have jurisdiction of any matter in controversy where the debt or sum claimed exceeds \$300. R. S. 3851 provides that the jurisdiction of a justice's court shall extend to actions arising on contract for the recovery of money only where the sum claimed does not exceed \$300. Held, that a justice had no jurisdiction where the interest claimed on the amount sued for would bring such amount above \$300.—*Quayle v. Glenn*, 6 Idaho, 549, 57 Pac. 308.

The question of the jurisdiction of a justice of the peace to enter a judgment may be raised at any time.—*Quayle v. Glenn*, 6 Idaho, 549, 57 Pac. 308.

Under R. S. 4726, subdivision 4, the objection that an action before a justice has been commenced in the wrong county raises not only a question of law, but one of fact, and if such fact is proven a nonsuit should be granted on appeal.—*Purdum v. Neil*, 10 Idaho, 263, 77 Pac. 631.

Where a justice of the peace has obtained jurisdiction of the person, his jurisdiction continues until the action is legally disposed of.—*Presley v. Dean*, 10 Idaho, 375, 79 Pac. 71.

R. S. 4145, authorizing a probate judge to order publication of a summons in a case

pending in the district court, is not void as being in conflict with Const., article 5, section 21, which limits the jurisdiction of probate courts in civil matters to cases wherein the debt or damage claimed does not exceed the sum of \$500.—*McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

Where defendant failed to appear in a probate court at the hour fixed for appearance in the summons, and default was entered at the end of one hour from such time but no order was made postponing the case, and three days thereafter proofs were submitted by plaintiff and judgment entered, the court did not lose jurisdiction under R. S. 4701.—*Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho, 681, 95 Pac. 825.

If a complaint in a justice's court discloses upon its face that in order for the plaintiff to recover, it is necessary for the justice's court to receive evidence as to title or determine the question of title to real property, then the complaint itself discloses the want of jurisdiction in the justice's court to try such action, and when the complaint makes such disclosure and a demurrer is filed to the complaint challenging the jurisdiction of such court for want of jurisdiction, the demurrer should be sustained.—*Hammer v. Garrett*, 15 Idaho, 657, 99 Pac. 124.

Under Const., article 5, section 22, and R. S. 3852, providing that justices of the peace have no jurisdiction of any cause where the boundaries or title to real property is called in question or put in issue, to oust a justice's court of jurisdiction on the ground that title to real property is called in question or put in issue, it must appear from the complaint or verified answer that title to real property is necessarily involved in the determination of the action.—*Hammer v. Garrett*, 15 Idaho, 657, 99 Pac. 124.

Where it clearly appears from a complaint filed in a justice's court that the gravamen of the action is the failure to make a warranty deed to plaintiff, as provided for in an agreement entered into between plaintiff and the defendant, and to recover damages, the fact that the plaintiff also alleges that the defendant had no title to said property is of no consequence, and does not control or affect the plaintiff's right to recover.—*Hammer v. Garrett*, 15 Idaho, 657, 99 Pac. 124.

Where it appears from the complaint in a justice's court that the title to real property is necessarily involved in order for the plaintiff to recover, and a demurrer is filed to the complaint upon the ground that the court has no jurisdiction, then it is the duty of the justice to sustain such demurrer, but if it does not appear from the face of the complaint that the title to real property is involved, and such fact does appear from the verified answer, then it is the duty of the justice to certify said cause to the district court for trial.—*Hammer v. Garrett*, 15 Idaho, 657, 99 Pac. 124.

A summons was duly served on defendant, who failed to appear on the return date named therein. His default was then entered and no further action was taken for six months when evidence was taken and judg-

ment rendered against him. Held, that the error committed in continuing the case for six months did not oust the justice of jurisdiction.—*Nadel v. Campbell*, 18 Idaho, 335, 110 Pac. 262.

Editorial Notes.

Amount claimed or amount due as determining jurisdiction of justice of the peace: Ann. Cas. 1912A, 1284.

IV. PROCEDURE IN CIVIL CASES.

Criminal jurisdiction and procedure. See Criminal Law.

Right of probate court to retax costs. See Costs, VI.

To support a judgment rendered by the judge of probate as a justice of the peace the record should show that he was acting in that capacity and not as probate judge.—*People v. Du Rell*, 1 Idaho, 44.

A demurrer is a proper pleading in the probate court.—*Legget v. Meyers*, 1 Idaho, 548.

Where a defendant in an action in the probate court has demurred within ten days after service of the summons on him, he has answered within the meaning of the statute; and no judgment for want of answer can be rendered against him.—*Legget v. Meyers*, 1 Idaho, 548.

An irregular or erroneous exercise of its jurisdiction by a probate court, will not render its proceedings void, but merely voidable. *Glendenning v. McNutt*, 1 Idaho, 592.

Under a statute requiring the entry of a judgment by an inferior court at the close of the trial, an entry *nunc pro tunc* of such judgment in an inferior court long after the trial, and after an appeal had been taken, is unauthorized.—*Grey v. Cederholm*, 2 Idaho, 34, 3 Pac. 12.

A judgment of a justice which recites that defendant was duly summoned and failed to answer, that evidence was heard, cause submitted and the court being sufficiently advised doth adjudge that the plaintiff recover of the defendant the sum of \$82.63, with interest and costs, dated and signed by the justice, is a valid judgment.—*Ollis v. Kirkpatrick*, 3 Idaho, 247, 28 Pac. 435.

Where it is shown that a court of limited jurisdiction has obtained jurisdiction of the person by proper service of summons, the judgment rendered will not be held void, for the reason that the record fails to show that a continuance was had for two days and not noted in the docket of the probate judge.—*Green v. Christie*, 4 Idaho, 438, 40 Pac. 54.

Where the probate court has jurisdiction of the parties and of the subject matter involved in an action, its judgment, while unreversed, is conclusive on all questions decided on issues fairly within the pleadings. *Elliott v. Porter*, 6 Idaho, 684, 59 Pac. 360.

Though an affidavit for continuance fails to state any statutory ground therefor, the probate court does not lose jurisdiction by erroneously granting such continuance.—*Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.

R. S. 4304 providing that attaching creditors shall prorate in the proceeds of defend-

ant's property where there is not sufficient to pay the judgment in full against him, has no application to attachments issued out of justice or probate court.—*Kimball v. Raymond*, 9 Idaho, 176, 72 Pac. 957.

Where a defendant appears in justice's court and objects to the jurisdiction thereof on the grounds that he resides in and was served in another county, and that the contract sued on was not in writing and was not to be performed in the county where the action was commenced, and in support of his motion to dismiss files his affidavit stating these grounds and plaintiff then files a counter-affidavit in denial, an issue of fact is raised and the motion to dismiss is properly overruled.—*Purdum v. Neil*, 10 Idaho, 263, 77 Pac. 631.

R. S. 4726, subdivision 4, provides that in actions in justices' courts judgment of dismissal may be entered, when it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county or precinct or city; but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial it is waived. Held, that a defendant is not required to defend on the merits in order to save his objection to the jurisdiction, but may rely on the question of jurisdiction both as a question of law and a question of fact, so as to be entitled to judgment of nonsuit after the evidence is in in case the evidence should show want of jurisdiction.—*Purdum v. Neil*, 10 Idaho, 263, 77 Pac. 631.

Where a justice's court obtains jurisdiction of the person of defendant by service of summons, such jurisdiction continues until the action is disposed of.—*Presley v. Dean*, 10 Idaho, 375, 79 Pac. 71.

Under R. S. 4643, providing that if an order has been made for a change of venue, the justice ordering the change must immediately transmit the papers "on payment of his costs by the party applying," it is the duty of the justice to try the case where the party applying for the change of venue refuses to pay the costs of the transcript.—*Presley v. Dean*, 10 Idaho, 375, 79 Pac. 71.

Where a change of venue has been granted to defendant conditioned on payment of the costs of the transcript and the defendant fails to pay such costs, an oral notice of the justice to the defendant's attorney that he will proceed to try the case on a certain day is sufficient.—*Presley v. Dean*, 10 Idaho, 375, 79 Pac. 71.

Laws 1905, page 29, provides that all the proceedings in probate courts and the process, etc., shall be the same as in justice's courts. R. S. 384 authorized the probate judge to act as his own clerk or appoint a clerk. Held, that a summons signed "O. J. Bandelin, Probate Judge, by E. S. McCrea, Clerk," was valid.—*Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho, 681, 95 Pac. 825.

A summons issued from a probate court should be signed by the clerk if a clerk of that court has been appointed, but if the probate judge is acting as ex-officio clerk of his

own court, he may then sign it himself, and it will be unimportant whether he designate himself as judge or as ex-officio clerk.—*Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho, 681, 95 Pac. 825.

R. C. 4759, requiring probate and justices' courts to keep a "docket" and designating the matters to be entered therein, does not require that the action of the probate court upon a demurrer or motion shall be entered on the docket.—*Smith v. Clyne*, 16 Idaho, 466, 101 Pac. 819.

Where actual service of summons issued from a justice or probate court has been made, but the return of service was insufficient and did not show a good service, and the default of the defendant was entered and judgment was taken against him, it is proper to thereafter allow an amended return of service to be made so as to show that a good and valid service had in fact been made.—*Call v. Rocky Mountain Bell Tel. Co.*, 16 Idaho, 551, 133 Am. St. Rep. 135, 102 Pac. 146.

Editorial Notes.

Justices of the peace, docketing of judgment by: 40 Am. Dec. 386.

Which controls as between oral announcement of decision by justice of peace and judgment actually entered of record: *Ann. Cas.* 1912A, 1283.

Entry or record of judgments of justices of peace: 28 L. R. A. 638.

V. REVIEW OF PROCEEDINGS.

Admissibility in evidence of original files and records. See *Evidence*, X.

Appeals from probate court in probate proceedings. See *Courts*, V.

Appeals from orders of probate court relating to sales of property. See *Executors and Administrators*, VIII.

(A) APPEAL AND ERROR.

Recovery of costs on appeal. See *Costs*, VII.

1. Appellate Jurisdiction.

The supreme court has jurisdiction to review a final judgment in the district court on certiorari from a justice's court, but has not jurisdiction to review a justice's judgment on appeal therefrom to the supreme court.—*Nordyke v. McConkey*, 7 Idaho, 562, 64 Pac. 893.

2. Decisions Reviewable.

Scope and extent of review. See *post*, V, (A), 8.

Entries in the docket of the probate court that complaint was filed and summons issued and served, demurrer to complaint filed, and the entry of fees for overruling the demurrer and entering default, with the following entries: "To entering final judgment, \$1; docketing judgment, 50 cents; making judgment-roll, 50 cents; sheriff's fees, \$5; damages, \$310"—do not constitute a judgment for either party; and an appeal from such judgment to the district court will not lie.—*Grey v. Cederholm*, 2 Idaho, 34, 3 Pac. 12.

A complaint in the justice's court alleged that defendant was indebted to defendant in

the sum of \$150. Defendant filed an answer denying the indebtedness. Jurisdiction of the justice court was limited to \$100. Defendant consented that judgment might be entered against him as prayed for simply to expedite the appeal. The district court dismissed the appeal. Held, that the judgment must be reversed and the action tried in the district court.—*Harvey v. Bunker Hill etc. Min. Co.*, 2 Idaho, 765, 24 Pac. 30.

Where there was no issue of fact tendered in the probate court and therefore the facts were conceded for want of an issue, the probate court in a civil case could commit no error as to the facts admitted, and if there was no error as to the facts, there could be no appeal from the judgment of the probate court in reference to the facts.—*Smith v. Clyne*, 16 Idaho, 466, 101 Pac. 819.

3. Requisites and Proceedings for Transfer in General.

Where judgment was rendered in a justice's court on October 2, 1885, and the notice and undertaking were filed with the justice on the 6th of the same month, and the notice of appeal was served on the 15th of the same month, the appeal was well taken.—*Salt Lake Brewing Co. v. Gillman*, 2 Idaho, 195, 10 Pac. 32.

To effectuate an appeal from a judgment of a justice of the peace, three things are required; the filing of the notice of appeal with the justice; the service of a copy of the same on the adverse party, and the filing of the undertaking; which must all be done within thirty days after the rendition of the judgment, but the mere order in which they are done is immaterial.—*Salt Lake Brewing Co. v. Gillman*, 2 Idaho, 195, 10 Pac. 32.

Under R. S. 4838, providing that an appeal may be taken from the probate or justice court to the district court within thirty days after the rendition of the judgment, and that the appeal is taken by filing a notice of appeal with the justice or judge and serving a copy on the adverse party, the order in which these acts are done is immaterial.—*Reynolds v. Corbus*, 7 Idaho, 481, 63 Pac. 884.

The rule of the district court requiring the transcript on appeal from justice court to be filed within ten days after the appeal is perfected is not jurisdictional and should be applied with discretion; and therefore, where more than thirty days intervene between the filing of the transcript and the opening of the term at which the action is to be tried and no prejudice results to respondent from failure to comply with the rule, the appeal should not be dismissed.—*Perkins v. Bridge*, 10 Idaho, 189, 77 Pac. 329.

Where an appeal is taken from a judgment rendered in a justice's court to the district court, and the notice of appeal states "an appeal to the district court of Cassia county," and the cause is appealed to the district court of the fourth judicial district in and for Cassia county, such appeal will not be dismissed, where it appears that the respondent upon said appeal is in no way misled or deceived.—*Darling v. Fremstadt*, 22 Idaho, 684, 127 Pac. 674.

4. Undertakings and Liabilities Thereon.

Under R. S. 4842, two obligations are necessary in cases of appeal from justices' court to the district court where execution is to be stayed, but both may be in the same undertaking, one in the sum of \$100 to cover costs of appeal and the other for double the amount of the judgment and costs in the justice court to secure the payment of whatever judgment and costs may finally be recovered by the respondent against appellant.—*Numbers v. Rocky Mountain Bell Tel. Co.*, 7 Idaho, 408, 63 Pac. 381; *Wilson v. Doyle*, 12 Idaho, 295, 85 Pac. 928.

Where sureties to an undertaking on appeal from the probate court are excepted to, notice thereof should be given to the adverse party.—*Holcomb v. Reed*, 5 Idaho, 60, 46 Pac. 1019.

Where exceptions to the sufficiency of sureties in an undertaking on appeal from the probate court are filed but no notice served on the adverse party, and thereafter the appellant is given five days by the district court in which to furnish new sureties or have the former sureties justify, which he fails to do, the appeal is properly dismissed.—*Holcomb v. Reed*, 5 Idaho, 60, 46 Pac. 1019.

Where an undertaking executed by a surety company is offered in lieu of an undertaking, excepted to on appeal from a justice, it must be accompanied by prima facie evidence showing that the surety company has complied with Laws 1899, page 337 et. seq., which provide when and how bonds may be executed by surety companies.—*Numbers v. Rocky Mountain Bell Tel. Co.*, 7 Idaho, 408, 63 Pac. 381.

Plaintiff filed exceptions to the sufficiency of an undertaking on appeal from a judgment in justice court under R. S. 4842, which provides that on exception to the sufficiency of the sureties, unless they or other sureties justify before the judge or justice from whom the appeal is taken, within five days, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no undertaking were given. Defendant thereupon filed a new undertaking executed by a surety company, but failed to give plaintiff notice thereof or that such surety would justify before the justice. Held, that the appeal was ineffectual.—*Numbers v. Rocky Mountain Bell Tel. Co.*, 7 Idaho, 408, 63 Pac. 381.

Where, on appeal from a judgment of the probate court, the complaint is amended in the district court so as to add a new cause of action and materially change the issues tried in the probate court, the sureties on the appeal bond are discharged.—*Smith v. Haner*, 8 Idaho, 379, 69 Pac. 109.

R. S. 4842 provides that on appeal from a judgment in a justice's court, the adverse party may except to the sufficiency of the sureties, and unless they or other sureties justify within five days upon notice to the adverse party, the appeal must be regarded as if no such undertaking had been given. Held, that where the sureties fail to appear and justify when required and a new bond is

filed by the appellant, notice of the filing of such bond must be given to the opposing party.—*Perkins v. Bridge*, 10 Idaho, 189, 77 Pac. 329.

Under R. S. 4842, providing that on appeal from a judgment in a justice court, the adverse party may except to the sufficiency of the sureties and unless they or other sureties justify within five days after the sureties are excepted to upon notice to the adverse party, the appeal must be regarded as if no such undertaking was given, failure of the sureties to appear and justify when required renders the undertaking a nullity.—*Perkins v. Bridge*, 10 Idaho, 189, 77 Pac. 329.

R. S. 4838 provides that an appeal may be taken from a judgment in a civil action in a probate or justice's court at any time within thirty days after the rendition of the judgment, and that the appeal is taken by filing a notice of appeal with the justice or judge and serving a copy on the adverse party. R. S. 4842 provides that an appeal from a probate or justice's court is not effectual for any purpose unless an undertaking be filed, etc. Held, that where the sureties on an undertaking failed to appear and justify and a second undertaking was given within the thirty days allowed for appeal and on proper notice, such second undertaking was filed in time.—*Perkins v. Bridge*, 10 Idaho, 189, 77 Pac. 329.

Where respondent on an appeal from a justice's court excepts to the sufficiency of sureties on an appeal bond, he may thereafter waive the justification of sureties or accept a new undertaking in lieu of the original and waive justification of the new sureties.—*Snyder v. Wooden*, 11 Idaho, 150, 81 Pac. 377.

Where an appeal is taken from a justice's court to the district court and an undertaking on appeal is filed within thirty days after the entry of judgment in the justice's court, and the adverse party excepts to the sufficiency of the sureties, the appellant, under R. S. 4842, may cause his original sureties or other sureties to justify before the justice of the peace within five days after the exception is taken, and at the time of justifying the sureties may execute a new and separate undertaking and justify thereto.—*Snyder v. Wooden*, 11 Idaho, 150, 81 Pac. 377.

A judgment was entered in a justice court for \$80.60 principal and \$3.60 costs. An undertaking on appeal was given for the sum of \$200, conditioned that "if defendant shall pay or cause to be paid the amount of said judgment and all costs, and obey any order the district court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment, and all costs that may be recovered against the said district court, then this obligation to be null and void; otherwise to remain in full force and virtue." Held, not sufficient as an appeal bond under R. S. 4842 and that the appeal was properly dismissed.—*Wilson v. Doyle*, 12 Idaho, 295, 85 Pac. 928.

An undertaking on appeal from a justice court reciting that whereas the defendant desires to give an undertaking for the payment

of costs on appeal and for a stay of execution and conditioned "under the said statutory obligations applicable to such undertaking on appeal and for a stay of proceedings in the sum of one hundred eighty dollars (\$180)," though insufficient to stay proceedings, is sufficient as an appeal bond.—*Edminston v. Steele*, 12 Idaho, 613, 87 Pac. 677.

Where an undertaking on appeal from a justice's court to the district court is signed by a surety company, and exceptions to the surety are filed, such surety company is required to justify within the time and upon the notice prescribed by R. S. 4842.—*Libby v. Spokane Valley etc. Co.*, 15 Idaho, 467, 98 Pac. 715.

Where an undertaking on appeal is not given to cover the costs of the appeal from the justice's court to the district court, on motion, the appeal will be dismissed.—*Libby v. Spokane Valley etc. Co.*, 15 Idaho, 467, 98 Pac. 715.

Where it clearly appears from the face of an undertaking that it was the intention of the appellant to give a bond in double the amount of the judgment and costs, for the purpose of staying the judgment, such undertaking will not be considered sufficient as an undertaking on appeal.—*Libby v. Spokane Valley etc. Co.*, 15 Idaho, 467, 98 Pac. 715.

Where a surety company is required to justify on an appeal bond under R. S. 4842, the presentation and filing of the notice or certified copy thereof prescribed by Laws 1906, page 395, section 3, amending Laws 1899, page 337, is sufficient.—*Libby v. Spokane Valley etc. Co.*, 15 Idaho, 467, 98 Pac. 715.

Where a justice of the peace receives and accepts a certified check in place of a money deposit on an appeal to the district court, and no effort has been made to cash the check and no contention is made that the bank is insolvent or that the check could not be cashed, the deposit of such check with the justice is a substantial compliance with R. C. 4778, which authorizes a money deposit in place and stead of an undertaking on appeal. *Smith v. Field*, 19 Idaho, 558, Ann. Cas. 1912C, 354, 114 Pac. 668.

5. Trial of Cause Anew and Proceedings Therein.

Amendment of pleadings in district court on appeal from justice or probate court. See Pleading, VI. Appeal and trial de novo in criminal actions. See Criminal Law, VIII, (D).

Under R. S. 4844, providing inter alia that on an appeal on questions of law alone the district court may, if necessary or proper, order a new trial, the district court may order a new trial therein, after setting aside the judgment of the lower court on an appeal on questions of law alone.—*Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.

Where an appeal is taken from a justice court to the district court upon questions both of law and fact, the case stands for trial de novo in the district court, and a motion for affirmance of the justice's judgment is in

legal effect a motion for judgment on the pleadings and should be denied where the pleadings raise material issues of fact.—*Swinehart v. Pocatello Meat etc. Co.*, 8 Idaho, 710, 70 Pac. 1054.

Where a defendant objects to the jurisdiction of a justice on the ground that he resides in and was sued in another county and that the contract sued on was not in writing and was not to be performed in the county where the action was commenced and makes affidavit to such facts, which affidavits are contradicted by plaintiff's counter-affidavits, and thereafter on appeal to the district court defendant renews his motion, the motion should be denied in the first instance and be determined on the evidence in the case.—*Purdum v. Neil*, 10 Idaho, 263, 77 Pac. 631.

Where a defendant fails to appear or answer or raise any issue of fact in a justice or probate court, and appeals from a default judgment to the district court on questions both of law and fact, he will not be allowed to file an answer in the district court and raise an issue of fact for the first time.—*Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho, 681, 95 Pac. 825.

Any uncertainty or ambiguity on the return of a summons should be taken advantage of by motion to quash and cannot be availed of on appeal after default.—*Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho, 681, 95 Pac. 825.

Where an issue of fact was tendered in the probate or justice's court, and the district court reverses the lower court upon questions of law, the appeal being taken both on the law and the facts, the district court may order a new trial in said court, unless the issues of law dispose of the case and finally determine the controversy.—*Smith v. Clyne*, 15 Idaho, 254, 97 Pac. 40.

Where an appeal is taken from the probate court in a civil matter to the district court, upon questions of law alone, the district court is called upon not only to pass upon the issues of law presented to the probate court, but also the question of law as to whether the probate judge erred in entering judgment.—*Smith v. Clyne*, 16 Idaho, 466, 101 Pac. 819.

Where the record of the probate court fails to show what disposition was made of a demurrer and motion filed, and it does not otherwise appear what disposition was made of the same, but the record does show that a default was entered against the defendant for want of an answer, the court will presume on appeal from such judgment that the demurrer and motion were overruled and that the defendant was in default.—*Smith v. Clyne*, 16 Idaho, 466, 101 Pac. 819.

Where the return of service of summons is insufficient to establish the fact of service, but judgment by default is entered and the defendant appeals to the district court on questions of law alone, and there moves to vacate and set aside the judgment on the ground that there is no valid proof of service,

it is not error for the district court to permit the filing of an amended return of service which has been properly made in the justice or probate court in which the judgment was entered, and which return has been duly certified to the district court.—*Call v. Rocky Mountain Bell Tel. Co.*, 16 Idaho, 551, 133 Am. St. Rep. 135, 102 Pac. 146.

6. Review.

The rule that a party, who has objected to the sufficiency of process, by answering over, waives such objection, does not apply to appeals from justice's or probate courts to the district court under R. S. 4841, providing that, on appeal to the district court, from a probate or justice's court, either party may have the benefit of all legal objections made in the probate or justice's court.—*Chase v. Hagood*, 3 Idaho, 682, 34 Pac. 811.

On motion to dismiss an appeal from a probate or justice's court, the only questions to be considered are whether the judgment or order is appealable, whether the appellant has the right to appeal and whether the appeal has been taken in accordance with law.—*Smith v. Clyne*, 15 Idaho, 254, 97 Pac. 40.

Where an appeal to the district court from the probate or justice's court is taken on questions of law alone, it is the duty of the district court to hear and determine such questions of law as arise upon the pleadings or files as appear in the docket of the court, even though no statement of the case is presented.—*Smith v. Clyne*, 15 Idaho, 254, 97 Pac. 40.

Where a notice of appeal from a probate or justice's court states that the appeal is on questions both of law and fact, and the record discloses that no issue of fact was tendered in the lower court, the appeal can be considered only on questions of law.—*Smith v. Clyne*, 15 Idaho, 254, 97 Pac. 40.

On motion to dismiss an appeal from a probate or justice's court, the district court cannot determine the sufficiency of the complaint to authorize the judgment rendered in the justice's court.—*Smith v. Clyne*, 15 Idaho, 254, 97 Pac. 40.

7. Determination and Disposition of Cause.

Dismissal for failure to give or for defects in undertaking. See ante, V, (A), 4.

Where an appeal is taken upon questions of law alone, and no issue of fact was tendered in the lower court, the district court has jurisdiction only to review the issues of law presented by the appeal, and, if the district court reverses the probate or justice's court, a retrial in the district court cannot be ordered because no trial was had in the lower court; and in such case, the cause must be remanded to the lower court for further proceedings.—*Smith v. Clyne*, 15 Idaho, 254, 97 Pac. 40.

(B) CERTIORARI.

The supreme court has no jurisdiction to review by certiorari a judgment of a justice of the peace.—*Nordyke & Marmon Co. v. McConkey*, 7 Idaho, 562, 64 Pac. 893.

JUVENILE DELINQUENTS.

See *Infants*.

KIDNAPING.

Where the mother has possession of an infant between two and three years of age, and leaves her husband and takes with her such child, and is assisted by the defendant in leaving the state with said child, and after such separation the child continues in the possession of the mother until her death, or until the legal authorities take the child from her, held, that the defendant is not guilty of enticing said child away from its father, under R. C. 6800.—*State v. Beslin*, 19 Idaho, 185, 112 Pac. 1053.

LACHES.

See *Equity*, II; *Quietting Title*, II.

LANDLORD AND TENANT.

Rights as to fixtures. See *Fixtures*.

Priority between mortgagees of crops and landlord.

See *Chattel Mortgages*, III.

Priority between tenant's mortgage of increase and wool of sheep and lessor's interest. See *Chattel Mortgages*, III.

Right of mortgagee of tenant to remove trade fixtures. See *Chattel Mortgages*, III.

Parties in action to restrain lessee from disposing of personal property. See *Parties*.

Possession under lease as defense to ejectment. See *Ejectment*.

Lessee of life tenant not required to pay taxes. See *Life Estates*.

Where a lease of premises used as a wood-yard contained a covenant against subletting and a provision that in case of a breach of any of the covenants the lessor might re-enter and remove all persons therefrom, a purchase of the use of said premises for one year for the purpose of removing the wood therefrom and of storing the same thereon, was clearly a subletting of such premises.—*Aveline v. Ridenbaugh*, 2 Idaho, 168, 9 Pac. 601.

A complaint in an action for breach of covenants in a lease, seeking to recover the value of a sawmill destroyed by fire during the term of the lease, also damages for the failure of defendants to furnish steam to plaintiffs as covenanted and for three months' rent of the leased premises and sawmill, held not demurrable.—*Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105.

Where the lessees of a sawmill covenant to keep a watchman during the active operations of the mill, and the mill is run in the daytime and fire banked in the furnace for the night, it is the duty of the lessees to keep a watchman during the night.—*Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105.

Where a lease provides that the leased property shall be restored to the lessor in as good condition as when leased, damages by the elements excepted, and the property is destroyed by reason of the lessees banking fire in the furnaces of the leased property and failing to keep a watchman as stipulated in the lease, the lessees are liable for the value of the property destroyed and cannot claim

that a fire so caused was within the exceptions of the lease.—*Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105.

The service of notice and commencement of action in forcible detainer does not terminate the lease; but a payment of rent with interest, damages and costs within five days after judgment keeps the lease alive.—*Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

Where the lessor leases a "cold storage building" and the lease contains a stipulation that the lessee "will use said cold storage building only for the purpose of handling fruit and produce and not for hay, grain or feed," there is an implied warranty that the building will be suitable for the purpose for which it was let.—*Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

A landlord's notice for the payment of rent or delivery of possession under R. S. 5093, 5094, is sufficient, where it notifies the tenant to pay the rent due, specifying the amount, or deliver up possession of the premises, describing them.—*Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

Where a lease reserves to the lessor an option to terminate the lease by service of a thirty days' notice after breach of any covenant thereof, the lessor is not thereby precluded from pursuing the summary remedy for nonpayment of rent given by R. S. 5093.—*Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

In a summary proceeding to obtain possession of land under R. S. 5102 et seq., the defendant has no right to be heard either upon a counterclaim or cross-complaint.—*Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

A lease of real estate "and all the livestock and farm utensils of every name and nature" mentioned in the lease provided that the lessee should pay for the use of said premises and for the use of all the stock an equal share and interest in and to all the increase of livestock, and that the terms and price of sale of the increase of said livestock should be left to a disinterested third person in case the parties failed to agree thereon. The value of certain calves and yearling steers excepted from the livestock on the premises was stipulated and the lessee agreed to return the total value thereof to the lessor, together with one-half share of the difference between what said calves and steers should sell for and their present value. Held, that the title to the livestock did not pass to the lessee nor was it intended that the lessee could sell the increase, and retain the proceeds till the termination of the lease, the clear intention being that when any of such increase were sold the share thereof belonging to the lessors must be paid over to them.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

Where a homestead entry on government land is contested, and prior to a decision in his favor the contestee leases a small portion thereof for two years with covenant against subletting, and thereafter the tenant transfers his interest to another, who through quitclaim deeds from a third party and his grantee and successors in interest claims title

to the land, the person making the original entry is entitled to judgment against the tenant and his transferee.—*White v. Johnson*, 10 Idaho, 438, 79 Pac. 455.

A complaint by a tenant of hotel property against his landlord alleged that defendant, in erecting a building on an adjoining lot, tore down the walls and roof of portions of the hotel, thereby rendering the property useless for hotel purposes, that plaintiff's furniture was damaged in the sum of \$100 and that he was obliged to move out of the hotel and that he was further damaged in the sum of \$1,100 because of the erection of said building. Held, that the damages sued for arose out of the same contract and were for injuries to property and hence there was no misjoinder under R. S. 4169.—*Frepons v. Grostein*, 12 Idaho, 671, 87 Pac. 1004.

After he has rented rooms in a building for a certain purpose, a landlord cannot so tear down and destroy or mutilate the building as to render such rooms unsuitable for the purposes for which they were leased without being liable for damages.—*Frepons v. Grostein*, 12 Idaho, 671, 87 Pac. 1004.

A landlord cannot make leased premises unfit for the uses for which it was leased and recover rent therefor if the premises be abandoned.—*Frepons v. Grostein*, 12 Idaho, 671, 87 Pac. 1004.

A landlord acquires no title in the grain raised by the tenant until the division and delivery thereof by the tenant to him, when under the lease the tenant is to deliver a share of the crop as rental.—*Eaves v. Shepard*, 17 Idaho, 268, 134 Am. St. Rep. 256, 105 Pac. 407.

Where an abutting owner has leased his entire premises, and possession thereof is given to his tenants, he is not liable for personal injuries caused by the carelessness or negligence of the tenants in keeping the sidewalk in front of such premises in proper repair.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

Where a tenant sues a landlord for the loss of merchandise, caused by a fire which the tenant alleges resulted from the carelessness and negligence of the landlord, but it is not alleged or shown that the negligence was criminal, or that the loss was caused through any fraud on the part of the landlord, and it was not shown or contended that the tenant had an old and well-established business and business reputation at the particular place, the measure of damages is the value of the goods at the time of the loss, and injury to the business or loss of profits cannot be taken into consideration in assessing damages.—*Russell v. Little*, 22 Idaho, 429, 126 Pac. 529.

Where a tenant loses a stock of merchandise stored in the leased premises, and there was no covenant in the lease whereby the landlord was obligated to repair the premises or keep them in repair, and the tenant seeks to recover from the landlord the value of the goods destroyed by fire occurring in the building, on the ground that the fire was caused by defects in the heating plant or flue or the negligent operation and management of the

furnace and heating plant, the recovery, if any shall be had, must be founded upon the law of negligence, and cannot rest upon the theory of an implied contract.—*Russell v. Little*, 22 Idaho, 429, 126 Pac. 529.

There are no implied covenants on the part of a landlord to repair the premises let, or to keep them in repair; and the landlord is not bound to repair the premises let, unless he has expressly covenanted so to do in his lease. *Russell v. Little*, 22 Idaho, 429, 126 Pac. 529.

Editorial Notes.

Agreements for the cultivation of land on shares: 37 Am. Dec. 317; 37 Am. Rep. 609.

Apportionment of rents on destruction of part of the leased property: 31 Am. Dec. 517; 37 Am. Rep. 283.

Covenants implied on the part of the landlord: 32 Am. Dec. 355; 43 Am. Rep. 227.

Nuisances, respective liabilities of landlord and tenant for: 50 Am. Dec. 776; 86 Am. St. Rep. 516.

Rights of tenant after the expiration of the lease: 69 Am. Dec. 508.

Right of entry of landlord after termination of lease: 69 Am. Dec. 754.

Destruction of leased premises, rights and liabilities of tenant upon: 94 Am. Dec. 662; 61 Am. St. Rep. 566.

Covenants to repair, express or implied: 95 Am. Dec. 118.

Breach of condition, forfeiture of lease for: 26 Am. St. Rep. 910.

Subletting of the leased premises: 117 Am. St. Rep. 91.

Right of lessee to recover rent paid in advance in case of destruction of premises: Ann. Cas. 1912B, 1117.

Acceptance of rent as waiver of breach of covenant against assignment or subletting: Ann. Cas. 1913A, 1202.

Rights of landlord and tenant inter se under lease of premises for saloon purposes where tenant is subsequently unable to use premises for that purpose: Ann. Cas. 1913E 262; 15 Ann. Cas. 1103.

Distinction between lease and license: 18 L. R. A. 491.

Scope of provision that lessee shall leave alterations, improvements, additions, etc., on the premises: 42 L. R. A., N. S., 546.

Tenant's duty to leave premises in good condition: 64 L. R. A. 649.

Holding over after expiration of lease with option for extension or renewal, without formally exercising option: 29 L. R. A., N. S., 174.

LARCENY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

(B) Evidence.

(C) Trial and Review.

(D) Sentence and Punishment.

Conviction of attorney of crime of petit larceny sufficient to disbar. See Attorney and Client, I.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

Sale or removal of mortgaged chattels by mortgagor. See Chattel Mortgages, VII.

To constitute the crime of larceny it is necessary that the property taken should have an owner, and that it be taken with felonious intent.—*People v. Frank*, 1 Idaho, 200.

In section 59, Crimes and Punishments, Revised Laws, page 332, wherein it provides that "every person who shall in the night . . . break and enter in a dwelling-house or tent with intent to commit murder, robbery, mayhem, larceny or other felony," the term "larceny" applies both to grand and petit larceny.—*People v. Stapleton*, 2 Idaho, 47, 3 Pac. 6.

To constitute the crime of larceny, the felonious intent must exist at the time of taking the property.—*State v. Riggs*, 8 Idaho, 630, 70 Pac. 947.

Where one rightfully in possession of personal property subsequently conceives the intent of appropriating it, he is not guilty of larceny.—*State v. Riggs*, 8 Idaho, 630, 70 Pac. 947.

Where defendant showed that he took the horse, alleged to have been stolen, under an order from one K., whom he supposed to have the right to possession, and that he had never claimed the animal, but represented it to be the property of K., and that he had used it in an open manner, he was entitled to an acquittal.—*State v. Seymour*, 10 Idaho, 699, 79 Pac. 825.

Where in a prosecution for grand larceny it appears that the stolen cattle had been gathered on the range by others and driven some distance, and the defendant met those who had gathered them, by agreement, and assisted them in mutilating the brands on the cattle and driving them across the Snake river into Oregon, a verdict of guilty will not be set aside for insufficiency of the evidence. *State v. Morse*, 12 Idaho, 492, 86 Pac. 53.

Where on the trial a son testifies that he owned a half-interest in the horse stolen, and the father is recalled and testifies that the arrangement was that the son could have one-half of what he could gather of certain horses, an instruction that, if there was such an

agreement, this would not constitute ownership till the horses were gathered, was proper. *State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

Editorial Notes.

What constitutes larceny: 57 Am. Dec. 271; 88 Am. St. Rep. 559; 30 Am. Rep. 159.

Intent essential to the crime of larceny: 51 Am. Rep. 312.

Bringing stolen goods from another jurisdiction as larceny in forum: Ann. Cas. 1912A, 392.

Taking property under mistaken belief as to ownership and afterward converting to own use as larceny: Ann. Cas. 1912B, 340.

Animals, when subjects of larceny: 47 Am. Rep. 765.

What constitutes asportation: 29 L. R. A., N. S., 38.

II. PROSECUTION AND PUNISHMENT.

(A) INDICTMENT AND INFORMATION.

Variance between information and proof in general. See Indictment and Information, IX.

Where the information alleges the title to stolen property to be in B and the proof shows that the property belonged to B and another, the variance is not fatal.—*State v. Bathbone*, 8 Idaho, 161, 67 Pac. 186; *State v. Ireland*, 9 Idaho, 686, 75 Pac. 257, overruling *People v. Frank*, 1 Idaho, 200.

An indictment for property stolen as "a quantity of specimens of gold and silver ores of one hundred and fifty pounds in weight" is sufficient.—*People v. Freeman*, 1 Idaho, 322.

In an indictment for larceny, the common and ordinary acceptance of property is to govern in its description, and the certainty must be to a common intent; that is, such as will enable a jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded.—*People v. Freeman*, 1 Idaho, 322.

Where the information alleges that C. was the owner of stolen property, and the proofs show that he was in possession of the property as the agent of the owner, with full power to sell or otherwise dispose of the same, there is no fatal variance between the information and the proof.—*State v. Farris*, 5 Idaho, 666, 51 Pac. 772.

Under R. S. 7048, subdivision 3 making the felonious taking of a horse, mare, gelding, etc., grand larceny, an information charging the felonious taking of two mares is sufficient without describing the mares.—*State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186.

An information charging defendant with larceny of one horse is sufficient under R. S. 7677, 7679, which specify the requirements of every indictment.—*State v. Collett*, 9 Idaho, 608, 75 Pac. 271.

An information charged that on or about a certain date defendant did willfully, unlawfully and feloniously steal, take, carry, lead and drive away from the possession of one D., one roan mare, the property of said D.

The information fixed the time and venue of the offense. Held, that the information substantially conformed to the requirements of R. S. 7677 to 7679 and was not demurrable.—*State v. Rooks*, 10 Idaho, 388, 79 Pac. 82.

Where the information charges that the property stolen was the property of "C. W. D." and the proof shows that "Charles D." was the owner, and the verdict shows the property to have been that of "C. W. D." the variance is immaterial where it does not appear that they are different persons.—*State v. Rooks*, 10 Idaho, 388, 79 Pac. 82.

An information charging the unlawful and felonious taking of a "gray horse colt" charges grand larceny under R. S. 7048.—*State v. Williams*, 12 Idaho, 483, 86 Pac. 53.

Where the information states that certain stolen property is owned by a certain person and the proof shows that he has only a half-interest therein, the variance is not fatal.—*State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

An information which charged that the defendant "did willfully, unlawfully and feloniously steal, take and drive away one brown gelding branded H on the left side; said gelding being then and there the personal property of A. J. Harley; and one black gelding branded X on the left shoulder; said gelding being then and there the personal property of J. B. Whitson and Brother, . . . contrary to the form, force and effect of the statute in such cases made and provided, and against the power, force and dignity of the state of Idaho," is sufficient to charge the defendant with the crime of grand larceny of the black gelding or of the brown gelding.—*State v. West*, 15 Idaho, 73, 95 Pac. 949.

Editorial Notes.

Indictment or information for larceny, description of property in: 22 Am. St. Rep. 154.

Sufficiency of indictment for larceny of animal and of proof in support thereof with respect to description of animal: 17 Ann. Cas. 735.

(B) EVIDENCE.

Oral evidence of unrecorded brand to show ownership of animal stolen. See Animals, I.

Evidence held sufficient to sustain a conviction of larceny.—*State v. Wright*, 12 Idaho, 212, 85 Pac. 493; *State v. Noyes*, 15 Idaho, 241, 96 Pac. 435; *State v. Fuller*, 18 Idaho, 372, 109 Pac. 257; (contra) *State v. Baird*, 13 Idaho, 29, 88 Pac. 233; *State v. Vogel*, 23 Idaho, 186, 132 Pac. 107.

Evidence in a prosecution for grand larceny held insufficient to show identification of money alleged to have been stolen.—*State v. Nesbit*, 4 Idaho, 548, 43 Pac. 66.

In a prosecution for larceny of cattle, the state proved ownership in V., possession by defendant and a sale thereof by defendant. In defendant's bill of sale statements were made as to the person from whom he received the cattle. Some of the state's witnesses testified that defendant had made statements to them as to whom he procured the cattle from.

Held, that it was not incumbent on the state, before a conviction could be had, to disprove such statements.—*State v. Smith*, 4 Idaho, 733, 44 Pac. 554.

The evidence in a prosecution for larceny showed that the hides of some of the alleged stolen cattle were found in defendant's possession. Against this evidence, defendant testified that he bought the cattle, giving the time and the circumstances under which the purchase was made. Testimony corroborating that of defendant was introduced. Held, not sufficient to warrant a judgment of conviction.—*State v. Marquardsen*, 7 Idaho, 352, 62 Pac. 1034.

Where a reasonable explanation of the possession of stolen property is given, corroborated by the testimony of other witnesses, and there is no conflict of evidence in regard thereto, a verdict convicting defendant of larceny is erroneous.—*State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033.

In a prosecution for larceny, a witness for the state testified that he stopped at a certain residence and put the alleged stolen animal in a corral there for the night. The state introduced further evidence showing that the witness had not stopped there on the night in question. Defendant attempted to introduce testimony showing that such witness had stayed overnight at such place, which testimony was rejected on the ground that it was not rebuttal, but evidence in chief and cumulative. Held, error to reject such testimony. *State v. Seymour*, 7 Idaho, 548, 63 Pac. 1036.

In a prosecution for larceny of horses, the evidence showed title in the complaining witness; that he was pasturing the horses on the land of A; that without his or A's knowledge or consent, the horses were taken away; that witness met defendant, who then had possession of the horses and inquired of him concerning them, minutely describing them; that defendant then denied that he knew anything about them; that shortly before this time, defendant had put the horses to pasture and shortly thereafter he moved them from the state. Held, sufficient to support a verdict of guilty.—*State v. Sanford*, 8 Idaho, 187, 67 Pac. 492.

Where the evidence wholly fails to show any felonious intent at the time accused took possession of the property, it is insufficient.—*State v. Riggs*, 8 Idaho, 630, 70 Pac. 947.

Evidence on a trial for larceny held insufficient to raise a reasonable doubt as to defendant's guilt.—*State v. Ireland*, 9 Idaho, 686, 75 Pac. 257.

In a prosecution for larceny, it was shown that the horse alleged to have been stolen was found in defendant's possession. Defendant showed that he took the horse up from the range in pursuance of a letter from K., who claimed to be the owner thereof; that he had never claimed the animal as his own, but had at all times disclaimed ownership, stating that the animal belonged to K.; that he had kept and used the animal in an open and notorious manner. There was no conflict in any of the material facts proven. Held, that a verdict

of conviction should be set aside.—*State v. Seymour*, 10 Idaho, 699, 79 Pac. 825.

The ownership of an animal branded with an unrecorded brand must be proved in the same manner as the ownership of any other personal property or of an unbranded animal. *State v. Dunn*, 13 Idaho, 9, 88 Pac. 235.

In a prosecution for larceny, it was not error to admit a bill of sale of the alleged stolen animal to the complaining witness, even though the instrument was not very intelligible.—*State v. Dunn*, 13 Idaho, 9, 88 Pac. 235.

In a prosecution for larceny of an animal, it is not error to admit evidence showing that the animal had escaped or been taken from the owner's possession shortly prior to the trial after it had been recovered by him subsequent to the alleged larceny.—*State v. Cook*, 13 Idaho, 45, 88 Pac. 240.

Editorial Notes.

Possession of stolen property, effect of as evidence of larceny: 70 Am. Dec. 447.

Admissibility of proof of possession by defendant of other stolen property: 10 Ann. Cas. 1089.

(C) TRIAL AND REVIEW.

Where there is no evidence to sustain a verdict of guilty in a prosecution for larceny, or where the evidence so preponderates against the verdict as to justify the presumption that it was rendered under the influence of passion or prejudice, the verdict should be set aside.—*State v. Nesbit*, 4 Idaho, 548, 43 Pac. 66.

In a prosecution for grand larceny, 'an instruction that if the jury "believe from the evidence that the defendant had no felonious intent to steal the property described, at the time he took it, the jury must acquit even if they should believe that defendant subsequently conceived the intent of appropriating the said animal," sufficiently leaves the question of intent to the jury.—*State v. Hines*, 5 Idaho, 789, 51 Pac. 984.

Where in a prosecution for the larceny of two mares, a witness testifies that he was half-owner of the mares and that after they were stolen he traced them and found them, and there is evidence to show that they were in defendant's possession and that he shipped them, the action of the court in refusing a new trial will not be disturbed on the ground of failure to show the owner's want of consent to the taking.—*State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186.

An instruction in a prosecution for larceny that the possession of recently stolen property is a circumstance from which, when unexplained, the guilt of the accused may be inferred, is not erroneous.—*State v. Sanford*, 8 Idaho, 187, 67 Pac. 492.

It is error to refuse an instruction that, if the jury believes that defendant had no felonious intent to steal the property when he took it, he must be acquitted, even though he subsequently conceived such intent, where there are facts in evidence warranting such

instruction.—*State v. Riggs*, 8 Idaho, 630, 70 Pac. 947.

In a prosecution for larceny, the court instructed the jury that possession of recently stolen property is, in law, a strong criminalizing circumstance, tending to show defendants' guilt, unless the evidence and the facts and circumstances proved show that they may have come honestly into the possession of the same. At defendants' request, the court instructed the jury that if they believed defendants were placed in possession of the property by others and were honestly employed to deliver it to another and were at the time of their arrest openly and publicly carrying out such employment, this is a satisfactory account of the possession of the animal in question and removes every presumption of guilt growing out of such possession. Held, that the instructions were not conflicting.—*State v. Collett*, 9 Idaho, 608, 75 Pac. 271.

The weight to be given to the explanation by defendant of his possession of recently stolen property is for the jury.—*State v. Ireland*, 9 Idaho, 686, 75 Pac. 257.

Instructions as to the possession of recently stolen property held not to assume that the evidence shows any particular fact and to correctly state the law in a larceny case.—*State v. Wright*, 12 Idaho, 212, 85 Pac. 493.

Where it is shown that defendant took possession of a colt belonging to W. and branded such animal, claiming it as his own, and on a trial on the charge of grand larceny he is found guilty, the judgment will not be reversed where all the facts connected with the alleged larceny were before the jury and the evidence was sufficient to warrant the verdict.—*State v. Williams*, 12 Idaho, 483, 86 Pac. 53.

In a prosecution for larceny in which there was testimony that the person named as owner in the information owned only a half-interest in the property stolen, an instruction as to ownership thereof examined and held to correctly state the law.—*State v. Cotterel*, 12 Idaho, 572, 86 Pac. 527.

An instruction that "the possession of stolen property, however recent, is not of itself a criminalizing circumstance, but to such evidence of possession must be added circumstances that will prove defendant's guilt beyond a reasonable doubt," is erroneous as being an incorrect statement of the law and an invasion of the province of the jury.—*State v. Peck*, 14 Idaho, 712, 95 Pac. 515.

(D) SENTENCE AND PUNISHMENT.

(No paragraphs.)

LAST CLEAR CHANCE.

See Negligence, III.

LAW OF THE CASE.

See Appeal and Error, XVI, (K).

On subsequent appeal. See Criminal Law, XV, (G), 7.

LEASE.

See Landlord and Tenant.

LEWDNESS.

See Adultery; Disorderly House.

LIBEL AND SLANDER.

- I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.
- II. PRIVILEGED COMMUNICATIONS AND MALICE THEREIN.
- III. JUSTIFICATION AND MITIGATION.
- IV. ACTIONS.
- V. SLANDER OF PROPERTY OR TITLE.
- VI. CRIMINAL RESPONSIBILITY.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

Criminal libel. See post, VI.

The charge that a woman is a "public prostitute" is not actionable per se, neither adultery, fornication, nor prostitution being punishable as such by our statutes.—*Douglas v. Douglas*, 4 Idaho, 293, 38 Pac. 934.

The courts must judge the intent a man has in doing the act by the means he employs and the thing to be accomplished, and, if they all be lawful, courts cannot impute malice or unlawful motives to the actor.—*Barton v. Rogers*, 21 Idaho, 609, Ann. Cas. 1913E, 192, 123 Pac. 478.

Editorial Notes.

Words, what actionable per se: 1 Am. Dec. 448; 12 Am. Dec. 39; 41 Am. Rep. 590; 116 Am. St. Rep. 802.

Charging woman with unchastity as actionable per se: 15 Ann. Cas. 1242; 24 L. R. A., N. S., 577.

Imputing incompetency to physician: 26 L. R. A. 325.

II. PRIVILEGED COMMUNICATIONS AND MALICE THEREIN.

As defense in criminal prosecution. See post, VI.

Whatever a litigant may properly plead as a cause of action or ground of defense as relevant or material to the issue he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel.—*Carpenter v. Grimes Pass etc. Co.*, 19 Idaho, 384, 114 Pac. 42.

The ends of justice and the public good can be best served by allowing litigants to freely plead any material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter which is neither pertinent nor material to the issue under inquiry.—*Carpenter v. Grimes Pass etc. Co.*, 19 Idaho, 384, 114 Pac. 42.

The privilege of freely pleading matters constituting causes of action or grounds of defense must be exercised in good faith.—*Carpenter v. Grimes Pass etc. Co.*, 19 Idaho, 384, 114 Pac. 42.

Whatever a party to an action may allege in his pleading as a cause of action or ground of defense that is pertinent or material to the charge made, or against which he is defending, can never give rise to a right of action for libel.—*Carpenter v. Grimes Pass etc. Co.*, 19 Idaho, 384, 114 Pac. 42.

Where the board of trustees of an independent school district enter orders and pass resolutions with reference to the government and conduct of the school and the duties of the teachers and superintendent, and such orders and resolutions clearly fall within the powers and authority of the school board under the law, the motives and purposes of such board cannot be put in issue in an action for damages under the charge of civil libel.—*Barton v. Rogers*, 21 Idaho, 609, Ann. Cas. 1913E, 192, 123 Pac. 478.

A school board cannot be protected in the use of libelous language or charges against a teacher under the pretext of discharging official duties; but so long as their actions are clearly within the purview of the law and such as they have an unquestionable right to perform, and they use lawful means in the performance of the act, they cannot be held liable in an action for libel, even though it be charged that they performed the act in pursuance of a conspiracy among their members or through a malicious motive.—*Barton v. Rogers*, 21 Idaho, 609, Ann. Cas. 1913E, 192, 123 Pac. 478.

Editorial Notes.

Privileged communications, expressions, or statements: 2 Am. Dec. 431; 15 Am. Dec. 232; 31 Am. Rep. 708; 104 Am. St. Rep. 110.

Privileged communications, attorney's liability for words spoken at a trial: 17 Am. Dec. 194; 7 Ann. Cas. 603.

Statements by party in pleadings in civil action as privileged within law of libel and slander: Ann. Cas. 1913D, 444; 12 Ann. Cas. 1025; 22 L. R. A. 649; 13 L. R. A., N. S., 820.

Liability of school board or superior officer for libel or slander of teacher: Ann. Cas. 1913E, 195.

Publication of pleadings before they come before court as privileged within law of libel: 11 Ann. Cas. 162; 15 Ann. Cas. 618; 38 L. R. A., N. S., 913.

Privileged communications as to character or reputation of servant: 4 L. R. A., N. S., 1104.

III. JUSTIFICATION AND MITIGATION.

In criminal prosecution. See post, VI.

IV. ACTIONS.

The courts will determine, as a matter of law, whether alleged libelous matter in a pleading was in fact pertinent or material to the issue joined.—*Carpenter v. Grimes Pass etc. Co.*, 19 Idaho, 384, 114 Pac. 42.

The complaint in an action for libel examined and held not to state a cause of action. *Barton v. Rogers*, 21 Idaho, 609, Ann. Cas. 1913E, 192, 123 Pac. 478.

V. SLANDER OF PROPERTY OR TITLE.

(No paragraphs.)

VI. CRIMINAL RESPONSIBILITY.

Under R. S. 7687, providing that no indictment is insufficient by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant on its merits and R. S. 8236, providing that neither a departure from the form or mode prescribed by this code, etc., renders the proceeding invalid, unless it has actually prejudiced the defendant or tended so to do in respect to a substantial right, an information for libel which sets forth the libelous matter in *haec verba*, prefacing with the words "that is to say," is good upon demurrer.—*Bonney v. State*, 3 Idaho, 288, 29 Pac. 185.

Under R. S. 6737, defining libel, it is not necessary, in order to constitute libel, that the alleged libelous matter charge the person named with a crime, it being sufficient under the statute that the defamation tends to impeach the honesty, integrity, virtue or reputation of such person, and thereby expose him to public hatred, contempt or ridicule.—*State v. Sheridan*, 14 Idaho, 222, 15 L. R. A., N. S., 497, 93 Pac. 656.

Under R. S. 6737, defining libel, a published article as follows: "Gooding and graft have become so thoroughly known as synonymous terms, that the rank and file will have no more of it. Only federal office-holders and those connected with the Gooding-Brady machine, are zealous in the support of the big chief" (meaning the said Frank R. Gooding), is libelous per se.—*State v. Sheridan*, 14 Idaho, 222, 15 L. R. A., N. S., 497, 93 Pac. 656.

Where a word is capable of two constructions, one actionable and the other not, that construction will be adopted which the circumstances show the word naturally bore and all the parts of the alleged libelous article will be taken together to determine the true meaning.—*State v. Sheridan*, 14 Idaho, 222, 15 L. R. A., N. S., 497, 93 Pac. 656.

Where an article is libelous per se, the prosecution is not required to prove the untruth of the article or that the same was published with bad faith, the truth or good faith of the publication being matter of defense.—*State v. Sheridan*, 14 Idaho, 222, 15 L. R. A., N. S., 497, 93 Pac. 656.

Where an article is libelous per se, the proof of the publication makes a *prima facie* case.—*State v. Sheridan*, 14 Idaho, 222, 15 L. R. A., N. S., 497, 93 Pac. 656.

Under R. S. 6743, an article which gives the opinion of a reporter or editor as to the proceedings of a judicial, legislative or other public official body, is not privileged.—*State v. Sheridan*, 14 Idaho, 222, 15 L. R. A., N. S., 497, 93 Pac. 656.

In a libel case words will be construed according to their plain, popular, natural and ordinary sense and as they would naturally be understood by persons hearing or reading them, unless it affirmatively appears that they

were used and understood in some other sense. *State v. Sheridan*, 14 Idaho, 222, 15 L. R. A., N. S., 497, 93 Pac. 656.

LICENSES.

I. FOR OCCUPATIONS AND PRIVILEGES.

II. IN RESPECT OF REAL PROPERTY.

I. FOR OCCUPATIONS AND PRIVILEGES.

See Ferries.

For particular occupations or privileges, *see Banks and Banking*, I; *Hawkers and Peddlers*.

Sale of intoxicating liquors. See Intoxicating Liquors.

To practice medicine. See Physicians and Surgeons.
Licenses to insurance companies. See Insurance, I.
Failure to procure license to loan money as affecting right to recover on loan. See Contracts, I, (F).

Under statutes, section 150, page 474, the district court has jurisdiction of the offense of transacting a business without license.—*People v. Du Bell*, 1 Idaho, 44.

The district court acquires jurisdiction of prosecutions for transacting business without a license by two methods: first, by grand jury and indictment; second, by appeals from justice's courts.—*People v. Du Bell*, 1 Idaho, 44.

Const., article 7, section 6, providing that the legislature shall not levy taxes for county, town, or municipal purposes, but may vest in the corporate authorities thereof power to assess and collect taxes, applies only to taxation proper and not to license taxes.—*State v. Union Cent. Life Ins. Co.*, 8 Idaho, 240, 67 Pac. 647.

Under Const., article 7, section 2, authorizing levy of valuation and license tax, it is not double taxation to levy a tax on billiard tables according to their value, and at the same time to require the proprietors thereof to pay a license tax under R. S. 1645.—*State v. Jones*, 9 Idaho, 693, 75 Pac. 819.

Laws 1901, page 156, section 8, repealing in part R. S. 1651, provides that the act requiring peddlers to take out a license shall not be construed to apply to peddlers and hawkers in farm products. A city ordinance prohibited farmers from selling farm products, with the exception of milk, fish and game, without first taking out a license. Held, that the ordinance was in conflict with the statute and hence unconstitutional under Const., article 12, section 2, which provides that any incorporated city or town may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with its charter or with the general laws.—*In re Snyder*, 10 Idaho, 682, 68 L. R. A. 708, 79 Pac. 819.

R. S. 1645, as amended by Laws 1903, page 104, providing that a license tax shall be paid by the "proprietor or keeper of a billiard table" is not in conflict with article 7, section 2, authorizing tax by valuation and further authorizing a license tax on persons doing business in this state.—*In re Gale*, 14 Idaho, 761, 95 Pac. 679.

Where the proprietor of a saloon keeps and maintains a billiard table in connection therewith, he is liable for the license tax imposed on the keeper or proprietor of a billiard table by R. S. 1645, as amended by Laws 1903, page 104, and such table is kept and used in "doing business" within the meaning of Const., article 7, section 2, although no charge is made for the use of such table by patrons of the saloon.—*In re Gale*, 14 Idaho, 761, 95 Pac. 679.

Editorial Notes.

Constitutional limitation on the power to impose license or occupation taxes: 129 Am. St. Rep. 249.

Power to tax occupations as affected by constitutional requirement that taxes shall be uniform: 2 Ann. Cas. 325; 15 Ann. Cas. 986.

Tax on hawkers and peddlers and persons engaged in soliciting orders by sample or otherwise as an exercise of the police power: 19 L. R. A., N. S., 301; 28 L. R. A., N. S., 265.

II. IN RESPECT OF REAL PROPERTY.

Distinction between license and easement. See Easements.

A license is a personal privilege to do certain acts upon the lands of another, but creates no interest therein, is revocable at will, and may rest in parol.—*Howes v. Barmon*, 11 Idaho, 64, 114 Am. St. Rep. 255, 69 L. R. A. 568, 81 Pac. 48.

Editorial Notes.

License, nature, effect, and revocability of: 10 Am. Dec. 40; 35 L. R. A., N. S., 716.

When revocable or assignable: 27 Am. Dec. 681.

Revocability of licenses, and when and how may be exercised: 43 Am. Dec. 195; 54 Am. Dec. 166.

Revocability of executed license on faith of which licensee has incurred expense: Ann. Cas. 1913A, 74; 49 L. R. A. 497; 9 L. R. A., N. S., 733.

LIENS.

Lien peculiar to particular classes of personal relations, occupations, or transactions. See Attorney and Client; Banks and Banking; Sales; Vendor and Purchaser; and other specific heads.

Agister's lien. See Animals.

Lien peculiar to particular species of property. See Railroads; Logs and Logging; Mechanics' Liens; Waters and Watercourses.

Enforcement of particular remedies. See Attachment; Judgment; Execution; and other specific heads.

Tax liens. See Taxation.

Mortgages. See Mortgages; Chattel Mortgages.

Agricultural liens. See Agriculture.

Custodian of attached property has no lien for services. See Attachment and Garnishment, V.

Priority of attachment lien. See Attachment and Garnishment, V.

Of taxes. See Taxation, VI.

Of judgment. See Judgment.

On mines and minerals. See Mines and Minerals, III, (C).

On trespassing hogs. See Animals, VII.

Possession necessary to give servant a lien for wages. See Master and Servant, II.

Right to show lien where answer claims title in fee. See Quietening Title, II.

R. S. 3333, provides that, notwithstanding a contrary agreement, a lien shall pass no title to the property covered thereby. M. hired sheep to F. for a period of years at a yearly rental per head. The agreement provided that F. should return an equal number of sheep at the expiration of the term and that the title should remain in M. and that M. should have a lien on the increase for the stipulated rental. Held, that the title to the wool and increase did not remain in M. under the lien created by the contract, and hence they were subject to mortgage by F.—*Solomon v. Franklin*, 7 Idaho, 316, 62 Pac. 1030.

One to whom has been intrusted the care and protection of both real and personal property is not entitled to a lien on the real property for his services.—*Williamson v. Moore*, 10 Idaho, 749, 80 Pac. 227.

Under R. S. 3445, as amended by Laws 1899, page 181, one, to whom has been intrusted the care and keeping of personal property, is entitled to a lien thereon for his services, dependent on his possession thereof.—*Williamson v. Moore*, 10 Idaho, 749, 80 Pac. 227.

Two of three tenants in common of personal property made a written contract for the care thereof with defendant. The third tenant in common was not consulted about the contract, but was notified thereof by notice to her agent immediately after it had been entered into. Held, that the contract was admissible for the purpose of establishing the contract and therefore attaching a lien against the interests of the parties for the keeping of the property, even though it had not been submitted to the third tenant in common or her agent for approval.—*Williamson v. Moore*, 10 Idaho, 749, 80 Pac. 227.

Where two of three tenants in common in possession of personal property make a contract for the care thereof with a third person, such third person is entitled to a lien thereon for his services dependent on his possession of the property under R. S. 3445, as amended by Laws 1899, page 181.—*Williamson v. Moore*, 10 Idaho, 749, 80 Pac. 227.

Laws 1903, page 94, amending R. S. 3481, extending the jurisdiction of probate courts to actions to enforce liens, violates Const., article 5, section 21, as an attempt to give such courts equity jurisdiction.—*Dewey v. Schreiber Imp. Co.*, 12 Idaho, 280, 85 Pac. 921.

Editorial Notes.

Liens of one cotenant on the moiety of another: 35 Am. St. Rep. 416.

Jurisdiction of equity to enforce liens: 74 Am. St. Rep. 387.

Right to lien for private storage of goods in absence of agreement for lien or of

statute authorizing it: Ann. Cas. 1913D, 1300.

LIFE ESTATES.

It is the duty of a life tenant and those succeeding to his estate by purchase to pay the taxes on the property, and they cannot by payment acquire any adverse rights against the remaindermen; but such duty and obligation does not rest on a mere lessee from the life tenant who pays his annual rent for the land to the life tenant, and acquires no other profit or benefit from the lands on account of which a duty arises to defray taxes and assessments.—*Wilson v. Linder*, 21 Idaho, 576, Ann. Cas. 1913E, 148, 42 L. R. A., N. S., 242, 123 Pac. 487.

Editorial Notes.

Rights and remedies of tenants of life estates: 14 Am. St. Rep. 630.

Taxes, duty of life tenant to pay: 114 Am. St. Rep. 448; 32 L. B. A. 744.

Duty of life tenant to remaindermen and reversioners: 137 Am. St. Rep. 651.

Duty of life tenant to keep property in repair: 33 L. R. A., N. S., 669.

LIMITATION OF ACTIONS.

I. STATUTES OF LIMITATION.

(A) Nature, Validity and Construction in General.

(B) Limitations Applicable to Particular Actions.

II. COMPUTATION OF PERIOD OF LIMITATION.

III. ACKNOWLEDGMENT, NEW PROMISE AND PART PAYMENT.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

V. PLEADING, EVIDENCE, TRIAL AND REVIEW.

Adverse possession of property as an element or evidence of title. See Adverse Possession.

Presumption of payment from lapse of time. See Payment.

Limitations by agreement between parties. See Contracts, and titles of particular classes of contracts.

Special limitations prescribed for actions by or against particular classes of persons, or for particular forms or kinds of action or other remedies. See Executors and Administrators; Mechanics' Liens; Taxation; Death; and other specific heads.

Operation and effect of statutory limitations, and of lapse of time, laches, etc., in equity. See Equity.

Limitations of criminal prosecutions. See Criminal Law.

Laches and stale demands. See Equity, II.

I. STATUTES OF LIMITATION.

(A) NATURE, VALIDITY AND CONSTRUCTION IN GENERAL.

Claim for deduction of unsecured debts in assessment of taxes as waiver of limitations. See Taxation, V, (C).

A law extending the time within which actions may be commenced can only affect causes of action existing at the time of its passage. It cannot revive causes of action

already barred; and as to existing causes of action, the time must be computed from the period when the action might have been commenced, and not from the passage of the law extending the same.—*Pridgeon v. Greathouse*, 1 Idaho, 359.

Where there is doubt as to the time when the limitation of an action begins to run under a statute, that construction must be given which is most favorable to the common-law rights of the citizen.—*Schneider v. Hussey*, 2 Idaho, 8, 1 Pac. 343.

An act limiting the time within which an action might be commenced provided that causes of action which had theretofore accrued might be commenced within the whole time allowed by the statute after its passage. Held, that the bar of the statute did not begin to run until the statute took effect. *Schneider v. Hussey*, 2 Idaho, 8, 1 Pac. 343.

Where the duty to be performed or the right to be enforced is of a strictly public nature, it is not subject to the statute of limitations. In *re Counties v. Alturas County*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349.

The record of a mortgage makes it the duty of a purchaser of the mortgaged property to inquire into the fact of the running of the statute of limitations on the debt secured or the waiver of such statute.—*Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019.

The plea of the statute of limitations is a personal one and may be waived either by failure to plead it where an action has been commenced or by a written waiver under R. S. 4078 providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the statute of limitations, unless the same is contained in some writing, signed by the party to be charged thereby.—*Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019.

The statute of limitations does not run against a county to recover public money wrongfully withheld by one of its fiducial agents.—*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264; overruled by *Bannock County v. Bell*, 8 Idaho, 1, 101 Am. St. Rep. 140, 65 Pac. 710.

The fact that a clerk of the district court, receiving alleged illegal fees and compensation, was a fiducial agent of the county and received the money as such agent will not prevent the running of the statute of limitations against the county from the time the money was wrongfully received, since implied trusts are within the statute.—*Bannock County v. Bell*, 8 Idaho, 1, 101 Am. St. Rep. 140, 65 Pac. 710.

The statute of limitations is a personal privilege which the debtor may or may not take advantage of and the effect of such statute is not that the debt has been paid.—*Sterrett v. Sweeney*, 15 Idaho, 416, 128 Am. St. Rep. 68, 20 L. R. A., N. S., 963, 98 Pac. 418.

In order to determine the application of the statute of limitations of this state to a con-

tract entered into in the state of Washington, it is necessary to examine said contract and the laws of the state of Washington for the purpose of determining the date from which the statute runs.—*Sterrett v. Sweeney*, 15 Idaho, 416, 128 Am. St. Rep. 68, 20 L. R. A., N. S., 963, 98 Pac. 418.

Where a debtor executed a promissory note in the state of Kansas and agreed to pay the same at a specified time and place within that state, and thereafter removed to the state of Washington and resided there until the bar of the statute of limitations of that state had run against the right of action on the contract, and the debtor thereafter came into the state of Idaho and was sued upon the obligation, he cannot plead the bar of the statute of limitations of the state of Washington.—*West v. Theis*, 15 Idaho, 167, 128 Am. St. Rep. 58, 17 L. R. A., N. S., 472, 96 Pac. 932.

The phrase "has arisen in another state" used in R. S. 4079, providing that "when a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state," refers to and means the state in which the foreign contract is to be paid or discharged, and has no application to an intermediate state or foreign country through which the debtor may subsequently travel or in which he may reside for a sufficient length of time to constitute the bar of the statute of limitations of such state prior to coming to this state, where an action is eventually commenced.—*West v. Theis*, 15 Idaho, 167, 128 Am. St. Rep. 58, 17 L. R. A., N. S., 472, 96 Pac. 932.

Whether residence within this state for the statutory period will prevail as a plea in bar upon a written contract depends upon the nature of the contract, its maturity, and the date from which the statute begins to run.—*Sterrett v. Sweeney*, 15 Idaho, 416, 128 Am. St. Rep. 58, 17 L. R. A., N. S., 472, 98 Pac. 418.

Laws 1907, page 321, amending R. S. 4144, and providing a method of substituted service of process upon a resident of the state temporarily absent from his residence or from the state, did not amend R. C. 4069 with reference to the running of the statute of limitations in case the person to be served departs or is absent from the state.—*Anthes v. Anthes*, 21 Idaho, 305, 121 Pac. 553.

Editorial Notes.

Municipal corporations are subject to the statute of limitations: 32 Am. Dec. 719.

"Nullum tempus occurrit regi," maxim of: 48 Am. Rep. 24; 101 Am. St. Rep. 144.

Government and governmental bodies, when operates against: 101 Am. St. Rep. 144.

May statute of limitations be interposed against an action by a municipality to recover damages for injury to property: 32 L. R. A., N. S., 245.

(B) LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.

Action by mayor to recover lands belonging to town-site. See Public Lands, II, (B), 4.

Action to revive judgment. See Judgment, XIX, XXI, (A).

Limitations in foreclosure of mechanic's lien. See Mechanics' Liens, VII.

Limitation on filing of mechanic's lien claim. See Mechanics' Liens, III.

Affecting proceeding for appointment of administrator. See Executors and Administrators, II.

Against action to set aside sheriff's deed under execution sale. See Execution, VII.

Time for presenting claims against estate of deceased person. See Executors and Administrators, VI, (B).

The liability of sureties on an official bond is a statutory liability, and action on such liability is barred in three years under R. S. 4054, subdivision 1, and not within five years as an action on an instrument in writing within the provisions of R. S. 4052.—*Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1071.

Under R. S. 4054, subdivision 1, an action to recover on a liability created by statute other than a penalty or forfeiture must be commenced within three years.—*Canyon County v. Ada County*, 5 Idaho, 686, 51 Pac. 748.

R. S. 4053 limits the time to commence an action on a contract, obligation, or liability not founded on written instrument to four years. R. S. 4060 provides that actions for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued. R. S. 4061 provides that the limitations prescribed in R. S., chapter 3, apply to actions brought in the name of the state. Held, that the statute of limitations runs against a county in an action against an ex-clerk of the district court, ex-officio auditor and recorder of the county, to recover illegal fees and compensation collected by him during his term of office.—*Bannock County v. Bell*, 8 Idaho, 1, 101 Am. St. Rep. 140, 65 Pac. 710.

Under R. S. 4053 providing that an action upon a contract, obligation or liability not founded on an instrument in writing must be brought within four years, such a claim against the state is barred after four years. *Small v. State*, 10 Idaho, 1, 76 Pac. 765.

Where the owner of a claim against the state does not make application to the court for a recommendatory decision to the legislature under Const., article 5, section 10, until nine or ten years after the claim becomes due and shows no excuse for the delay, the application will be denied on the ground that the claim is barred by the statute of limitations.—*Small v. State*, 10 Idaho, 1, 76 Pac. 765.

The statute of limitations will not run against an action by a railroad company to quiet title to a right of way over public lands under a grant of such right of way from the government.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

Where plaintiff claims that during the three years prior to the commencement of

his action defendants had wrongfully and negligently deposited vast quantities of waste from their mines in a certain stream the waste being carried on his lands and injuring and destroying such lands and the trees and vegetation thereon, the action is one for a continuing injury and is not barred by limitations or laches, since plaintiff could have commenced his action when the damage first developed or might wait till his property was entirely destroyed and then sue.—*Hill v. Standard Min. Co.*, 12 Idaho, 223, 85 Pac. 907.

Under R. S. 4036, an action to enforce an implied or constructive trust is barred within five years.—*Ames v. Howes*, 13 Idaho, 756, 93 Pac. 35.

In an action to have a deed declared a mortgage and for a release of the same on payment of the amount found due, the statute of limitations is no defense, as it was not incumbent on plaintiffs to bring the action and it was within the power of defendant to bring his action to foreclose at any time on demand.—*Bergen v. Johnson*, 21 Idaho, 619, 123 Pac. 484.

Under the statute of limitations (R. C. 4054, subd. 1, and secs. 4037, 4038, 4060), an action to have ordinances vacating streets and alleys of a city declared null and void, and to compel the removal of obstructions from the streets, should have been commenced within at least five years from the time the cause of action arose, and is barred where the ordinances were passed in 1900, and the action was not commenced until 1909.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

One who sustains damage by reason of the mistake and false and fraudulent representation contained in an abstract may, under R. C. 4054, subdivision 4, commence his action to recover damages within three years after discovering the fraud or mistake.—*Hillock v. Idaho Title & Trust Co.*, 22 Idaho, 440, 126 Pac. 612.

Where a county recorder has recorded instruments and has not collected the full amount of the fees prescribed, by statute, and the county thereafter commences an action against the person for whom such recording is done, the question as to whether the action is barred by the statute of limitations is to be determined by the provisions of R. C. 4053, as the same is an action upon a contract, obligation, or liability not founded upon an instrument in writing.—*Lincoln Co. v. Twin Falls etc. Water Co.*, 23 Idaho, 433, 130 Pac. 788.

A principal's obligation to reimburse his surety is not founded upon a written instrument within R. C. 4052, providing that an action founded upon a written instrument must be commenced within five years.—*Tritthart v. Tritthart*, 24 Idaho, 186, 133 Pac. 121.

II. COMPUTATION OF PERIOD OF LIMITATION.

Commencement of action in federal court by non-resident alien does not stop running of statute in state courts. See Aliens.

Demand necessary to start running of statute against depositor. See *Banks and Banking*, III, (C).

The statute of limitations begins to run from the time when the action might properly be commenced.—*Pridgeon v. Greathouse*, 1 Idaho, 359.

The statute of limitations does not begin to run against a cestui que trust until the trust is denied, either directly, or by some act by the trustee inconsistent with the trust. *Nasholds v. McDonnell*, 6 Idaho, 377, 55 Pac. 894.

A mortgagor made a written acknowledgment of a debt on September 19, 1890. He died March 21, 1894. Letters of administration were issued on January 3, 1895. An action to foreclose the mortgage was commenced on November 21, 1895. Held, that the action was brought in time under R. S. 4071 providing that if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters of administration or testamentary. *Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019.

R. S. 4054, subdivision 1, providing that actions to recover upon a liability created by statute other than a penalty or forfeiture must be commenced within three years, does not begin to run against a municipality claiming its percentage of road taxes under R. S. 870, subdivision 6, as amended, until a demand by the municipality or notice of the county's refusal to pay.—*Village of Mountainhome v. Elmore Co.*, 9 Idaho, 410, 75 Pac. 65.

Where there is no fraud shown, neither the ignorance of a person of his right to bring an action nor the mere silence of a person liable to the action prevents the running of the statute of limitations.—*Coe v. Sloan*, 16 Idaho, 49, 100 Pac. 354.

The words "return to the state" used in R. S. 4069, providing that "if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state," apply to a nonresident debtor who enters into a contract in a foreign state, and thereafter comes into this state, as well as to a citizen who enters into a contract within this state, and thereafter departs from the state.—*West v. Theis*, 15 Idaho, 167, 128 Am. St. Rep. 58, 17 L. R. A., N. S., 472, 96 Pac. 932.

Under the provisions of R. S. 4079, "a cause of action arises" at the time and the place in the state or foreign country when and where the debt is to be paid or the contract performed, and the cause of action thus arising continues and follows the debtor until such time as it is either barred by the statute of limitations of the state wherein it arose, or until the debtor has lived within this state a sufficient length of time to bar it by the statute of limitations of this state.—*West v. Theis*, 15 Idaho, 167, 128 Am. St. Rep. 58, 17 L. R. A., N. S., 472, 96 Pac. 932.

Under R. C., 4054, subdivision 3, which requires an action for taking, detaining, or injuring any goods or chattels, or for the specific recovery of personal property, to be brought within three years, a right of action accrues in favor of the owner of goods as soon as they are wrongfully taken from his possession, or wrongfully converted by one who rightfully came into possession of them. *Havird v. Lung*, 19 Idaho, 790, 115 Pac. 930.

Where the possession of property is acquired by tort, no demand need be made previous to the institution of suit for its recovery, and consequently the statute of limitations is set in motion without such demand.—*Havird v. Lung*, 19 Idaho, 790, 115 Pac. 930.

Nondiscovery of the location of a chattel is not a material element in the computation of the period of limitation allowed to commence an action to recover such chattel.—*Havird v. Lung*, 19 Idaho, 790, 115 Pac. 930.

R. C. 4054, subdivision 4, providing that the cause of action for fraud or mistake is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake, applies only to actions for fraud or mistake within the common acceptance of those terms and has no application to the action for taking, detaining or injuring goods or chattels, the period for commencing which is prescribed by the third subdivision of the section.—*Havird v. Lung*, 19 Idaho, 790, 115 Pac. 930.

R. C. 4069 provides that if, when a cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. Held, that the time of absence of a person pleading the statute is not a part of the time limited for commencing the action, whether the absence be of a merely temporary nature or a change of residence and domicile.—*Anthes v. Anthes*, 21 Idaho, 305, 121 Pac. 553.

A prospective purchaser of a tract of land purchased from an abstract company an abstract of title to such property, accompanied by certificate to the effect that such abstract contained a notation of all instruments of record affecting the title, including tax certificates and tax deeds. Relying upon the correctness of the abstract and the truth of the certificate annexed thereto, the purchaser of the abstract subsequently purchased the land therein described, and it thereafter developed that at the time of the making and delivery of such abstract there was an outstanding tax deed to such property which was not disclosed by the abstract, and the purchaser of the abstract and land therein described was obliged to expend money to procure a cancellation and release and satisfaction of the tax deed, and thereafter commenced an action against the abstract company to recover damages sustained on account of mistake and false representation made by the abstract and certificate thereto.

Held, that the limitation of such action is governed by R. C. 4054, subdivision 4, and that the cause of action in such case does not accrue until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.—*Hillock v. Idaho Title & Trust Co.*, 22 Idaho, 440, 126 Pac. 612.

In an action by the receiver of an insolvent corporation to recover illegal dividends, the complaint alleged that the creditors did not discover that illegal dividends had been paid until on or about March 30, 1911, the dividends having been declared on January 14, 1908. Held, that the action was not barred by the statute of limitations.—*Stoltz v. Scott*, 23 Idaho, 104, 129 Pac. 340.

Express as well as implied trusts may be repudiated by adverse possession, and, if repudiated, the statute of limitations begins to run from the time the beneficiary has notice of such repudiation.—*Olympia Min. & Mill. Co. v. Kerns*, 24 Idaho, 481, 135 Pac. 255.

The general rule is that length of time is no bar to a trust, clearly established, and that express trusts are not within the statute of limitations; but that rule is subject to the qualification that time begins to run against a trust as soon as it is openly disavowed by the trustee, which disavowal or repudiation is clearly and unequivocally made known to the cestui que trust.—*Olympia Min. & Mill. Co. v. Kerns*, 24 Idaho, 481, 135 Pac. 255.

Where an action was brought for the flooding of a bathing beach and damages were claimed for each season for five years preceding the commencement of the action, separate recoveries might be had for each flood, and the statute of limitations does not run for all time and against all recurring floodings and damages from the time of the infliction of the first injury or the erection of the structure which caused the flooding.—*Deffenbaugh v. Washington Water P. Co.*, 24 Idaho, 514, 135 Pac. 247.

Editorial Notes.

Limitations, statute of, when prevented from operating by fraud: 60 Am. Dec. 511.

Absence from the state forms no exception unless expressed: 13 Am. Dec. 368.

Disabilities which protect from the statute of limitations: 36 Am. Dec. 68.

Exceptions in statute of limitations as to time defendant is absent from state as applicable to nonresidence at time of accrual of action: Ann. Cas. 1912D, 467.

Inclusion of day of accrual of action in computing limitation against action: 1913D, 1068; 12 Ann. Cas. 58; 38 L. R. A., N. S., 1160.

Right to maintain action on official bond where statute of limitations has run with respect to action against officer: Ann. Cas. 1913E, 1265.

What constitutes "residence out of the state" within meaning of statute: 17 L. R. A. 225.

Applicability to nonresidents of provision suspending limitations against defendant who is out of state until "his return": 25 L. R. A., N. S., 24.

III. ACKNOWLEDGMENT, NEW PROMISE AND PART PAYMENT.

To take a case out of the statute of limitations on an account stated, the acknowledgment of the debt or the promise to pay it must be in writing, signed by the party to be charged thereby; and this, whether the original cause of action was or was not barred at the time of the acknowledgment or promise. *Reed v. Smith*, 1 Idaho, 533.

The stating of an account is in the nature of a new promise, depending for its validity upon the consideration of the old debt; but the evidence of such promise must be in writing in order to take the case out of the statute of limitations.—*Reed v. Smith*, 1 Idaho, 533.

Where a written promise to pay a debt barred by the statute of limitations is relied on, the identity of the sum included in such written promise, a promissory note, with the interest due on the pre-existing debt, and that it was given for such interest, may be proven by parol testimony.—*Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Kelly v. Leachman*, 3 Idaho, 672, 34 Pac. 813.

A promise in writing signed by the party to be charged thereby to pay the interest due upon the whole of a pre-existing debt, given by the debtor to the creditor, is an unequivocal acknowledgment of the whole debt, from which a promise to pay may be implied, and is a sufficient acknowledgment to take a case out of the statute of limitations under R. S. 4078.—*Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Kelly v. Leachman*, 3 Idaho, 672, 34 Pac. 813.

An indorsement on a note, secured by mortgage, acknowledging the debt evidenced by the note, signed by the maker, who is also the mortgagor, does not extend or renew either the principal obligation or the mortgage or create a new indebtedness; it simply affects the remedy on the note and mortgage and not the contract or obligation thereof.—*Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019.

An indorsement on a note, secured by mortgage, acknowledging the debt evidenced by the note, signed by the maker, who is also the mortgagor, does not extend or renew either the principal obligation or the mortgage, since it affects the remedy only, and is not therefore in contravention of R. S. 335, providing that the lien of a mortgage cannot be extended beyond its terms so as to secure a debt not named in the mortgage, except by writing acknowledged as in case of a conveyance of real property.—*Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019.

In a suit on a note to which the statute of limitations was interposed as a defense, defendant admitted the delivery of a check alleged to be a payment taking the case out of the statute, but denied that it was a payment or that he had authorized plaintiff to credit the amount of the check on the note. Defendant also alleged that he signed the note as surety and as an accommodation to P. The evidence showed that defendant owed P. twelve dollars for baling hay and that P. authorized him to pay this amount to plaintiff,

that he did as directed and that the credit on the note in plaintiff's handwriting was not made for three months after delivery of the check. The check was payable to defendant or bearer and bore the words "P. note. Hay baled." Held, not to show a payment sufficient to raise the bar of the statute of limitations.—Gray v. Pierson, 7 Idaho, 540, 64 Pac. 233.

A new note and mortgage was given to secure the payment of the same debt covered by a prior note and mortgage, the new mortgage reciting "this mortgage being a renewal of said mortgage." The second mortgage covered additional property, was for a greater amount, and the rate of interest and amount of attorney's fees stipulated in the notes was not the same. Held, that the new note and mortgage were not a new contract but a renewal of the old contract, and hence that the statute of limitations which had run on the old note and mortgage was not a defense to an action on the new note and mortgage.—Vollmer v. Estate of Reid, 10 Idaho, 196, 77 Pac. 325.

Where a resident of this state goes into the state of Washington and makes a partial payment upon a Washington contract after its maturity, and before such contract is barred by the statute of limitations of that state, upon his return to this state the contract follows him as made, and is enforceable under the laws of this state, and the statute of limitations of this state begins to run upon his re-entry into this state, after such payment.—Sterrett v. Sweeney, 15 Idaho, 416, 128 Am. St. Rep. 68, 20 L. R. A., N. S., 963, 98 Pac. 418.

Under Ballinger's Washington Ann. Code, section 4817, the making of a partial payment by a debtor, after the maturity of the debt and before the statute has run, is a waiver of the debtor's privilege to claim the maturity of the debt as the date from which the statute begins to run.—Sterrett v. Sweeney, 15 Idaho, 416, 128 Am. St. Rep. 68, 20 L. R. A., N. S., 963, 98 Pac. 418.

Under R. C. 5469, 5471, 5461, and 5463, an administrator of the estate of a deceased person has no power or authority to waive the bar of the statute of limitations so as to set a new date for the statute to begin to run.—Dern v. Olsen, 18 Idaho, 358, Ann. Cas. 1912A, 1, 110 Pac. 164.

Under R. C. 4078, an administrator cannot "acknowledge or promise" to pay "a new or continuing contract" so as to remove the same from the operation of the statute of limitations and bind the estate, for the reason that the debt is the obligation of the estate represented by the administrator, and would not be the debt of the party making the acknowledgment or promise and "to be charged thereby."—Dern v. Olsen, 18 Idaho, 358, Ann. Cas. 1912A, 1, 110 Pac. 164.

Under R. C. 4078, a clear and definite acknowledgment of the existence of a contract and liability which has not at the time been barred by the statute of limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt and fixes a new date from which the

statute begins to run.—Dern v. Olsen, 18 Idaho, 358, Ann. Cas. 1912A, 1, 110 Pac. 164.

Where O. was owing D. a note and mortgage which was overdue but not yet barred by the statute of limitations, and O. wrote D. telling him of a prospective sale of mining property he had in view, and saying, "Now, if I can make this deal, will try and get enough money down to liquidate the mortgage you hold against the property," such letter constitutes an "acknowledgment" of a "continuing contract" within the meaning of R. C. 4078, and sets a new date from which the statute of limitations begins to run.—Dern v. Olsen, 18 Idaho, 358, Ann. Cas. 1912A, 1, 110 Pac. 164.

Editorial Notes.

Acknowledgment of debts barred by statute: 8 Am. Dec. 162.

New promise by a joint debtor: 10 Am. Dec. 695.

Acknowledgment, what sufficient to remove: 23 Am. Dec. 588; 38 Am. St. Rep. 737.

New promise, indefinite acknowledgment of indebtedness: 29 Am. Dec. 467.

Acknowledgment or payment by one joint or joint and several promisor: 51 Am. Dec. 330.

Promise or acknowledgment to take debt out of the statute of limitations: 62 Am. Dec. 101; 35 Am. Rep. 417; 102 Am. St. Rep. 751.

Acknowledgment or new promise, payment of dividend by assignee of insolvent debtor does not amount to: 52 Am. Rep. 401.

Limitation of actions, acknowledgment, made by stranger: 57 Am. Rep. 334.

New promise, from what inferable: 58 Am. Rep. 749.

Part payment by joint debtor as suspending running of statute of limitations as to joint obligors not authorizing or ratifying such act: Ann. Cas. 1912D, 1328.

Indorsement of payment on promissory note by holder as sufficient proof of part payment to stop running of statute of limitations: Ann. Cas. 1913A, 1223.

Giving check, bill, note, etc., as part payment or collateral security, as starting statute of limitations running anew: 15 Ann. Cas. 332.

Person to whom acknowledgment or new promise must be made to toll the statute or remove the bar: 25 L. R. A., N. S., 805; 33 L. R. A., N. S., 262.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

The statute of limitations acts upon the remedy, and not upon the debt, and the running of the statute does not extinguish the debt nor impair the lien of the mortgage given to secure the same.—Kelly v. Leachman, 3 Idaho, 672, 34 Pac. 813; Kelly v. Leachman, 3 Idaho, 629, 33 Pac. 44.

The statute of limitations runs against the remedy and not against the debt.—*Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

Under R. S. 4520 providing that "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage, whatever will prevent or stop the running of the statute of limitations on either note or mortgage will prevent it on both, and whatever will bar the remedy on one will bar it on the other.—*Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

A mortgage given to secure the payment of a note is a mere incident to the debt and its foreclosure is not barred by the statute of limitations so long as an action on the note is not barred.—*Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019.

Editorial Notes.

Effect of the bar of the statute of limitations: 95 Am. St. Rep. 656.

Statutes creating limitation of actions, effect of the bar of: 95 Am. St. Rep. 656.

Limitations, statute of, operation of where a cause of action for nominal damages subsequently ripens into a right to actual damages: 126 Am. St. Rep. 944.

Retroactive operation of statute of limitations: Ann. Cas. 1912A, 1041; 4 Ann. Cas. 166.

V. PLEADING, EVIDENCE, TRIAL AND REVIEW.

Plea of statute does not prevent voluntary dismissal by plaintiff. See *Dismissal and Nonsuit*, I.

Failure to plead the statute of limitations is a waiver thereof, and defendant cannot raise the question of limitations for the first time in the supreme court.—*Kraft v. Great-house*, 1 Idaho, 254.

Where the statute of limitations is pleaded by demurrer it must be pleaded in the manner prescribed by R. S. 4213 or the demurrer should be overruled.—*Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Kelly v. Leachman*, 3 Idaho, 672, 34 Pac. 813.

The statute of limitations must be pleaded to be made available.—*Franz v. Idaho Artesian Well etc. Co.*, 5 Idaho, 71, 46 Pac. 1026.

Under R. S. 4217, providing, inter alia, that the statement of any new matter in the answer in avoidance, or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party, it is error to render judgment of dismissal on the pleadings, without a trial, when the answer sets up the statute of limitations of a foreign state.—*Alspaugh v. Reid*, 6 Idaho, 223, 55 Pac. 300.

The plea that an action is barred by the statute of limitations may be taken by demurrer if it clearly appears on the face of the complaint that the action did not accrue within the statutory time; otherwise, by answer.—*Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

Where defendant pleads the statute of limitations, plaintiff is deemed to have denied the

allegations of the answer by virtue of R. S. 4217, which provides that the statement of new matter in the answer must, on the trial, be deemed controverted by the opposite party, and defendant's motion for judgment on the pleadings should be denied; since the court could not take notice of his plea of the statute on such motion.—*Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

Under R. S. 4213, providing how the statute of limitations may be pleaded, such statute must be specially pleaded and cannot be raised by demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.—*Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

A finding of fact that the damages sought to be recovered accrued within the period covered by the statute of limitations, immediately prior to the commencement of the action, when such statute is made a defense, is a sufficient finding on such defense.—*Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574.

Where the answer interposes as a defense R. S. 4036, 4037, limiting the time to commence actions, it is incumbent on the trial court to make a finding on such defense, unless a finding thereon would not affect or control the judgment, or call for a different judgment than that authorized by the findings made.—*Village of Hailey v. Riley*, 14 Idaho, 481, 17 L. R. A., N. S., 86, 95 Pac. 686.

Where the pleadings show that both parties considered the action to be on a written contract and the statute of limitations applicable to written contracts was pleaded in defense, and the record shows that the action is not barred if on a written contract but is barred if on an implied contract and the court finds that it is an action on implied contract, the respondent cannot urge the proper statute in bar on the appeal.—*Tritthart v. Tritthart*, 24 Idaho, 186, 133 Pac. 121.

Editorial Notes.

Who may plead limitation of actions: 104 Am. St. Rep. 742.

LOCAL OPTION.

See *Intoxicating Liquors*.

LOGS AND LOGGING.

Sufficiency of complaint in action by assignee of claim for conversion of saw-logs. See *Assignments*.

Obstruction of navigation by logs, rafts or booms. See *Navigable Waters*.

Injuries to riparian proprietor due to flowage created by log jam. See *Navigable Waters*, III.

Condemnation for the purpose of floating logs. See *Eminent Domain*.

Floating of logs and rafts on navigable streams. See *Navigable Waters*.

Sufficiency of delivery in sale of saw-logs. See *Sales*, V.

Treble damages in action for trespass. See *Trespass*.

The construction and use of booms is a necessary adjunct to the floating of logs.—*Powell v. Springston Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

The right to float logs down any stream sufficient in volume to float and carry such commodity gives no right to enter and trespass upon the lands through which such stream flows and erect dams or other obstructions in such stream in order to increase the volume of water therein for floating or any other purposes.—*La Veine v. Stack-Gibbs Lumber Co.*, 17 Idaho, 51, 34 Am. St. Rep. 253, 104 Pac. 666.

Defendant, having an option to purchase certain lands, sold the timber thereon to plaintiff. Thereafter defendant procured the title to the lands to be conveyed to N., contracting with N. to protect him in his contract with plaintiff. Thereafter N. sold the land to innocent purchasers without reserving the rights of plaintiff to take the timber from the land. Held, that defendant was liable to plaintiff for the damages sustained.—*Bell v. Shields*, 18 Idaho, 649, 111 Pac. 1076.

Where the state sells the timber standing and growing on a tract of land, and grants to the purchaser the right of possession for the period of twenty years from the date of sale for the purpose of cutting and removing the timber, and provides that all timber that may remain standing on the land at the expiration of the twenty years shall belong to the state, a subsequent sale of the land and grant of the fee by the state conveys to the purchaser all the timber that may remain standing upon the land at the expiration of the twenty-year period, and the purchaser of the timber has no further right after the expiration of that period to enter upon the land or remove timber and has no further right in any timber on such land.—*Pike v. State Board of Land Comms.*, 19 Idaho, 268, Ann. Cas. 1912B, 1344, 113 Pac. 447; *State v. Hoover*, 19 Idaho, 299, 113 Pac. 455.

Under a contract for the sale of real estate, the purchaser was granted the right to cut certain timber standing on said land, and pay therefor the sum of \$1.50 per thousand feet of timber so cut. He assigned his contract to purchase said land to the A. Company, and the A. Company failed to complete the contract, but made a contract with three persons to cut timber from said land, and such persons assigned their contract to the B. Company. Held, that the B. Company is liable under said assignment to them.—*Page v. Bradford-Kennedy Co.*, 19 Idaho, 685, Ann. Cas. 1912C, 402, 115 Pac. 694.

Under R. C. 1504, all prize logs must be divided between the owners in proportion to the number of logs owned by each, and "prize logs" are defined to mean such logs as bear no mark or marks and all logs bearing marks, not recorded or claimed within one year after any general drive.—*Norman v. Rose Lake Lumber Co.*, 22 Idaho, 711, Ann. Cas. 1913E, 673, 128 Pac. 85.

Parties had stull timber and logs in a river and a rise or flood occurred and carried such timber down the river and created a jam composed of about 6,000,000 feet of logs, board measure, and 500,000 linear feet of stull timber, without any fault on the part of either of the parties. The R. Lumber Company had

about 85,000 linear feet of stull timber, unmarked, in said jam and the plaintiff had 8,876 feet of stull timber therein, which had an ax mark thereon. None of such stull timber was marked or branded with a registered mark or brand, and the Log Owners' Association took charge of said jam and separated it, and 30,854 linear feet of such stull timber was turned over to the lumber company, and the lumber company sold the same. Held, that the plaintiff would only be entitled to recover the value of his proportionate part of the stull timber turned over to the lumber company by the Log Owners' Association, in addition to the value of the stull timber that he had particularly identified as his own.—*Norman v. Rose Lake Lumber Co.*, 22 Idaho, 711, Ann. Cas. 1913E, 673, 128 Pac. 85.

A complaint alleging that plaintiff was the owner and in possession of certain stulls, that defendants took them without his consent and unlawfully converted them to their own use, that the value of the said timber was \$547, states a cause of action.—*Norman v. Rose Lake Lumber Co.*, 22 Idaho, 711, Ann. Cas. 1913E, 673, 128 Pac. 85.

Where plaintiff could identify his stulls by marks he had placed on them, even though such marks had not been recorded in the office of the lumber inspector, he was entitled to recover for the stulls so identified.—*Norman v. Rose Lake Lbr. Co.*, 22 Idaho, 711, Ann. Cas. 1913E, 673, 128 Pac. 85.

Where a complaint for the conversion of stull timber did not give the number of linear feet or the amount or quantity of the timber taken or the location or character or kind of timber so taken, a demurrer for uncertainty as to the place from which the timber was taken, and the amount and quantity thereof should have been sustained.—*Norman v. Rose Lake Lumber Co.*, 22 Idaho, 711, Ann. Cas. 1913E, 673, 128 Pac. 85.

Evidence in an action on a contract for the sale of logs and lumber examined, and held to be sufficient to sustain the findings and judgment of the trial court that the purchaser was not entitled to a lien on the logs or lumber for advances claimed to have been made by him.—*Wittenberg v. Northern Idaho Pine Lbr. Co.*, 23 Idaho, 66, 131 Pac. 1.

LOST GOODS.

Liability of postmaster. See Postoffice.

LOST INSTRUMENTS.

Secondary evidence of contents. See Evidence.

MALICIOUS PROSECUTION.

See False Imprisonment.

Wrongful attachment, without malice. See Attachment and Garnishment.

In order to recover in an action for malicious prosecution, plaintiff must allege and prove that there was a prosecution, that it terminated in favor of the plaintiff, that defendants were prosecutors, that they were actuated by malice, that there was a want of probable cause, and the amount of damages

plaintiff had sustained.—*Russell v. Chamberlain*, 12 Idaho, 299, 9 Ann. Cas. 1173, 85 Pac. 926; *Horner v. Chamberlain*, 12 Idaho, 304, 85 Pac. 927.

In actions for malicious prosecution, want of probable cause and malice must coexist and must be alleged and proved.—*Russell v. Chamberlain*, 12 Idaho, 299, 9 Ann. Cas. 1173, 85 Pac. 926; *Horner v. Chamberlain*, 12 Idaho, 304, 85 Pac. 927.

In an action for damages for malicious prosecution it is not necessary to allege that all of the defendants were originators of the proceedings complained of, since they may be held liable if after the proceedings were commenced they voluntarily conspired and maliciously joined in such prosecution without probable cause.—*Russell v. Chamberlain*, 12 Idaho, 299, 9 Ann. Cas. 1173, 85 Pac. 926; *Horner v. Chamberlain*, 12 Idaho, 304, 85 Pac. 927.

Editorial Notes.

Action for malicious prosecution, what necessary to support: 12 Am. Dec. 266; 26 Am. St. Rep. 127.

Malicious prosecution of civil actions: 44 Am. Rep. 346; 14 Am. Dec. 599; 93 Am. St. Rep. 454.

Termination of criminal prosecution must precede action for malicious prosecution: 39 Am. Rep. 432; 2 L. R. A., N. S., 928.

Discharge by committing magistrate, after hearing on merits, as sufficient termination of proceeding, to sustain action for malicious prosecution: Ann. Cas. 1913A, 926.

Probative force, in action for malicious prosecution, of conviction in criminal proceeding reversed on appeal or new trial: Ann. Cas. 1913B, 1054.

MALPRACTICE.

See Physicians and Surgeons.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges and Judicial Officers.

(B) Acts and Proceedings of Public Officers and Boards of Municipalities.

(C) Acts and Proceedings of Private Corporations and Individuals.

III. JURISDICTION, PROCEEDINGS AND RELIEF.

Mandatory injunction. See Injunctions.

I. NATURE AND GROUNDS IN GENERAL.

It is not within the scope of the writ of mandate to confer power upon those to whom it is directed; it only enforces the exercise

of powers already existing, when the exercise is a duty.—*Clough v. Curtis*, 2 Idaho, 523, 22 Pac. 8.

Where a duty is of a strictly public character, by law required to be performed by a public officer, there is no one especially empowered to make the demand for its performance; therefore such demand is not necessary.—*In re Counties v. Alturas County*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349.

Parties aggrieved by the action of the board of county commissioners in refusing to allow a claim may either appeal under R. S. 1776 or bring action against the county under R. S. 1780, and therefore a writ of mandate will not lie.—*Jolly v. Woodward*, 4 Idaho, 496, 42 Pac. 512.

A writ of mandate will not issue where there is a plain, speedy and adequate remedy at law.—*Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565.

Where an order made by a probate judge is appealable, mandamus will not lie to compel action on the part of such judge.—*State ex rel. Missoula etc. Co. v. Whelan*, 6 Idaho, 78, 53 Pac. 2.

Certiorari and not mandamus is the remedy to review the action of the district court in quashing the jury panel for the term.—*Heitman v. Morgan*, 10 Idaho, 562, 79 Pac. 225.

When a writ of mandate is prayed for against an officer and before the matter is determined by the court, the officer performs the act sought to be compelled, the writ shall not issue.—*Chemung Mining Co. v. Morgan*, 11 Idaho, 232, 81 Pac. 384.

The proceeding for a writ of mandate is a special proceeding of a civil nature and is not a suit at common law or a civil action.—*Nelson v. Steele*, 12 Idaho, 762, 88 Pac. 95.

R. S. 4982 leaving it to the discretion of the judge as to whether questions of fact raised on application for a writ of mandate are to be tried to a jury, does not contravene the seventh amendment to the constitution of the United States preserving the right to trial by jury in certain cases.—*Nelson v. Steele*, 12 Idaho, 762, 88 Pac. 95.

Mandamus cannot be used to correct an order of the district court in striking out portions of a pleading, as such act is a judicial act within the jurisdiction of the court. *Connolly v. Woods*, 13 Idaho, 591, 92 Pac. 573.

Where an appeal is given by law, and such appeal is not a plain, speedy, and adequate remedy in the due course of law, resort may be had to mandamus.—*Fenton v. Board of Commrs.*, 20 Idaho, 392, 119 Pac. 41; *Independent School Dist. v. Board of Commrs.*, 20 Idaho, 448, 119 Pac. 52.

A mandate will not be issued by this court against a party and thereby compel the commission of a crime.—*Crescent Brewing Co. v. Oregon Short Line R. Co.*, 24 Idaho, 106, 132 Pac. 975.

Editorial Notes.

Writ of mandamus, what is and when allowable: 89 Am. Dec. 728.

Mandamus to control the exercise of discretion: 98 Am. Dec. 375.

To compel performance of a public duty: 28 Am. Rep. 448.

II. SUBJECTS AND PURPOSES OF RELIEF.**(A) ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS.**

Mandamus will not lie to reverse the order of an inferior tribunal continuing the hearing of an action before it, when such inferior tribunal is exercising a judicial discretion vested in it by law.—Board of Commrs. v. Mayhew, 5 Idaho, 572, 51 Pac. 411.

After a return of sale has been made to, and confirmed by, the court, mandamus will lie to compel the administrator to execute a conveyance to the purchaser.—State v. Cunningham, 6 Idaho, 113, 53 Pac. 451.

A writ of mandate will issue to the district court to compel it to proceed with the trial of a criminal case, properly triable before it. Hays v. Stewart, 7 Idaho, 193, 61 Pac. 591.

Where the district court strikes a complaint from the files and refuses to enter a final judgment, mandamus will lie to compel the court to enter a final judgment of dismissal.—Havens v. Stewart, 7 Idaho, 298, 62 Pac. 682.

Where the supreme court finds that the district court has acted beyond its power in construing the opinion or mandate of the supreme court on an appeal, it will correct such mistake by writ of mandate to the trial court.—American Hyd. etc. Co. v. Rich, 8 Idaho, 570, 69 Pac. 280.

Where the trial court erroneously quashes a summons and refuses to take jurisdiction of the subject matter, mandamus will lie to compel the court to try the action.—Hill v. Morgan, 9 Idaho, 718, 76 Pac. 323.

Where a case was reversed and remanded on the ground that the trial court erred in granting a nonsuit, and on a retrial the court granted judgment of dismissal after counsel for plaintiff had made his opening statement for plaintiff, a writ of mandate will be granted to compel the trial court to proceed as directed by the appellate court.—Kroetch v. Morgan, 10 Idaho, 172, 77 Pac. 19.

A peremptory writ of mandate will issue to compel a trial judge to decide a matter which has been submitted to him more than twenty days and which he has not decided.—McGary v. Steele, 20 Idaho, 753, 119 Pac. 448.

Editorial Notes.

Right of private person to mandamus to enforce performance of duty by court or magistrate: Ann. Cas. 1912A, 1118; 9 Ann. Cas. 1074.

(B) ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

To compel clerk of court to file information. See Indictment and Information, IV.

To compel issuance of medical license under void law. See Physicians and Surgeons.

To compel issuance of license for the sale of intoxicating liquors. See Intoxicating Liquors, IV.

To compel execution of contract for state wagon road. See Highways, III.

To compel officers to take steps necessary to settle county indebtedness. See Counties, I, (D).

In an election contest, the supreme court decided that the act under which the case was tried was unconstitutional and void, and reversed the trial court, afterward amending the record and dismissing the action. The next day and after the term had ended, two of the justices ordered the record amended by restoring the word "reversed" for the word "dismissed." Remittitur was sent to the trial court as cause "reversed." Held, that the remittitur should have been to dismiss the case, and not being so, plaintiff had no speedy and adequate remedy at law and mandamus would lie to compel the county commissioners to issue warrants for plaintiff's salary and fees.—Havird v. Commrs. Boise Co., 2 Idaho, 687, 24 Pac. 542.

Mandamus will not lie to inquire into the acts of a legislative body by verbal testimony and cause its record to be corrected, or if there be no record to make one, since the legislative journal can be corrected only by the body that made it.—Burkhart v. Reed, 2 Idaho, 503, 22 Pac. 1.

Mandamus will not lie to compel the Secretary of State to record, as part of the legislative proceedings, records or proceedings from any other persons than the clerks of the respective branches of the legislature.—Clough v. Curtis, 2 Idaho, 523, 22 Pac. 8.

A writ of mandate will not issue to compel the state auditor to draw his warrant upon a fund that has not been established by law. Curtis v. Moody, 3 Idaho, 123, 27 Pac. 732.

Mandamus will not lie to direct the board of state wagon road commissioners to allow a claim already rejected by the board.—Payne v. State Board Wagon Road Commrs., 4 Idaho, 384, 39 Pac. 548.

Where a writ of mandate is sought to compel the commissioners of a county to perform an official act, and the petition shows that two of the respondents had ceased to act as such commissioners and had accepted the office of commissioner of B. county, one of two counties organized out of the old county, the respondents are not de facto officers of the old county and the writ will not issue against them as such officers.—Wright v. Kelley, 4 Idaho, 624, 43 Pac. 565.

Where a probate judge elected prior to the amendment of Const., article 18, section 6, separating the officers of probate judge and county superintendent, offers to take the oath required by law of said superintendent and the board of commissioners refuses to ad-

minister the oath or admit him to the office, mandamus will lie to compel such action on the part of the board.—*Blake v. Commrs. Ada County*, 5 Idaho, 163, 47 Pac. 734.

Where a board of accountants appointed to apportion the indebtedness of certain counties refuses to act, mandamus will lie to compel the performance of their duties.—*County of Blaine v. Smith*, 5 Idaho, 255, 48 Pac. 286.

Where a city council has passed upon and allowed a claim against the city, and ordered a warrant upon the city treasury to issue for the amount thereof, it is the duty of the mayor to sign such warrant, and mandamus will issue to compel him to sign it.—*Rice v. Gwinn*, 5 Idaho, 394, 49 Pac. 412.

Mandamus will lie to compel the state board of examiners to proceed and pass upon a claim against the state, but the court has no jurisdiction to direct how the board shall act on such claim.—*Pyke v. Steunenbergh*, 5 Idaho, 614, 51 Pac. 614.

Mandamus is the proper remedy to compel the Secretary of State to file and certify a ticket of a political party, entitled to filing and certification by such officer.—*Williams v. Lewis*, 6 Idaho, 784, 54 Pac. 619.

Mandamus will lie to compel the county auditor to file the ticket nominated by a convention controlled by the regular party organization of a political party and to place such ticket on the official ballot.—*Addle v. Davenport*, 7 Idaho, 282, 62 Pac. 681.

Mandamus will not lie to compel the state board of examiners to audit a claim on which it had already acted.—*Kroutinger v. Board of Examiners*, 8 Idaho, 463, 69 Pac. 279.

Sess. Laws 1899, page 37, section 24, provides that whenever any person nominated for public office shall at least thirty days before election, except municipal elections, file a written declination of such nomination, the nomination shall be void. Held, that such law is mandatory and hence that the county auditor could not be compelled by writ of mandate to file a declination not presented thirty days before election or to file a certificate of nomination of one nominated in place of the person who had so declined.—*Napton v. Meek*, 8 Idaho, 625, 70 Pac. 945.

Where one offers to contest an entry made under what is known as the Carey land act, before the state board of land commissioners, and said board refuses to hear the contest for the reason that such board has extended the time in which the law requires the entryman to make improvement and irrigation of the land so entered, the contestant may by writ of mandate compel the board to hear the contest.—*Pierson v. Loveland*, 16 Idaho, 628, 102 Pac. 340.

Where a court or board of officers is vested with a judicial discretion as to the grant or refusal of license, and in the exercise of such discretion examines and rejects a particular application for license, mandamus will not lie to review the case and compel the granting of a license, unless it appear that such discretion has been abused and the court, board

or officer acted arbitrarily or in an unlawful manner.—*Darby v. Pence*, 17 Idaho, 697, 27 L. R. A., N. S., 1194, 107 Pac. 484.

The state engineer may be compelled to perform the ministerial duties of his office by writ of mandate.—*Idaho etc. Transp. Co. v. Stephenson*, 16 Idaho, 418, 101 Pac. 821.

Under Laws 1911, chapter 72, page 202, section 101, appropriating \$25,000 per annum for use and expenditure of the state militia, which was in operation January 6, 1913, and during said month, the plaintiff in this case, having been appointed assistant adjutant general, and having performed such services, has a claim against the state for \$125, and it is the duty of the state auditor, the defendant in this action, to draw a warrant for that sum.—*Jeffreys v. Huston*, 23 Idaho, 372, 129 Pac. 1065.

Editorial Notes.

To compel performance of public duty at instance of private person: 7 Am. St. Rep. 484.

To compel letting of contracts to the lowest responsible bidder: 50 Am. St. Rep. 489.

Mandamus against public officers: 98 Am. St. Rep. 863.

To compel payment of municipal debt by custodian of funds: 14 L. R. A. 773.

To compel restoration to office: 19 L. R. A., N. S., 49.

(C) ACTS AND PROCEEDINGS OF PRIVATE CORPORATIONS AND INDIVIDUALS.

Mandamus to compel furnishing of water for irrigation. See *Waters and Watercourses*, IX, (B), 8, (c).

Where an administrator has made return of a sale of real estate of his intestate, and the sale has been confirmed by the probate court, mandamus will lie to compel him to execute a conveyance thereof.—*State ex rel. Chemung Min. Co. v. Cunningham*, 6 Idaho, 113, 53 Pac. 451.

Where an applicant for water under Laws 1899, page 380, providing for the appropriation and distribution of water, has performed everything required of him under the law, and the canal company has sufficient unsold water to supply him, mandamus will lie to compel the company to furnish such water.—*Bardsly v. Boise City etc. Co.*, 8 Idaho, 155, 67 Pac. 428.

A telephone company seeking to compel a railroad company to allow it to install one of its telephones in the railroad company's office cannot attain such end by mandamus.—*Idaho etc. Tel. Co. v. Oregon etc. R. R. Co.*, 8 Idaho, 175, 67 Pac. 318.

A water consumer within an irrigation district, who is also within the corporate limits of a town or village, may have his writ of mandate to compel the district to deliver water to him in accordance with and under the regulations prescribed by the town or village in which his lot or land is situated.—

City of Nampa v. Nampa and Meridian Irr. Dist., 23 Idaho, 422, 131 Pac. 8.

Editorial Notes.

To compel transfer of stock by private corporation: 51 Am. Rep. 798.

To compel corporations and their officers to make calls on stockholders: 3 Am. St. Rep. 807.

To private corporations to compel performance of their duties: 37 Am. St. Rep. 317.

Mandamus as remedy to compel private corporation to perform duties arising out of contract: Ann. Cas. 1912C, 890; 8 Ann. Cas. 410; 12 Ann. Cas. 112.

III. JURISDICTION, PROCEEDINGS AND RELIEF.

Plea of other action pending, when insufficient. See Abatement and Revival.

Sufficiency of answer on application to compel filing certificate of nomination. See Elections, VI, (F).

Writs of mandate must be applied for in the first instance from the district court, unless reasons are given which render it indispensable that the writ should issue originally from the supreme court; and the sufficiency of said reasons will be determined by the supreme court in awarding or refusing the writ.—Wright v. Kelley, 4 Idaho, 624, 43 Pac. 565.

R. S. 4987, providing that if judgment be given for the applicant for a writ of mandamus, he may recover damages and costs, does not apply to courts or judges against whom such writ may issue.—Hill v. Morgan, 9 Idaho, 777, 76 Pac. 765.

In an action for a writ of mandate against a water-master, commanding him to distribute waters from a different stream than that named in the decree under which he is making distribution, all parties to be affected thereby should be made parties to the action. Stethem v. Skinner, 11 Idaho, 374, 82 Pac. 451.

Under R. S. 4982, where issues of fact are made by a return to an alternative writ of mandate, neither party is entitled to a trial by jury as a matter of right, the submission to the jury in such cases being within the discretion of the judge.—Nelson v. Steele, 12 Idaho, 762, 88 Pac. 95.

Under R. S. 4955, a party prosecuting a mandamus proceeding must be designated as the plaintiff and the adverse party the defendant.—Connolly v. Woods, 13 Idaho, 591, 92 Pac. 573.

In an original proceeding in the supreme court for a writ of mandate to compel the clerk of the district court to file an information presented by the prosecuting attorney, the state is the party interested, and the prosecuting attorney, representing the state, may verify the complaint or petition.—State v. Quarles, 13 Idaho, 252, 89 Pac. 636.

Editorial Notes.

Necessary parties to proceedings in mandamus, who are: 105 Am. St. Rep. 122.

Who may join as relators in mandamus proceedings: Ann. Cas. 1912B, 420.

Necessity that peremptory writ of mandamus conform to alternative writ: Ann. Cas. 1912D, 671.

Who is real party in interest by whom mandamus proceedings must be instituted: 64 L. R. A. 622.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

Celestial and patriarchal marriage. See Bigamy.

Validity of agreement to marry made within six months from divorce decree. See Breach of Marriage Promise.

As revocation of will. See Wills, IV.

The judgment and decree of the supreme court of the state of Utah, adjudging and decreeing a marriage performed in that state to be valid, in an action involving the validity of such marriage, controls and governs this court, in an action in this state between the same parties involving the validity of such marriage and the marriage status of the parties thereto.—Hilton v. Stewart, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

In an action involving the validity of a marriage and the right of a surviving wife or widow to her interest as such in her deceased husband's property, she is not estopped from maintaining such action on the ground of public policy, morality and decency, where it appears that she may have honestly believed that she had been legally divorced from her said husband, even though she has lived with another as his wife.—Hilton v. Stewart, 15 Idaho, 150, 128 Am. St. Rep. 48, 96 Pac. 579.

Where H. and B. are married by a minister upon authority of a certificate issued by authority of law, and at the time such ceremony is performed H. has a wife still living from whom he had not been divorced, and the first wife died about a year and seven months after said marriage ceremony between H. and B. was performed, and after said death H. and B. continued to live together as husband and wife for a period of twenty-eight years, and there were born to them six children, and they conducted themselves as husband and wife, and sustained toward each other every natural association and relation consistent with married life, a marriage will be presumed to have occurred after the removal of the legal impediment by the death of the former wife.—Huff v. Huff, 20 Idaho, 450, 118 Pac. 1080.

Editorial Notes.

Validity of marriage, by what laws determined: 8 Am. Dec. 133; 57 L. R. A. 155; 11 L. R. A., N. S., 1082; 17 L. R. A., N. S., 800; 26 L. R. A., N. S., 179; 28 L. R. A., N. S., 753.

Marriage during continuance of prior valid marriage, effect of: 46 Am. Dec. 130.

Conflict of laws, validity of marriage, when contracted by residents of a state

in violation of its laws beyond its boundaries: 60 Am. St. Rep. 941.

Second marriage being shown, on whom rests burden of proving termination or continuance of the first: 89 Am. St. Rep. 198.

Conclusiveness of judgment involving fact or validity of marriage: Ann. Cas. 1912C, 245.

Status of marriage originally void because of legal impediment where cohabitation is continued after removal of impediment: Ann. Cas. 1913D, 544; 6 Ann. Cas. 484.

Presumption and burden of proof as to validity of subsequent marriage: 17 Ann. Cas. 680.

MARTIAL LAW.

See Insurrection.

MASTER AND SERVANT.

I. THE RELATION.

II. SERVICES AND COMPENSATION.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

- (A) Nature and Extent in General.
- (B) Tools, Machinery, Appliances and Places for Work.
- (C) Methods of Work, Rules and Orders.
- (D) Warning and Instructing Servant.
- (E) Fellow-servants.
- (F) Risks Assumed by Servant.
- (G) Contributory Negligence of Servant.
- (H) Actions.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

Liability of employer to pay poll tax of employee. See Taxation, III, (A); VIII, (B).

I. THE RELATION.

Agreements not to be performed within one year. See Frauds, Statute of, V.

ratification of contract of employment made by agent. See Principal and Agent, III.

In an action against a lumber company and a railroad company for personal injuries, the evidence showed that the lumber company owned five hundred and ninety-five of the six hundred shares of the capital stock of the railroad company; that plaintiff was employed by the lumber company to drive teams and cut and skid logs, and worked at that labor for three days, when the lumber company directed and required him to suspend such work and to perform services as brakeman upon the logging train of the railroad company, at which latter work he was injured. Held, that the railroad company owed plaintiff the duty of a master to its servant.—*Barrow v. B. R. Lewis Lbr. Co.*, 14 Idaho, 698, 95 Pac. 682.

Editorial Notes.

Relation of master and servant, when exists: 22 Am. St. Rep. 459.

To whom person bears relation of servant when he is hired by one person but paid by another: Ann. Cas. 1913B, 912.

Distinction between office and employment: 17 L. R. A. 244.

Which of two or more persons is master of third: 37 L. R. A. 33.

II. SERVICES AND COMPENSATION.

Wages of servants as exempt from execution or attachment. See Exemptions.

Under R. C. 3446, the possession necessary to entitle the party to a lien must be such as to give the party for the time the exclusive care, control, and direction of the property which must be more than that of a mere servant for hire from day to day or month to month who is subject to the direction and orders of the master.—*Mendilie v. Snell*, 22 Idaho, 663, 127 Pac. 550.

The following two instructions, when taken and considered together correctly state the law applicable in a case where a servant sues for a special and additional compensation over and above the regular wage or salary:

"(a) If you find from the evidence that the plaintiff has performed services for the defendant with defendant's knowledge and consent, and the defendant voluntarily took the benefit thereof, then the law will presume that the plaintiff should be paid by the defendant for those services, unless the contrary is shown by the evidence; and if no special contract is shown, fixing the price, then plaintiff would be entitled to recover what the services are reasonably worth.

"(b) Where an employee, who is working for stipulated wages, performs extra work for the employer, there is a presumption, in the absence of an express or clearly implied agreement to the contrary, that no extra compensation is to be paid therefor, and that payment for that extra work is included within the regular wages; but this presumption does not extend to extra work performed for persons other than the employer."—*Quirk v. Sunderlin*, 23 Idaho, 368, 130 Pac. 374.

Where a servant or employee is in the regular employ of the master or employer, at a stated wage or salary, in order to recover for special services or extra work performed during the same period of time, the burden is cast upon the employee to show by a preponderance of the evidence that the work was extra work, outside of and beyond the scope of the employment, and that there was either an express or a clearly implied contract and agreement to pay extra for the special work so performed, and that it was not intended that such work should fall within the general employment of the servant, or be compensated for by the regular wage or salary paid.—*Quirk v. Sunderlin*, 23 Idaho, 368, 130 Pac. 374.

Editorial Notes.

Right of servant to recover pay for extra services performed: 12 Ann. Cas. 663; 30 L. R. A., N. S., 652.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Actions for death of servant. See Death.
Employer's liability insurance. See Insurance.

(A) NATURE AND EXTENT IN GENERAL.

A railroad corporation is liable for damages to employees injured through the negligence of their agents or servants who are invested with a controlling or superior duty in the management of the business of the corporation.—Palmer v. Utah etc. Ry. Co., 2 Idaho, 315, 13 Pac. 425.

Where a servant of a railroad company was killed through the negligence of defendant, the fact that he was riding on a "gang-pass" together with other workmen is no defense, as he was not bound by the conditions thereof. Palmer v. Utah etc. Ry. Co., 2 Idaho, 315, 13 Pac. 425.

Where the servant of a railway company is injured in an accident resulting from the derailment of a car on which he is riding, it will be presumed, until the contrary is shown, that the company was not in fault in providing suitable instrumentalities for its business, and had no notice of any defect or other causes of the accident.—Minty v. Union Pac. Ry. Co., 2 Idaho, 471, 21 Pac. 660.

Where the traveling auditor of a railway company was injured by the derailment of a car on which he was riding pursuant to his duties, the fact that at the time of the accident he was riding on a pass, which contained the condition that in case of injury the holder would protect the defendant from liability, is no defense to an action for such injuries.—Minty v. Union Pac. Ry. Co., 2 Idaho, 471, 21 Pac. 660.

The master is liable for the negligence of an employee who represents him in the discharge of his personal duties to his servants, and beyond that he is liable only for his own personal negligence.—Larsen v. Le Doux, 11 Idaho, 49, 81 Pac. 600.

Where an injury has been received by the servant on account of the negligence of the master, damages should be computed and ascertained and awarded on the basis; as nearly as possible, of compensating the servant for the pain, suffering, and loss he has sustained and will sustain in the future on account of the injury; and he should be placed, as nearly as it is possible to estimate, in as good a position as he was in before the injury was inflicted.—Maloney v. Winston Bros. Co., 18 Idaho, 740, 111 Pac. 1080.

When an engineer observes a man who possesses his faculties, walking upon the railroad track and in no immediate danger, the obligation of care and effort on his part arises only at the moment when the person on the track is seen or believed to be in a perilous

situation.—Neil v. Idaho & W. N. R. R., 22 Idaho, 74, 125 Pac. 331.

Plaintiff was a railroad conductor. His train was made up, consisting of about twenty cars, with intrastate and interstate freight. He had given his clearance card to the engineer and was going back to his caboose, and while so doing, he walked on an adjacent track where he was injured by another train. Held, that he was engaged in interstate commerce within the meaning of the act of Congress relating to the liability of common carriers to their employees (Act April 22, 1908, c. 149, 35 Stat. 65, Supp. 1909, Fed. Stats. Ann., p. 584).—Neil v. Idaho & W. N. R. R., 22 Idaho, 74, 125 Pac. 331.

Laws 1909, page 34, known as the employer's liability act, is not in conflict with and does not repeal pre-existing statutes conferring the right of action for a death claim, and does not prevent the prosecution of an action under R. C. 4100.—Chiara v. Stewart Min. Co., 24 Idaho, 473, 135 Pac. 245.

The employer's liability act (Laws 1909, p. 34) was intended to extend the rights of employees and limit the defenses of employers in cases of personal injury.—Chiara v. Stewart Min. Co., 24 Idaho, 473, 135 Pac. 245.

Editorial Notes.

Master and servant, liability of the former to the latter, general rules of: 3 Am. Rep. 147.

Who is an independent contractor: Ann. Cas. 1913B, 573; 65 L. R. A. 461.

Constitutionality of workmen's compensation act: Ann. Cas. 1912B, 174.

Construction of provision in employers' liability act requiring notice of injury to be given employer: Ann. Cas. 1912B, 326; Ann. Cas. 1913D, 835.

What is accident arising out of and in course of employment within meaning of workmen's compensation act: Ann. Cas. 1913C, 4.

Duty to furnish medical aid to servant: 28 L. R. A. 546; 4 L. R. A., N. S., 49.

(B) TOOLS, MACHINERY, APPLIANCES AND PLACES FOR WORK.

Where a servant informs his employer of defects in machinery or tools with which the servant is working and the employer refuses to put such machinery or tools in good condition, the servant should decline to do the work with such machinery and tools; and if he does not do so, and is injured in their use, he cannot recover.—Harvey v. Alturas Gold Min. Co., 3 Idaho, 510, 31 Pac. 819.

Where a servant finds his tools defective and not in good condition, and that some of them are dangerous, it is his duty to inform his employer thereof.—Harvey v. Alturas Gold Min. Co., 3 Idaho, 510, 31 Pac. 819.

The general rule as between master and servant is that the employer engages to furnish machinery and tools ordinarily used in the performance of such work as is required of the servant; that he will keep such ma-

chinery and tools in a reasonably safe and good condition while such work is being performed; and, if he fails in either of these, and the servant is injured thereby, the servant, having fulfilled all the conditions on his part required to be performed, can recover a reasonable sum for damages by him suffered. *Harvey v. Alturas Gold Min. Co.*, 3 Idaho, 510, 31 Pac. 819.

Where an employer promises to remedy defective tools or appliances within a reasonable time, the servant may continue in the work, and if he is injured within such reasonable time, without any fault on his part, he can recover for such injury.—*Harvey v. Alturas Gold Min. Co.*, 3 Idaho, 510, 31 Pac. 819.

Where plaintiff was furnished a team and dump-cart and directed to haul laths to the dry-house of defendant's sawmill, and there was but one road over which he could travel, he had a right to assume that the cart loaded with laths would safely pass under a refuse carrier which extended across such road, especially on the first day he worked at such place.—*Crawford v. Bonners Ferry Lbr. Co.*, 12 Idaho, 678, 10 Ann. Cas. 1, 87 Pac. 998.

A corporation that maintains a railway as a part of its lumber manufacturing plant is bound to exercise ordinary care, to the end that its railroad shall be so constructed and maintained as to be reasonably safe as a place of work for its employees.—*Barrow v. B. R. Lewis Lbr. Co.*, 14 Idaho, 698, 95 Pac. 682.

Plaintiff was injured by the falling of a scaffold on which he was working in a tunnel. The scaffold was erected under the supervision of defendant's shift boss. The evidence was conflicting as to what workmen erected the scaffold, and as to whether plaintiff or the shift boss assisted in its erection. Held, that it was the duty of defendant to see that the scaffold was safe.—*Craesafulli v. Winston Bros. Co.*, 18 Idaho, 158, 108 Pac. 740.

In the case of a hazardous work like driving a railroad tunnel through the mountain, an increased risk is assumed and an increased duty is imposed by law on the master, proportionate to the dangers of the place, to exercise increased care and diligence in maintaining the place in as safe a condition as the nature of the work will permit.—*Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

Where the master is engaged in driving a railroad tunnel and has a large number of men engaged in drilling, blasting, and shoveling away the rock and earth, it is the duty of the master to take reasonable precaution for the safety of the men, and to that end to have some person intrusted with the duty of examining and inspecting the place after shots have been fired, and of directing the manner and method of removing loose rock or earth from the walls and roof, and of making the place reasonably safe for the men who are to work therein.—*Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

In an action by a railroad conductor, run down in the railroad yards by a switch engine, held, that the doctrine of the "last clear chance" has no application to this case.

Neil v. Idaho & W. N. R. R., 22 Idaho, 74, 125 Pac. 331.

When an engineer sees an adult, apparently in the full possession of his faculties, walking on the track ahead of his engine, he has a right to presume that such person will get off the track before the train reaches him.—*Neil v. Idaho & W. N. R. R.*, 22 Idaho, 74, 125 Pac. 331.

It is the duty of the master to furnish the servant with a reasonably safe place at which to work, and with reasonably safe machinery, tools and implements with which to work.—*Smith v. Potlatch Lbr. Co.*, 22 Idaho, 782, 128 Pac. 546.

Editorial Notes.

Master and servant, defective machinery, liability of the former for injuries to the latter by: 77 Am. Dec. 218; 34 Am. Rep. 621; 98 Am. St. Rep. 289.

Safe means and appliances with which to work, duty of master to furnish: 92 Am. Dec. 213; 21 Am. Rep. 579; 34 Am. Rep. 621; 54 Am. Rep. 726; 57 Am. Rep. 727.

Master and servant, repairs, liability of the former to the latter for injuries due to failure to make: 59 Am. Rep. 75.

Promise to repair, liability of master for injuries due to breach of: 60 Am. Rep. 157.

Promise to repair, liability of master for injuries due to breach of: 23 Am. St. Rep. 385; 119 Am. St. Rep. 434.

Duty of master to inspect common or simple tools: Ann. Cas. 1912A, 1004; 7 Ann. Cas. 342.

Duty of master to furnish safe appliances or safe place to work as applicable to servant sent to work on premises of third person: Ann. Cas. 1913B, 796.

Liability of master for injuries to servant caused by fall of scaffolding: Ann. Cas. 1913B, 1123; 18 Ann. Cas. 611.

Duty of master to provide safe place for servant to pass to and from work: Ann. Cas. 1913E, 1033; 5 Ann. Cas. 712.

Master's liability for injury by defect in common tools: 13 L. R. A., N. S., 668; 40 L. R. A., N. S., 832.

Changing conditions and making repairs: 19 L. R. A., N. S., 340; 28 L. R. A., N. S., 1267.

(C) METHODS OF WORK, RULES, AND ORDERS.

It is a general rule of law that, when a master is engaged in a complex or hazardous business, he must promulgate and adopt such rules and regulations for the conduct of the business and the government of his servants as will afford reasonable protection to them, and such duty is a positive obligation imposed upon the master and he is liable for the negligent performance thereof, whether he undertakes the performance personally or delegates it to another.—*Lucey v. Stack-Gibbs Lbr. Co.*, 23 Idaho, 628, 131 Pac. 897.

It is the duty of the master to use reasonable care to see that the rules adopted by him for the safety of his servants are complied with, and if he fails to do so, he will be responsible for injuries resulting from failure of compliance.—*Lucey v. Stack-Gibbs Lbr. Co.*, 23 Idaho, 628, 131 Pac. 897.

Editorial Notes.

Reasonableness of rule promulgated by master for guidance of servant as question of law or fact: *Ann. Cas.* 1913C, 187.

Rules and regulations for conduct of business: 43 L. R. A. 306.

(D) WARNING AND INSTRUCTING SERVANT.

Where the place in which the servant is required to work is inherently dangerous, and signals are required by order of the master or by common custom for the protection of the employees, and are relied upon by the employees as a means of saving themselves from harm, it becomes the absolute duty of the master to give them, and the failure to do so, though the failure be the neglect of an employee, renders the master liable to a servant who is injured in consequence of such neglect. *Lucey v. Stack-Gibbs Lbr. Co.*, 23 Idaho, 628, 131 Pac. 897.

Editorial Notes.

Warnings and instructions to servants engaged in dangerous work: 1 Am. St. Rep. 28; 1 Am. St. Rep. 548.

(E) FELLOW-SERVANTS.

A carpenter employed by a railroad company, whose death was caused by the derailment of a train on which he was riding is not a fellow-servant of a station agent who had notice of a defect in the railroad track which caused such derailment and whose duty it was to warn conductors and other persons in charge of trains of such defect.—*Palmer v. Utah etc. Ry. Co.*, 2 Idaho, 315, 13 Pac. 425.

Plaintiff was a miner engaged in underground work. G. was a blacksmith engaged in the same mine in sharpening tools for the miners and whose duty it was to deliver such tools to the miners at work in the mine. Held, that plaintiff and G. were fellow-servants.—*Snyder v. Viola Min. etc. Co.*, 3 Idaho, 28, 26 Pac. 127.

Where, in an action for personal injuries, it is shown that plaintiff was injured through the carelessness of a fellow-servant and defendant is not shown to have been negligent, plaintiff cannot recover.—*Snyder v. Viola Min. etc. Co.*, 3 Idaho, 28, 26 Pac. 127.

Where the evidence in an action for personal injuries shows that the injury was caused by the act of a fellow-servant, plaintiff cannot recover.—*Zienke v. Northern Pac. Ry. Co.*, 8 Idaho, 54, 66 Pac. 828.

Whether an employee is a fellow-servant or is the representative of the master is to be determined not from the grade or rank of the offending or injured servant, but from the character of the act being performed by the

offending servant by which another employee is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.—*Larsen v. Le Doux*, 11 Idaho, 49, 81 Pac. 600.

Plaintiff and K. were engaged in carrying brick and mortar to bricklayers constructing a building. B. was the manager and in immediate charge of the construction for defendants. B. directed K. to erect a scaffold for the use of the bricklayers and in doing so it was necessary for him to place two joists or cross-pieces on which to lay the floor of the scaffold. B. selected two pieces and one of the bricklayers nailed the ends thereof in place. Thereafter B. and K. laid some boards on said scaffold and thereafter plaintiff assisted K. in completing the scaffold. B. directed K. to lap the ends of the floor across the joist, which he neglected to do. Thereafter plaintiff and K. placed a considerable quantity of mortar and bricks on the scaffold, one of the cross-pieces was broken and plaintiff fell and was injured. Held, that if there was negligence in placing a defective cross-piece in the scaffold, or in constructing the same, it was the negligence and carelessness of plaintiff's fellow-servant K. and defendants were not liable.—*Larsen v. Le Doux*, 11 Idaho, 49, 81 Pac. 600.

Where plaintiff was injured by the falling of a scaffold in a tunnel in which he was working, and the evidence shows that the scaffold was erected by inexperienced men under the direction of defendant's shift boss, the fellow-servant doctrine does not apply.—*Craesafulli v. Winston Bros. Co.*, 18 Idaho, 158, 108 Pac. 740.

The liability of the master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee or fellow-servant to whom the negligent act is traceable.—*Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

Plaintiff was employed by the appellant lumber company, and was engaged in constructing a bridge of poles for a turn-out, and while so engaged was struck and injured by a tree felled by other employees. No warning was given by the choppers who felled the tree. Plaintiff was not a boss, and had no control over the choppers. Held, that the negligence of the choppers to give the proper signal was not the neglect and carelessness of a fellow-servant, but was the neglect of a duty devolving upon the employer, for which it was liable.—*Lucey v. Stack-Gibbs Lbr. Co.*, 23 Idaho, 628, 131 Pac. 897.

Editorial Notes.

Master and servant, liability of former to latter for injuries due to the negligence or misconduct of a fellow-servant: 36 Am. Dec. 279.

Fellow-servants, who are and who are not: 67 Am. Dec. 588; 16 Am. Rep. 495; 53 Am. Rep. 45; 50 L. R. A. 422.

Fellow-servants, employees of railways, who are not: 53 Am. Rep. 621.

Vice-principals, who are: 41 Am. St. Rep. 94; 75 Am. St. Rep. 584; 51 L. R. A. 517.
Hodcarrier as fellow-servant of other employee: Ann. Cas. 1912A, 1009.

(F) RISKS ASSUMED BY SERVANT.

See, also, post, III, (H).

To overcome the presumption that the servant assumes all the ordinary hazards of the business in which he was injured, he must show that the injury did not arise from an obvious defect in the instrumentalities of the business, or from hazard incident thereto, or from causes known to him to exist, or which he might have known by the exercise of ordinary care.—*Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660.

The traveling auditor of a railroad company, whose duties are to travel on the company's cars from stations on its roads and audit accounts, is a servant of the company, and assumes the ordinary risks incident to the employment.—*Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660.

Where a fireman upon a locomotive engine in discharge of his duty, with full knowledge of the nature and extent of the dangers of the service in which he is engaged or with the means of being informed of such facts and conditions by the exercise of ordinary care, voluntarily assumes such risks, and is thereby injured, and the employers are guilty of no laches or misconduct unknown to the servant or which with ordinary care he might have known, he cannot recover for such injury.—*Drake v. Union Pac. Ry. Co.*, 2 Idaho, 487, 21 Pac. 560.

Where an injured servant had had no experience, or virtually none, in railroad construction or the running of trains and for that reason was not capable of judging whether or not it was safe to take down ten cars loaded with logs on a steep grade with four brakemen and without an engine, he will not be held to have assumed the risk incident to such operation.—*Barrow v. B. R. Lewis Lbr. Co.*, 14 Idaho, 698, 95 Pac. 682.

Where plaintiff was injured by the falling of a scaffold on which he was working, and the evidence shows that the scaffold was erected by inexperienced men under the direction of defendant's shift boss, the doctrine of assumption of risk does not apply.—*Craessulli v. Winston Bros. Co.*, 18 Idaho, 158, 108 Pac. 740.

An employee engaged in driving a railroad tunnel through a mountain assumes an increased risk proportionate to the dangers of the place and the servant must either assume or avoid patent and obvious dangers and those necessarily incident to such work and the place where it is being prosecuted.—*Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

Where a laborer seeks and obtains employment at a hazardous and dangerous task, and which must necessarily be prosecuted in a dangerous place, he thereby assumes the ordinary risks incident to the employment and attendant on the place where the work is prosecuted,

but he does not thereby assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition, as a place of the kind should be maintained in which employees are to prosecute their work. *Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

An employee whose business it is to operate a particular piece of machinery is held to a stricter rule with reference to the assumption of risk than one whose duties do not require him to operate such machine, and the latter employee is not required to familiarize himself with such machinery or its appliances, or investigate its condition, but has a right to assume that his safety has been reasonably provided for.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

Where in an action for damages for personal injury alleged to have been caused by defective machinery, it appears that the machinery in question was different in its general construction from machinery of a similar character installed in defendant's factory, that it would require greater care in its operation, attended with greater hazard, that it was unsafe in operation, and that this was known to the defendant, or could have been ascertained by the use of ordinary care on the part of the defendant company or its agents, the plea that plaintiff had knowledge of the danger and assumed the risk incident to the employment is not a valid defense.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

A servant or employee in accepting a service or employment assumes the risk incident to such employment only when the employer furnishes a reasonably safe place and reasonably safe machinery and appliances with which to perform his work. A risk which arises from the use of defective machinery or appliances is not a risk incident to the employment.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

A servant in accepting employment assumes the ordinary risks incident to such employment; but the servant does not assume such risks as arise out of the negligence of the master, unless such risks are known to the servant, or are of such character that by the exercise of ordinary care upon the part of the servant he could have known the same.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

It is the duty of the master to furnish the servant with a reasonably safe place at which to work, and with reasonably safe machinery, tools, and implements with which to work; and if the employer discharges such duties, and the employment is accepted by the employee, then the employee assumes all the risk and hazard incident to or attendant upon the particular employment or the performance of the particular work.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157; *Smith v. Potlatch Lbr. Co.*, 22 Idaho, 782, 128 Pac. 546.

It is provided by section 4 of the federal employer's liability law (Act April 22, 1908,

c. 149, 35 Stat. 66 [U. S. Comp. Stats. Supp. 1911, p. 1323]), that the employee shall not be held to assume the risk of his employment in any case where the violation by such carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employees; otherwise, under said act, the defense of assumption of risk remains as at the common law.—*Neil v. Idaho & W. N. R. R.*, 22 Idaho, 74, 125 Pac. 331.

Where an employer employs an employee to work a horse in a particular way, and at a certain place, and such horse is unbroken in such work, and such fact is known by the employer and also the employee, and the employee knows as much about the horse and its character and its likelihood to work, and what it will do, and how it may act, as the employer, and said employee commences using the horse and uses it for two hours, and by such use learns that the horse has not been broken to such work, such employee assumes the risk incident to the breaking of the horse and its use in being broken, which was unknown to the employer, and could not have been known to the employer, and the employee is fully advised of the character of the horse, then the employee assumes the risk incident to the breaking of the horse to do such work.—*Smith v. Potlatch Lbr. Co.*, 22 Idaho, 782, 128 Pac. 546.

Editorial Notes.

Risks assumed by servant: 52 Am. Rep. 737.

Risks, knowledge of master concerning, how far servant may rely on: 24 Am. St. Rep. 320.

Liability to servant volunteering upon a duty with which he is not charged: 85 Am. St. Rep. 622.

Extrahazardous duties, right of recovery by employees accepting: 97 Am. St. Rep. 884.

Applicability of doctrine of assumption of risk to lineman: Ann. Cas. 1912B, 467; 15 Ann. Cas. 598.

Liability of mine owner to servant for injuries caused by falling of roof of mine: Ann. Cas. 1912B, 577.

Assumption of risk on failure of employer to perform statutory duty: Ann. Cas. 1913C, 210.

Assumption of risk as affected by master's promise to repair: Ann. Cas. 1913C, 505; 4 Ann. Cas. 153; 9 Ann. Cas. 1011.

Liability of railroad to employee injured by object falling from passing train: Ann. Cas. 1913D, 48.

Duty of employee to disclose to master matters coming to his knowledge before entering or outside scope of employment: Ann. Cas. 1913E, 819.

Duty and liability of master to servant with respect to animal furnished by him to servant: 19 Ann. Cas. 863.

Volenti non fit injuria as a defense: 47 L. R. A. 162.

May servant assume the risk of dangers created by the master's negligence: 4

L. R. A., N. S., 848; 28 L. R. A., N. S., 1215.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

See, also, post, III, (H).

Where, in an action for personal injuries, the evidence shows that the defendant had furnished safe and convenient machinery and appliances for the performance of the required labor, and either the plaintiff or his fellow-servant, or both, for their own convenience, had used other means or appliances than those furnished by defendant and injury results therefrom, the defendant is not liable, and in such case plaintiff is guilty of contributory negligence.—*Snyder v. Viola Min. etc. Co.*, 3 Idaho, 28, 26 Pac. 127.

The general rule as between master and servant is, the servant undertakes, when he engages in a certain kind of work, that he has the necessary skill and experience to perform the work he undertakes; that he understands the management of the machinery necessary to perform this work; the machinery generally used to perform such work, or the particular machinery which he sees is in use, in this particular instance; that he will exercise the ordinary care used by a man of prudence in performing such work; and if he fails in either of these, and is injured in consequence, he is guilty of contributory negligence and cannot recover.—*Harvey v. Alturas Gold Min. Co.*, 3 Idaho, 510, 31 Pac. 819.

In an action by a servant against his master for injuries received during the course of his employment, contributory negligence is matter of defense and the burden of establishing it is on the defendant.—*Crawford v. Bonners Ferry Lbr. Co.*, 12 Idaho, 678, 10 Ann. Cas. 1, 87 Pac. 998.

Where plaintiff was injured by the falling of a scaffold on which he was working and the evidence shows that the scaffold was erected by inexperienced men under the direction of defendant's shift boss, the doctrine of contributory negligence does not apply.—*Craesafulli v. Winston Bros. Co.*, 18 Idaho, 158, 108 Pac. 740.

Where the servant is under the immediate direction of a superior employee or a vice-principal, and performs each task or duty at the time and in the manner directed by his superior, and the servant has no discretion in the matter of inspecting or making safe the place in which he is to work, he has a right to assume that the superior or vice-principal has examined and inspected the place in which he is set to work and has found it in a reasonably safe condition, and in such case the servant is only chargeable with the duty of taking notice of conditions as he sees them, and those dangers that are patent and obvious.—*Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

In an action for personal injury received by the plaintiff at the hands of a defendant, if the evidence shows that the plaintiff contributes to the injury by a want of ordinary

care in placing himself in a dangerous position, and where he might be injured, and does not exercise ordinary care in preventing the accident after he so placed himself in such position, then the mere fact that the defendant was negligent would not relieve the plaintiff from the effect of his contributory negligence, unless it also appears that the defendant, after discovering plaintiff's dangerous position, could have avoided the consequences of the plaintiff's negligence; that is, could have avoided the injury which took place by the exercise of ordinary care.—*Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465.

Where contributory negligence is pleaded as a defense, it is not necessary for the plaintiff to prove the negative of contributory negligence as a part of the cause of action, and the defendant is required to prove by a preponderance of the evidence that the plaintiff was guilty of contributory negligence; and the plaintiff may also introduce evidence contradicting such proof of the defendant, and the jury determines, from the preponderance of the evidence upon the particular question, whether the plaintiff was in fact guilty of contributory negligence.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

A person in charge of a switch engine in a railroad yard, used for the purpose of moving cars and making up trains, has a right to act on the belief or presumption that the various employees in the yard, familiar with the continuously recurring movements of the cars, will take reasonable precaution against the approach of the cars, particularly where the cars are moving so slowly that ordinary attention on the part of the employee would enable him to avoid injury.—*Neil v. Idaho & W. N. R. R.*, 22 Idaho, 74, 125 Pac. 331.

Editorial Notes.

Disobedience of rules or regulations of master as affecting right of servant to recover for personal injuries: *Ann. Cas.* 1912A, 84; 24 L. R. A. 657; 43 L. R. A. 350.

Forgetfulness of known danger as negligence of servant: *Ann. Cas.* 1913B, 1197.

(H) ACTIONS.

Presumptions as to instinct of self-preservation. See *Death*.

Excessive damages. See *Damages*, VII.

In an action against a railroad company, the court charged: "While the burden of proof is on the plaintiff to show negligence of defendant, yet it is sufficient, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of the defendant, and that the cause of that injury was probably the negligence of the defendant." Held, error.—*Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660.

Where a servant sues for injuries caused by the derailment of a car, due to a defective track, an instruction "that if the car was overturned by reason of any defect in said car, or of the track on which it was running,

this is in itself presumptive evidence of neglect on the part of the defendant, and the burden is then on the defendant to show that there has been no negligence whatever," is erroneous, as such presumption does not arise between master and servant.—*Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660.

Where a master has promised to remedy defective tools or appliances, and the servant relying thereon continues to work and is injured, the question as to whether such injury occurred within a reasonable time after the promise to repair is a question for the jury. *Harvey v. Alturas Gold Min. Co.*, 3 Idaho, 510, 31 Pac. 819.

Plaintiff's intestate was an employee tending an ore conveyor in the mill of defendant company. It was his duty to watch a belt conveying ore from the lower part of the mill to the upper floor and thence to an ore chute and to keep rosin on the belt to prevent its slipping on the pulleys. He was inexperienced in the work and was not accustomed to work about the mill or concentrator, having worked in the mill only a short time prior to the accident. The officers of defendant company appear to have been aware of his inexperience. He did not have charge of the repair of the machinery, such work being under the control of the foreman. At the time of the accident, the belt had been torn in one place for about seventy feet and bolts would become loose in the belt, and this condition could not be detected when the machinery was in operation. The place where he was required to work was poorly lighted. Bolts were allowed to extend on the under side of the belting as much as three-fourths of an inch, and immediately after the discovery of the dead body pieces of his sweater and clothing were found on the bolts and nuts and many of the nuts were loose and some of the bolts were bent. It was the custom to have the machinery inspected and the nuts tightened between shifts. There was no eyewitness to the accident. Held, that a nonsuit was improperly granted.—*Adams v. Bunker Hill etc. Min. Co.*, 12 Idaho, 637, 11 L. R. A., N. S., 844, 89 Pac. 624.

A complaint alleged that plaintiff had been engaged in working about for defendant; that on the day of the accident he had been required by the master to perform labor with which he was not familiar; that in the performance of such labor he was injured, stating the manner and circumstances of the injury; that he had carefully inspected the situation and no danger was apparent; that he took the team and dumping cart furnished by defendant, loaded laths thereon as directed and followed the only road furnished for him, and met with the accident as alleged; that no warning had been given him by defendant or its agents of the danger in passing under one of defendant's refuse carriers with the dumpcart loaded with laths; that the hind end of the cart struck against said carrier and the timbers thereof seriously injuring plaintiff; that plaintiff exercised due care and caution; that defendant was negligent in the

construction and operation of its sawmill and other machinery connected therewith, specifying the particulars of such negligence, and in not furnishing plaintiff a safe place in which to work. Held, to state a cause of action.—*Crawford v. Bonners Ferry Lumber Co.*, 12 Idaho, 678, 10 Ann. Cas. 1, 87 Pac. 998.

In an action for personal injuries, the fact that the defendant corporation is insured by a casualty company, protecting it against damages resulting from personal injuries to its employees, is immaterial, and evidence thereof is inadmissible.—*Steve v. Bonners Ferry Lumber Co.* (on rehearing), 13 Idaho, 392, 92 Pac. 363.

The complaint alleged that plaintiff was working at the top of an open hole or shaft through which material was drawn to the second floor of the building under construction. The ropes, pulleys used for hoisting and the wheelbarrow on which plaintiff was loading stone when he was injured by the tipping of the wheelbarrow were alleged to be unsuitable for the purpose, but no defects therein were pointed out. Held, that the ropes, pulleys and wheelbarrow referred to in the complaint were not defective either in construction or in the manner in which they were being operated, and that whatever risk there was in operating the same was assumed by the plaintiff.—*Goure v. Storey*, 17 Idaho, 352, 105 Pac. 794.

Where it appears from the allegations of the complaint that the appliances used by the workman were of simple construction and easily understood by the inexperienced, and the using of such appliances was not negligence per se on the part of the defendants, if the plaintiff continues to work therewith for a month prior to the accident, it would be contributory negligence on his part and prevent a recovery for injuries sustained.—*Goure v. Storey*, 17 Idaho, 352, 105 Pac. 794.

In an action for personal injuries received by and on account of the negligence of the master, negligence must be shown and this may be done by positive testimony of the commission of a wrongful act by the master or the neglect by him to discharge a positive duty, or it may be shown by proof of the conditions of the place in which the master placed the servant, or the attendant circumstances surrounding the occurrence and the happening of the thing which caused the injury.—*Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080.

In an action to recover damages for personal injuries, evidence which tends to show the respective duties and relations of the alleged principal and his employees, as well as their relations to the business generally, and all of the surrounding circumstances, is admissible to aid in determining whether the injured employee sustained such injury by reason of the negligence of a fellow-servant or of a vice-principal.—*Walsh v. Winston Bros. Co.*, 18 Idaho, 768, 111 Pac. 1090.

In an action for damages for personal injury occasioned by the use of machinery al-

leged to have been defective, the questions as to whether such machinery when installed was defective, as to whether when in operation it endangered the safety of the employees of the defendant company, and whether such company or its officers had knowledge of such defects in the machinery, and the danger incident to its operation, or whether the plaintiff must have known of such defects, are all questions of fact for the jury to determine, and are properly submitted to the jury.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

In an action for damages for personal injury arising from the operation of machinery, if different conclusions might reasonably be arrived at as to whether there was negligence on the part of the defendant company, then the question is one of fact, to be submitted to the jury under proper instructions; but, if only one conclusion is deducible from the facts, the question becomes purely a question of law.—*Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

Evidence in an action by a servant against the owner of a steam-threshing outfit for injuries sustained in the operation thereof held insufficient to support a verdict for plaintiff.—*Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465.

Where the owner of a sawmill is operating a slasher, and the chains which move the slats and slabs and lumber thrown upon such chains pass through holes in the floor and double back under the floor, and then come through the floor again, and such holes are constructed by the lumber company, and one of such holes has been constructed larger than was necessary for the chain to pass through, or had worn larger than was necessary, and larger than is used for such purpose, and because of the unusual and unnecessary size of such hole such hole is dangerous and may be stepped into by a servant operating said slasher, and may be covered up and concealed by the slats and slabs and lumber thrown upon the chains so that it is not exposed, and a servant unacquainted with its construction may not observe or know of such hole or its size or the danger, and while discharging his duties as such servant steps into such hole and is thereby injured, the question of negligence of the lumber company in maintaining the slasher and hole in such condition is for the jury to determine.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

An instruction, following the language of R. C. 4221, that it is not necessary for the plaintiff to either plead or prove the negative of contributory negligence, is not erroneous, especially where the court otherwise properly instructed as to the rulings concerning contributory negligence.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

In an action for injuries to a servant, instructions that if the master fails to use proper care, and an injury results, it is not a risk incident to the employment which is assumed by the servant, unless the danger was open and apparent, or the servant had ac-

tual knowledge thereof, and that the plaintiff had a right to assume and rely on the presumption that the defendant had used reasonable care, and that plaintiff was not required to search or inspect the place for defects therein that were not obvious or apparent, were not erroneous, where the court also instructed that, while a servant assumes the ordinary risks of the employment, he does not assume those occasioned by the negligence of the master, unless they were known to him, or by the exercise of ordinary care he could have known them.—*Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

The engineer and fireman on a moving train, with bell ringing and the exhaust of steam and the train making considerable noise, may presume, when they observe a railroad conductor walking on the track, that he will heed the ringing of the bell and the noise of the train and step off the track in time to save himself from injury, unless something indicates the contrary.—*Neil v. Idaho & W. N. R. R.*, 22 Idaho, 74, 125 Pac. 331.

Where a railroad conductor, forty years of age, being in the possession of all of his faculties, who has had large experience in railroad business as a brakeman, switchman, switchyard foreman, yardmaster, and conductor, whose train is made up, consisting of about twenty freight cars and a caboose, and who goes to the engine attached to his train and delivers to his engineer his clearance card, and steps across the space between the tracks upon the "scale track" and walks leisurely back toward the caboose on his train, and the switch engine that made up his train and left it standing on the "passing track" proceeds down in the yards to get four cars loaded with coal and returns up the scale track with said cars, with the bell ringing so that it could be heard at least a thousand feet, and the engine laboring up a one per cent grade and running at from eight to twelve miles an hour, and the exhaust of steam and noise of the engine could be heard for a quarter of a mile, and the fireman on the switch engine had seen the respondent walking on the track when he was about five hundred feet away, and respondent is not noticed thereafter by the fireman or engineer until he is struck by the engine, held, that the railroad is not guilty of negligence. (By Judge Sullivan; Stewart, J., and Ailshie, J., dissent.)—*Neil v. Idaho & W. N. R. R.*, 22 Idaho, 74, 125 Pac. 331.

The evidence in this case examined, and held that there is no substantial evidence to sustain the verdict and judgment from which the appeal is taken.—*Smith v. Potlatch Lbr. Co.*, 22 Idaho, 782, 128 Pac. 546.

Where no evidence is offered which shows that an animal blind in one eye is more likely to kick than if such animal had two good eyes, the jury or court cannot presume that such horse, blind in one eye, will be more liable to kick than he would if he had two good eyes.—*Smith v. Portland Lbr. Co.*, 22 Idaho, 782, 128 Pac. 546.

In an action for injuries sustained by a servant through a collision in a mining tun-

nel, held, that the evidence is sufficient to sustain the verdict of the jury, except as to the amount of damages.—*Barter v. Stewart Min. Co.*, 24 Idaho, 540, 135 Pac. 68.

Where a laborer, working in a mine as loader and dumper on ore cars, was accustomed to ride from the place of dumping the ore and waste back to the mouth of the tunnel on the bumper of the back car, and it is shown that such place was unsafe for anyone to ride, and that the laborer, after working a few days at this work, either fell off or was thrown from the bumper, and run over and crushed by the car, and it appears that the master had not furnished the workman with any other place that was more safe for him to ride or do his work, and that the master had been accustomed to allow other loaders to ride at this same place, the master is guilty of negligence, and liable in damages for the death of the servant, and the servant was not guilty of such contributory negligence as will defeat a recovery.—*Chiara v. Stewart Min. Co.*, 24 Idaho, 473, 135 Pac. 245.

Editorial Notes.

Whether employees are fellow-servants as question of law or fact: *Ann. Cas.* 1912D, 75.

Duty of person working on railroad track to look out for and avoid passing trains: *Ann. Cas.* 1913A, 440.

Right of jury to consider fact that employer is insured against accidents to employees: *Ann. Cas.* 1913C, 359.

Admissibility of evidence, in action by servant against master, of changes or repairs made in machinery or appliances after accident: *Ann. Cas.* 1913E, 356.

Workmen's compensation acts: who is "dependent" within workmen's compensation act: *Ann. Cas.* 1913E, 480.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

Instruction as to negligence of defendant's servants in action for causing death. See *Death*.

Actions for death of servant. See *Death*.

Presumption as to self-preservation. See *Death*.

In an action against a railway company for the wrongful building of a dam by its employees which caused the overflow of plaintiff's land, an instruction "that the master is liable for the wrongful acts of its servants or employees if done in the course of their employment, even though the master did not authorize or know of such acts, or may have forbidden them" is erroneous.—*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.

In an action for damages caused by the alleged wrongful action of a railway company in building a dam, the court instructed the jury that defendant would be liable even though it did not authorize or did not know of such acts of its servants or may have forbidden them, if the acts were done in the course of their employment. A second instruction stated that "the plaintiff must not only show

that these men were in the employ of the railway company, but he must also show by a preponderance of the evidence that in so doing these men were acting within the lines of their employment." A third instruction was to the effect that defendant could not be held liable unless its servants were directed to do such work by the company or its representative. Held, that the instructions were conflicting and contradictory and hence it was reversible error to give them.—*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.

In an action against a railway company for damages, statements of a person not shown to be an employee or servant of defendant are inadmissible against defendant.—*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.

In an action against a railway company for damages arising from the alleged wrongful acts of its employees, the burden of proving that such employees were servants of the company is on the plaintiff.—*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.

Editorial Notes.

Liability of master for torts of servant: 35 Am. Dec. 192.

Liability of master for negligence or misconduct of servant: 55 Am. Dec. 317.

Liability of master for act of servant not in the course of his employment: 29 Am. Rep. 640.

Liability of master for acts and neglects of the servant in the course of his employment: 40 Am. Rep. 226.

Acts of servant for which master is not liable: 27 Am. Rep. 702; 54 Am. St. Rep. 71.

Liability of master for injury done by servant to third person in use of dangerous agency placed in his custody: 10 L. R. A., N. S., 367.

V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

Remote and speculative damages in action by a master for injuries to an apprentice, serving as a jockey. See *Damages*, III.

MECHANICS' LIENS.

I. NATURE, GROUNDS AND SUBJECT MATTER IN GENERAL.

II. RIGHT TO LIEN.

III. PROCEEDINGS TO PERFECT.

IV. OPERATION AND EFFECT.

V. ASSIGNMENT OF LIEN OR CLAIM.

VI. WAIVER, DISCHARGE, RELEASE AND SATISFACTION.

VII. ENFORCEMENT.

VIII. INDEMNITY AGAINST LIENS.

Agricultural liens. See *Agriculture*.

Liens on logs. See *Logs and Logging*.

Liens on mines. See *Mines and Minerals*, III, (C).

Trial by jury. See *Jury*.

Construction of railroad. See *Railroads*, VIII.

I. NATURE, GROUNDS AND SUBJECT MATTER IN GENERAL.

Mechanics' liens exist only by force of the statute and cannot exceed the express provisions thereof.—*Bradbury v. Idaho etc. L. I. Co.*, 2 Idaho, 239, 10 Pac. 620.

All the provisions of our mechanic's and laborer's lien law must be liberally construed with a view to effect their objects and promote justice.—*Phillips v. Salmon River Min. etc. Co.*, 9 Idaho, 149, 72 Pac. 886.

Laws 1899, page 147, section 1, gives a lien for work or labor done or materials furnished on ditches, dykes, flumes, etc. Laws 1899, page 282, section 20, grants to the person or company with a contract for the construction of a canal system and for the reclamation of arid lands under the Carey act a "prior lien on said water right and land upon which said water is used for all deferred payments for said water right." Act of Congress June 7, 1896, section 1 (6 Fed. Stats. Ann., p. 398, U. S. Comp. Stats. 1901, p. 1556) authorizes the state to create a lien for the actual cost and necessary expense of reclamation," etc., under the Carey act. Held, that where a construction company contracts with the state to reclaim certain lands under the Carey act, the contractors and subcontractors under such company are entitled to a lien for their work and materials, and in case of foreclosure and sale they would be entitled to sell all the right, interest and claim of the construction company, and that the purchaser at such sale would be subrogated to all the rights, interests and privileges of the construction company therein.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

By the provisions of Laws 1899, page 282, the legislature accepted the terms of the Carey act (6 Fed. Stats. Ann., pp. 396-398, U. S. Comp. Stats. 1901, pp. 1502-1554) and prescribed the means, manner and method by which the state might avail itself of any part of the million acre grant made by the Carey act and acts of Congress supplemental thereto, and also provided for the reclamation, occupation and disposal of the same. Laws 1899, page 282, section 20, grants to the person, company or association which secures the contract for the construction of a canal system and for the reclamation of arid lands under the Carey act a prior lien on said water right and land upon which said water is used for all deferred payments for said water right." Section 1 of act of Congress June 7, 1896 (6 Fed. Stats. Ann., p. 398, U. S. Comp. Stats. 1901, p. 1556) authorizes the state to create a lien "for the actual cost and necessary expense of reclamation," etc., under the Carey act. The Twin Falls L. & W. Co. contracted with the state to build a dam and construct a system of main and lateral canals sufficient to irrigate a certain portion of such Carey act lands. Laws 1901, page 191, section 7 (amending Laws 1899, p. 282, sec. 19), authorized such construction companies to acquire absolute title from the state to lands within the district not applied for or taken by settlers within two years of the final com-

pletion of the irrigation system. The water right, the right to charge for water and have a lien therefor, the right of way, the right to use the surplus water, the right to possession and control of the system belonged to the company under its contract and the statutes. Held, that the company had a lienable interest in the canal system and the lands thereunder and the waters appropriated and that such property rights were real estate, and, therefore, that it could not successfully contend in a suit to foreclose a lien on its interest that the canal system and the water and the entire works belonged to the state of Idaho and that the lands to be irrigated belonged principally to the United States.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

A lien may be foreclosed against an interest in real property less than that of a fee simple title, as whatever interest the debtor may have in the property may be foreclosed in an action brought for that purpose.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

The lien laws of this state do not authorize or justify mechanics', laborers' or materialmen's liens against state buildings.—*Rathbun v. State*, 15 Idaho, 273, 97 Pac. 335.

Laws 1909, page 165, requiring the execution of a penal bond in a sum equaling sixty per cent of the contract price in contracts with cities, etc., for the erection of public buildings or works, does not repeal R. C. 5111, allowing a lien therefor, but affords an additional and cumulative remedy, and should be construed in harmony with said R. C. 5111.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069.

Editorial Notes.

Estates and interests affected by mechanics' liens: 45 Am. Dec. 678.

Buildings and other property subject to mechanics' liens: 78 Am. Dec. 694.

Public buildings, when subjects of mechanics' liens: 27 Am. Rep. 83; 35 L. R. A. 141; 20 L. R. A., N. S., 261; 41 L. R. A., N. S., 315.

Public school building as subject to mechanic's lien: Ann. Cas. 1913A, 762; 17 Ann. Cas. 131.

Nature of improvement for which mechanic's lien may exist: Ann. Cas. 1912B, 5.

II. RIGHT TO LIEN.

Construction of railroad. See Railroads.

Effect of owner's acceptance or entering possession of building. See Contracts, V.

A person constructing a branch or section of a main canal, or performing labor thereon in its construction under a contract with the owner, is entitled to a lien upon such branch or section for any balance due him for such labor.—*Creer v. Cache Valley Canal Co.*, 4 Idaho, 280, 95 Am. St. Rep. 63, 38 Pac. 653.

Where, in an action to foreclose mechanics' liens, the record shows that credit was given

to the party in possession of the property under an option to purchase, and not to the owner of the property, such liens will not, on the failure of the person to whom credit was given, to fulfill his contract to purchase, be enforceable against the owner of the property. *Steel v. Argentine Mining Co.*, 4 Idaho, 505, 95 Am. St. Rep. 144, 42 Pac. 585.

Where, in a suit to foreclose a laborer's lien, the evidence shows that M. was the only representative of defendant company with whom a contract could be made where the work was being done, that M. had charge of the check-book and that he had told plaintiff he could proceed with the work, that other defendants were on the ground afterward and made no complaint that plaintiff had done or was doing the work, M.'s agency for defendants was sufficiently shown to admit proof of his acts tending to create a liability on the part of defendants.—*Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218.

Under Laws 1899, page 147, the contractor for the construction, alteration or repair of a building is the special agent of the owner for the purpose of securing the material necessary, but through such agency the owner cannot be personally bound, the charge being purely in rem against the property.—*Valley Lumber etc. Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24.

Under Laws 1899, page 147, section 1, making the contractor the agent of the owner for the purposes of the mechanic's lien laws, such agency extends only to the purchase of material reasonably necessary out of which to build the structure in accordance with the contract entered into between the owner and the builder.—*Valley Lumber etc. Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24.

Under R. C. 5112, anyone who, at the request of the owner of the lot in an incorporated city or town, grades, fills in, or otherwise improves the same, or the street in front of or adjoining the same, has a lien upon such lot for the work done or materials furnished. *Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

Under R. C. 5110, the contractor who constructs a sidewalk is made the agent of the owner of the abutting lots for the purpose of the provisions in said codes providing for mechanics' and materialmen's liens.—*Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

Under the mechanic's lien law of this state, the materialman or laborer is given an absolute lien upon the structure or improvement in which the material was used or the labor done, if he files his claim of lien within the time required by law, and the payment by the owner of the full contract price to the contractor, prior to the date of the filing of the lien, is no defense in an action to foreclose such lien.—*Weeter Lumber Co. v. Fales*, 20 Idaho, 255, Ann. Cas. 1913A, 403, 118 Pac. 289.

Where defendant company, engaged in the constructing of a dam for the purpose of creating a reservoir for irrigation purposes, employs H. to haul and transport cement from

a railroad station to the place of use to be used in the construction of said dam by the company, and H. sublets a contract to H. & S. to do such hauling, H. is the agent of the land and water company, the owner and builder of the dam, under R. C. 5110, in relation to mechanics' liens.—*Hill v. Twin Falls etc. Co.*, 22 Idaho, 274, 125 Pac. 204.

Where H. & S. haul and transport cement from a railroad station to the place where T. Co. are constructing a dam, and such cement is accepted and used by the company in the construction of said dam, and H. & S. are employed to haul and transport said cement by H., a contractor employed by the company, and upon the delivery of said cement the same is used in the construction of said dam and becomes a part of the improvement and enhances the value of the company's property, H. & S. are entitled, upon complying with the statute, to a lien upon said dam for labor and services rendered by them in hauling and transporting said cement.—*Hill v. Twin Falls etc. Co.*, 22 Idaho, 274, 125 Pac. 204.

Under the mechanic's lien law of the state it was the intent of the legislature to grant an absolute lien direct upon the property to the person who performs labor upon or furnishes materials to be used in the building, structure, or other improvement, without reference to whether such person performing such labor or furnishing such material is an original contractor or a subcontractor or a laborer or a materialman.—*Hill v. Twin Falls etc. Co.*, 22 Idaho, 274, 125 Pac. 204.

The purpose of the mechanic's lien statute is to compensate the man who performs labor under, or furnishes material to be used in, the construction, alteration, or repair of a building or structure, irrespective of the value which such labor or material may add to the real estate.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069; *Potlatch Lbr. Co. v. City of Lewiston*, 23 Idaho, 167, 129 Pac. 1073.

Where a city entered into a contract to have an intake pipe added to the pipe of its waterworks system, extending the main out into the bed of the river, and the contractors found it necessary to build a cofferdam in the stream in order to carry on the work, or to employ some other means which would accomplish the same end, laboring men and materialmen would be entitled to a lien for labor performed upon such cofferdam, and materials furnished in the construction thereof, as a necessary incident to the performance of the contract, although such dam, and material included therein, would not be a part of the completed work, and would not be of any use to the city when finally completed.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069; *Potlatch Lbr. Co. v. City of Lewiston*, 23 Idaho, 167, 129 Pac. 1073.

Where labor was performed and material furnished in the construction of an intake pipe and the placing of a steel cage around the pipe as an extension and addition to a waterworks system, a lien filed for labor performed and material furnished in connection

with such work will attach to the waterworks system, notwithstanding the fact that the intake pipe, on which the work was done, was never completed or actually attached to the system.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069; *Potlatch Lbr. Co. v. City of Lewiston*, 23 Idaho, 167, 129 Pac. 1073.

A lien cannot be had under the mechanics' lien laws of this state for tools and appliances which are the property of the contractors or laborers, and that are not necessarily consumed in the specific work, but which may be used, from time to time, in other works and upon other contracts.—*Ninneman v. City of Lewiston*, 23 Idaho, 169, 129 Pac. 1073.

Under the mechanic's lien laws of this state, a lien will be allowed for material furnished and actually used and consumed in the construction of the building or other structure, irrespective of the fact that such use and consumption may not be in the main building or structure itself, but in such work as was necessarily incident to the carrying on of the principal work and discharging the contract.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069; *Potlatch Lbr. Co. v. City of Lewiston*, 23 Idaho, 167, 129 Pac. 1073; *Hewett v. City of Lewiston*, 23 Idaho, 172, 129 Pac. 1073.

Under the laws of this state, the test for a mechanic's lien is, Was the labor performed or material furnished in the construction, alteration, or repair of the building, structure, or other work? and the right to a lien is not dependent upon the actual enhanced value of the property on which the labor was performed, or for which the material was furnished.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069; *Potlatch Lbr. Co. v. City of Lewiston*, 23 Idaho, 167, 129 Pac. 1073; *Hewett v. City of Lewiston*, 23 Idaho, 172, 129 Pac. 1073.

Editorial Notes.

Mechanics' liens for materials furnished to be used, but not in fact used: 64 Am. Dec. 678; 31 L. R. A., N. S., 749.

Lien of materialmen: 79 Am. Dec. 268.

"Laborer," "workman," "servant," who is within the meaning of statutes relating to mechanics' liens: 32 Am. Rep. 264.

Who is "laborer" within statute giving lien to laborers: Ann. Cas. 1913B, 138.

Necessity that materials for which mechanic's lien is claimed be incorporated in structure: Ann. Cas. 1913B, 502; 13 Ann. Cas. 13; 19 Ann. Cas. 588; 42 L. R. A., N. S., 354.

Tools and appliances used for construction work as materials for which mechanic's lien may be had: Ann. Cas. 1912B, 227.

III. PROCEEDINGS TO PERFECT.

A statement at the head of the notice of a mechanic's lien giving the names of the plaintiffs as subcontractors and plaintiffs against "B., contractor and B. G. Mullins, owner," is not a compliance with R. S. 5130, requiring that the name of the owner or reputed owner shall be stated in the lien

claim.—*White v. Mullins*, 3 Idaho, 434, 31 Pac. 801.

Under R. S. 5130, a notice of mechanic's lien which fails to state unequivocally and plainly the name of the owners, or reputed owner, or the terms, time and conditions of the contract under which the labor was performed is fatally defective.—*White v. Mullins*, 3 Idaho, 434, 31 Pac. 801.

Any person contracting directly and exclusively with the owner of a building, and between whom and the contractor for the construction of the structure there is neither relation of interest nor privity of contract, is an original contractor, and as such has the sixty days provided in the statute for the filing of his notice of lien.—*Colorado Iron Works v. Rickenberg*, 4 Idaho, 262, 38 Pac. 651.

A notice of lien for work done in constructing a canal system stated the name of the owner, that such owner was the reputed owner of said premises, which were before described, and caused the said canals to be constructed and excavated, and further substantially states the contract by the terms of which the canal was constructed, is sufficient.—*Creer v. Cache Valley Canal Co.*, 4 Idaho, 280, 95 Am. St. Rep. 63, 38 Pac. 653.

Under an agreement with the contractor, plaintiff furnished the material to build defendant's dwelling which was completed by the contractor. Fifty-nine days after the last item of material was furnished, the contractor and owner made a new contract to erect a porch on the dwelling and on that day the contractor ordered lumber from plaintiff for said porch, which was furnished, the last item thereof being furnished March 15, 1905. On May 11, 1905, plaintiff filed its materialman's lien on the premises. Held, that in the absence of proof that plaintiff knew of the two separate contracts, the lien was filed in time.—*Valley Lumber etc. Co. v. Driessel*, 13 Idaho, 662, 13 Ann. Cas. 63, 15 L. R. A., N. S., 299, 93 Pac. 765.

Where there are two separate and distinct contracts for the erection of a building, and the materialman knows that there are two contracts, he cannot tack the last contract to the first so as to procure a lien for all the materials furnished under the separate contracts where the time had expired for filing a lien for the material furnished under the first contract.—*Valley Lumber etc. Co. v. Driessel*, 13 Idaho, 662, 13 Ann. Cas. 63, 15 L. R. A., N. S., 299, 93 Pac. 765.

Where materials are furnished for the same building or improvement in installments and at intervals, and the parties intend them to be included in one account in settlement, the entire account will be treated as a continuous and connected transaction, and the lien limitation begins to run from the last item of the contract.—*Valley Lumber etc. Co. v. Driessel*, 13 Idaho, 662, 13 Ann. Cas. 63, 15 L. R. A., N. S., 299, 93 Pac. 765.

Where the materialman had furnished no material for thirty days, and during the last twenty days of that time the building was

occupied by the owner, and in the meanwhile the contractor had returned material that was not used in the building, and the materialman had notice of all these facts, he could not extend the time for filing his lien by proof that he thereafter sent to such building, for the contractor, forty cents' worth of material, there being no showing that such material was necessary for or used in the building under the original contract.—*Valley Lumber etc. Co. v. Nickerson*, 13 Idaho, 682, 13 Ann. Cas. 63, 15 L. R. A., N. S., 299, 93 Pac. 24.

A claim of lien which describes property as "commencing at the intersection of the middle line of Eighth street and Ada street in said Boise City; running thence south along the center line of said Eighth street 85 feet; thence west 142 feet; thence north 85 feet to the center line of Ada street; thence east 142 feet to the place of beginning," is a sufficient description of such property, as the court will take judicial notice that Boise City is in Ada county, state of Idaho.—*Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

A description of the property as "the pumping plant and waterworks system of the city of Lewiston, said waterworks system being located on the south bank of the Clearwater river about one and one-half miles above the point where the Clearwater river flows into the Snake river," is a sufficient description upon which to predicate a lien against the city's waterworks system, and is sufficient for identification thereof.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069; *Potlatch Lbr. Co. v. City of Lewiston*, 23 Idaho, 167, 129 Pac. 1073; *Hewett v. City of Lewiston*, 23 Idaho, 172, 129 Pac. 1073.

Editorial Notes.

Time to file mechanic's lien as computed from date of actual completion or date of acceptance of work: Ann. Cas. 1912A, 908.

Time for filing mechanic's lien as extended by substituting new materials for those already furnished: Ann. Cas. 1912C, 217.

Sufficiency of statement or notice of mechanic's lien naming in caption but not in body of statement or notice owner or person against whose interest lien is claimed: 20 Ann. Cas. 1162.

IV. OPERATION AND EFFECT.

Priority of mortgage lien. See *Mortgages*, III.

Estates which may be subjected. See *ante*, I.

In an action to foreclose a lien, the evidence showed that plaintiffs constructed nearly the whole of the north and south branches of the canal on which the lien was claimed, after a mortgage on the premises was given. Held, that the lien would be prior to the mortgage. *Creer v. Cache Valley Canal Co.*, 4 Idaho, 280, 95 Am. St. Rep. 63, 38 Pac. 653.

A person performing labor upon or furnishing material used in the construction of an entire property may claim a lien upon a part of such property, as well as the whole.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

Under the statute of this state, a lien may be filed to secure profits upon a contract when such profits are included in the contract.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

Under Laws 1899, page 148, section 6, providing that every person performing labor or furnishing material for a building or structure is entitled to a lien therefor, the amount to be recovered under such lien is always measured by the amount found due under the contract.—*Steltz v. Armory Co., Ltd.*, 15 Idaho, 551, 20 L. R. A., N. S., 872, 99 Pac. 98.

Editorial Notes.

When may include property in addition to that upon which work was performed: 65 Am. St. Rep. 165.

V. ASSIGNMENT OF LIEN OR CLAIM.

(No paragraphs.)

VI. WAIVER, DISCHARGE, RELEASE AND SATISFACTION.

One who files a lien on property for material furnished, and thereafter appears in an interpleader action brought to determine the priority of the rights of creditors to the purchase price of the property, and demands that his claim be paid out of said fund, thereby waives his lien and cannot afterward foreclose it.—*Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 96 Am. St. Rep. 290, 59 Pac. 533.

Where one has a valid lien on property for the payment of a debt, and such property is sold on a contract made prior to the creation of such debt, and the claimant goes into a court of equity and asks to have his lien claim paid out of the purchase price fund, he is estopped from thereafter resorting to such property to make such debt.—*Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 96 Am. St. Rep. 290, 59 Pac. 533.

The fact that the labor performed and material furnished for the construction, alteration, and repair of any building, structure, or other works was carried away by floods and high water, without any fault of the man who performed the labor and furnished the material, does not deprive the laboring man or materialman from preferring his liens under the statute, and such lien attaching to the real estate on which the work was done or improvement made.—*Chamberlain v. City of Lewiston*, 23 Idaho, 154, 129 Pac. 1069; *Potlatch Lbr. Co. v. City of Lewiston*, 23 Idaho, 167, 129 Pac. 1073.

Editorial Notes.

Waiver of mechanics' liens: 41 Am. Dec. 221.

Waiver of mechanics' liens by taking notes or other securities: 41 Am. St. Rep. 761.

VII. ENFORCEMENT.

Requisites of supersedeas bond. See Appeal and Error, IX.

Time of filing lien claim. See ante, III.

Trial by jury. See Jury.

In an action for the foreclosure of a mechanic's lien, the complaint alleged that defendants were tenants in common of the encumbered premises at the time of commencing the action. Held, that defendants were jointly liable if liable at all.—*Lowe v. Turner*, 1 Idaho, 107.

In an action for the foreclosure of a mechanic's lien, the complaint alleged that defendants were tenants in common of the encumbered premises at the time of commencing the action. Held, that a separate personal money judgment could not be entered against one of the defendants by default.—*Lowe v. Turner*, 1 Idaho, 107.

Laws 1899, page 147, section 12, providing that on the foreclosure of a mechanic's lien the court may allow reasonable attorney's fees in favor of plaintiff, is constitutional and valid.—*Thompson v. Wise Boy Min. & M. Co.*, 9 Idaho, 363, 74 Pac. 958; *Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789; *Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

Under Laws 1899, page 147, section 4, providing that the land, upon which any building, etc., is constructed, "together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof to be determined by the court on rendering judgment, is also subject to lien," etc., it is error in a suit to foreclose a laborer's lien for the court not to fix the amount of land to be sold for the convenient use and occupation thereof.—*Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218.

A complaint for the foreclosure of a laborer's lien alleged that plaintiff had agreed with defendants through their agent to perform certain work for what the same should be reasonably worth per day, that the work was performed in a certain number of days, that the work was reasonably worth a specified sum per day, that there was due and owing from defendants under said agreement a specified sum, that the work was performed on certain described property, and that the statutory notice of lien had been filed. Held, sufficient.—*Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218.

Attorney's fees are allowable in a suit to foreclose a laborer's lien.—*Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218.

In an action to foreclose a mechanic's lien, defendants filed a cross-complaint wherein they demanded damages for failure of plaintiff to complete his contract. Special questions as to whether plaintiffs had constructed the building in a good, substantial and workmanlike manner and as to whether defendants had accepted the building were answered in the negative by the jury. The jury also brought in a general verdict for plaintiff. The court set aside the general verdict and entered judgment for defendants without making further findings. Held, that the judgment must be reversed for the reason that neither court nor jury found on the issue of damages raised by the cross-complaint.—*Sandstrom v. Smith*, 12 Idaho, 446, 86 Pac. 416.

Where a defendant in an action to foreclose a mechanic's lien claims that the material was

furnished under two separate contracts and that the lien was not filed in time to secure the claim for the material furnished under the first contract, the burden of proof is on defendant to show either that the plaintiff had actual or constructive notice that the material was furnished and used on two separate contracts.—*Valley Lumber etc. Co. v. Driessel* (on rehearing), 13 Idaho, 662, 13 Ann. Cas. 63, 15 L. R. A., N. S., 299, 93 Pac. 765.

In an action to foreclose a mechanic's lien on an irrigation system in view of the magnitude of the contract, the amount involved, the obstacles met in attempting to recover and the obstinacy with which the case was contested, held that an allowance of \$10,000 attorneys' fees was not excessive.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

In an action to foreclose a lien for work done in building an irrigation canal, the complaint showed that the measurements of the amount of work done and the estimates and classification thereof were by the contract to be left to defendant's chief engineer, that defendant and its engineers fraudulently, arbitrarily, without sufficient inspection or knowledge made false estimates and calculations both as to the classification of the work done and the amount thereof; and the complaint in each instance gave the classification and number of cubic yards thereunder allowed by defendant's engineer and also the number of cubic yards and classification plaintiff contended to be correct. Held, that defendant was not entitled to a bill of particulars, showing the particular place or places along the line of works and the particular stations where these errors, mistakes and fraudulent estimates occurred.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

In an action to foreclose a lien for work done in building an irrigation canal, the complaint showed that the measurements of the amount of work done and the estimates and classification thereof were by the contract to be left to defendant's chief engineer, that defendant and its engineers fraudulently, arbitrarily, without sufficient inspection or knowledge made false estimates and calculations both as to the classification of the work done and the amount thereof; and the complaint in each instance gave the classification and number of cubic yards thereunder allowed by defendant's engineer and also the number of cubic yards and classification plaintiff contended to be correct. Held, that a demurrer for uncertainty and ambiguity in that the particular place or places along the line of works and the particular stations or subdivisions where these errors, mistakes and fraudulent estimates were made were not pointed out by the complaint, was properly overruled.—*Nelson Bennett Co. v. Twin Falls L. etc. Co.*, 14 Idaho, 5, 93 Pac. 789.

Where a building has been completed and the owner thereof has entered into possession of the same on the theory that the building is a completed structure, and he later discovers that the building was defectively constructed and not properly tied to the adjoining wall and the front falls out, the owner may recover the damages thus incurred on account

of breach of the contract as an offset against the contractor who is seeking to foreclose his mechanic's lien for the construction of the building.—*Steltz v. Armory Co., Ltd.*, 15 Idaho, 551, 20 L. R. A., N. S., 872, 99 Pac. 98.

Where a building contract provides for a forfeiture of \$5 per day for each day the owner is kept out of possession thereof after the day fixed by the contract for the completion of the building, such damages cannot be recovered by the owner in an action by the contractor to foreclose his lien unless the same is affirmatively pleaded by way of defense or cross-complaint.—*Steltz v. Armory Co., Ltd.*, 15 Idaho, 551, 20 L. R. A., N. S., 872, 99 Pac. 98.

Under R. C. 5121, the attorneys' fees provided for are recoverable although the amount of the claim for which the lien is foreclosed is less than \$100.—*Shaw v. Johnson*, 17 Idaho, 676, 107 Pac. 399.

Attorneys' fees allowed plaintiff, in a mechanic's lien proceeding, are a lien upon the property.—*Shaw v. Johnson*, 17 Idaho, 676, 107 Pac. 399.

The surety for a contractor on a building contract cannot maintain an action for the foreclosure of a lien for materials furnished in the carrying out of the contract and erection of the building, where it appears that the full contract price has been paid to the contractor, or on his order, prior to any claim being made by the surety or notice being given to the owner of the building.—*Sanders v. Keller*, 18 Idaho, 590, 111 Pac. 350.

Under the statutes of this state, an attorney's fee may be allowed and recovered, in an action to foreclose a mechanic's lien.—*Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

A complaint for the foreclosure of a mechanic's lien, which describes in the lien the defendant's name as R. M. Gambill, and in the complaint gives the initials of said defendant as R. L. Gambill, and alleges that R. M. Gambill and R. L. Gambill are one and the same person, and that the true and correct name is R. L. Gambill, and it does not appear that the defendants are or could be in any way misled or deceived by such error in the initials of said defendant, does not make a variance between the complaint and the lien, and does not affect the validity of the claim or the sufficiency of the complaint.—*Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

The question whether reasonable diligence has been shown in the prosecution of an action to foreclose a mechanic's lien is one of fact, and is to be determined by the trial judge upon the facts as they are presented; and the discretion of the trial judge will be determined by the same rule of law as is applied generally in cases where discretion is vested in the trial court, and if there is an abuse of such discretion his action will be reversed; if there is not, it will be affirmed.—*Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

An action for the foreclosure of a mechanic's lien may be dismissed, where reasonable diligence is not shown in the service of the summons; and the trial judge has the dis-

cretion to determine from the proof offered whether the plaintiff is guilty of laches, or has shown due diligence in making such service.—*Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

R. C. 4138 and 4139, which provide that civil actions are commenced by filing a complaint, and that summons may issue thereon at any time within one year thereafter, apply to actions brought for the foreclosure of mechanic's liens, and, with R. C. 5118, provide the only limitations in the foreclosure of mechanics' liens, which are, first, that the proceedings must be commenced for the foreclosure of liens within six months after the claim of lien is filed, and, second, that a summons may be issued at any time within one year after the commencement of the action.—*Shaw v. Martin*, 20 Idaho, 168, 117 Pac. 853.

The facts of this case examined and reviewed, and held, that they are sufficient to support a finding and judgment that the materials and supplies were furnished for the construction of a mill and the equipments and improvements to be used on and in connection with a mining claim, and that the same constituted one continuing contract, and that the materialman was entitled to a lien dating from the time of commencing to furnish materials therefor.—*Mine etc. Co. v. Idaho Consol. Mines Co.*, 20 Idaho, 300, 118 Pac. 301.

Editorial Notes.

Right to personal judgment in action to foreclose mechanic's lien: *Ann. Cas.* 1912A, 129.

Presentation of claim as condition precedent to action to foreclose mechanic's lien against decedent's estate: *Ann. Cas.* 1913D, 275.

Validity of mechanic's lien providing for taxing of attorney's fees: 11 *Ann. Cas.* 714.

VIII. INDEMNITY AGAINST LIENS.

Requiring penal bond on contracts for public buildings. See *ante*, I.

MEDICINE.

Practice of. See *Physicians and Surgeons*.

MILITIA.

Mandamus to compel issuance of salary warrant to assistant adjutant general. See *Mandamus*, II, (B).

Laws 1891, page 217, an act for the organization of the militia of the state of Idaho, appropriates a certain sum to defray the current expenses of the Idaho National Guard. Section 3 provides the compensation of the adjutant general to be paid quarterly out of the military fund, in the same manner as other state officers are paid. Held, that the compensation of the adjutant general is not a part of the "current expenses" and that said act fails to establish a "military fund."—*Curtis v. Moody*, 3 Idaho, 123, 27 Pac. 732.

MINES AND MINERALS.

I. PUBLIC MINERAL LANDS.

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Sufficiency of delivery of deed to mining claims. See *Deeds*, I, (D).

Taxation of. See *Taxation*, III, (O), (D).

I. PUBLIC MINERAL LANDS.

(A) RESERVATION AND DISPOSAL IN GENERAL.

(No paragraphs.)

(B) LOCATION AND ACQUISITION OF CLAIMS.**1. Lands Open to Location and Acquisition.**

The acceptance and allowance of the entry and final proofs made by a claimant for the public mineral lands of the United States and the issuance to such claimant of a final receipt of purchase by the officers of the local land office in conformity with the statute and the rules and regulations of the general land office constitute a segregation of the land so claimed from the public domain, and such lands are no longer subject to entry or location under the general land laws until such entry is set aside or vacated and canceled.—*Batterton v. Douglas Mining Co.*, 20 Idaho, 760, 38 L. R. A., N. S., 1121, 120 Pac. 827.

Editorial Notes.

Grants of reserving the land and grants of land reserving the minerals, and the rights of the parties thereto: 24 Am. St. Rep. 554.

Validity of reservation of mineral rights in perpetuity: Ann. Cas. 1912D, 886.

Lodes or veins within placer claims: 50 L. R. A. 289.

Location of mining claim: 7 L. R. A., N. S., 765.

2. Persons Entitled.

Pleading and proving citizenship. See post, I, (B), 5, (e); also, II, (A).

Only citizens of the United States and persons who have declared their intention to become such can acquire any right by location upon mineral lands of the public domain.—*Rosenthal v. Ives*, 2 Idaho, 265, 12 Pac. 904; *Bohanon v. Howe*, 2 Idaho, 453, 17 Pac. 583.

Prior to act of Congress of March 3, 1887, known as the "Alien Act," there was nothing in the laws of the United States, nor of the territory of Idaho, prohibiting aliens from holding and working mining ground, under a lease from one qualified, and who had made a proper location of such mining ground.—*Ah Kle v. McLean*, 3 Idaho, 538, 32 Pac. 200.

3. Requisites and Validity of Location Proceedings.**(a) In General.**

A party claiming mining lands through possession alone only holds so much as he is in actual possession of; while, if he seeks to hold through location, he must show a valid location upon which such possession is based. *Lalande v. McDonald*, 2 Idaho, 307, 13 Pac. 347.

A location of mining claim is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the act of Congress and the local laws and regulations.—*Lalande v. McDonald*, 2 Idaho, 307, 13 Pac. 347.

The authority to make an amended mining location need not be in writing.—*Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

(b) Location by Agent.

The location of a mining claim may be initiated by an agent of the locator.—*Schultz v. Keeler*, 2 Idaho, 333, 13 Pac. 481; *Schultz v. Keeler*, 2 Idaho, 568, 21 Pac. 418; *Dunlap v. Pattison*, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504.

(c) Discovery.

The words "vein," "lode," and "ledge" are used as synonymous terms, in the common parlance of miners, in the laws of Congress, and in the decisions of courts in mining states and territories.—*Synnott v. Shaughnessy*, 2 Idaho, 122, 7 Pac. 82.

A tunnel located and run for the development of veins, pursuant to U. S. Rev. Stats. 2323, becomes a mining claim, and is entitled to protection the same as a lode claim.—*Back v. Sierra Nevada etc. Min. Co.*, 2 Idaho, 420, 17 Pac. 83.

It is not required in locating a mining claim that well-defined walls shall be developed or paying ore found within them, but something must be found in place, as rock, clay or earth so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the inclosing country.—*Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

"A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore," is a proper instruction, and changing the word "willing" to "justified" is an improper modification thereof and ground for reversal.—*Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98.

Editorial Notes.

Discovery of mineral in mining claims and rights of locators prior thereto: 139 Am. St. Rep. 154.

Sufficiency of discovery of mineral to support location of mining claim: 15 Ann. Cas. 628.

(d) Extent and Boundaries of Claim.

Conflicting locations. See post, I, (B), 3, (j).

Where the boundaries of a claim are made excessive in size with fraudulent intent, it is void; or if so large as to preclude the presumption of innocent error, fraud will be presumed.—*Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49; *Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

Where a claimant of a quartz claim claims more than the law allows, such claim is void for the excess.—*Atkins v. Hendree*, 1 Idaho, 95.

In an action to recover a quartz claim the court instructed the jury that "no quartz claim can exceed two hundred feet in length along the lead or lode, and if the jury believes from the evidence that the claim of plaintiff was properly located to include a

greater number of feet than two hundred, then the location is an attempted fraud upon the provisions of the law and the rights of others, and the location is null and void as against subsequent locators, and the jury must find for defendants." Held erroneous, since to claim more than the law allows is no fraud on others who have the same means of ascertaining the attempted fraud that the other has of committing it.—*Atkins v. Hendree*, 1 Idaho, 95; (disapproved) *Flynn Group Min. Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

Where it is found on a survey of a mining claim, that the measurements of the locator are in excess of the area allowed by law, but no fraud is alleged nor any rights of third parties infringed upon, the claim is void only as to the excess.—*Stemwinder Min. Co. v. Emma etc. Min. Co.*, 2 Idaho, 456, 21 Pac. 1040.

Where an excessive mineral location has been made through mistake, while the locator was acting in good faith, the location will be void only as to the excess; but, where the locator has purposely included within his exterior boundaries an excessive area with the fraudulent intent of holding the entire area under one location, such location is void; or, if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed.—*Nicholls v. Lewis & Clark Mining Co.*, 18 Idaho, 224, 109 Pac. 846.

Where a discovery is made on a vein of mineral-bearing rock, and the notice provides that such claim extends seven hundred feet in a northwesterly direction and eight hundred feet in a southeasterly direction from such discovery, and the corner stakes on the southeasterly end are so placed as to take in more than eight hundred feet of such vein, subsequent locators may legally locate the excess of ground, as the first location is valid only to the extent of eight hundred feet southeasterly from the point of discovery on said claim.—*Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

Where the exterior boundaries of a mineral location includes such an unreasonably excessive area that such boundary lines cannot be said to impart notice to a prospector of a mineral location or discovery within the reasonable distance of a lawful claim as located under the statute, such location will be held void on the ground that the boundaries of the claim have never been marked and established as required by law.—*Nicholls v. Lewis & Clark Mining Co.*, 18 Idaho, 224, 109 Pac. 846.

There can be no extralateral right on the strike of a vein.—*Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.

Where a mineral vein or lode has been cut off by a great and well-defined fault, and the end edge of the vein along the fault is left in such a position that if the fault were eroded or washed away the edge of the vein would stand out as an overhanging cliff with

both a dip and a declination to the onward course of the vein of from thirty to forty-five degrees, such edge of the vein is not the top or apex of the vein within the meaning and purview of U. S. Rev. Stats. 2322 (U. S. Comp. Stats. 1901, p. 1425). The fact that such end edge of the vein is at places curled, cupped, or turned upward at varying angles from the general course or strike of the vein will not serve to convert such edges or spurs into an apex of the vein.—*Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.

U. S. Rev. Stats. 2322 (U. S. Comp. Stats. 1901, p. 1425), grants to the locator of a mining claim the exclusive right of possession and enjoyment of "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations," and the words "top or apex," as there used, mean the highest point in the vein. An apex must be the top or terminal edge of the vein on the surface or the nearest point to the surface, and must be the top of the vein proper rather than of a spur or feeder, and must be a point from which the vein has a dip as well as a strike or course.—*Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.

The general rule that where a mineral vein or lode crosses the side lines of the location, as marked on the surface, such side lines are in law end lines, and that the lines that were laid off and marked as end lines are in law side lines, is subject to the exception that where the discovery vein does in fact cross the end lines of the claim as marked on the surface, and such end lines are the true end lines of the claim, and the side lines are the true side lines of such claim, those lines will remain such for all secondary veins having their apices within the surface boundaries of such claim, and the fact that a secondary vein may be discovered crossing the side lines will not give the locator extralateral rights beyond the vertical plane of the end lines of the claim. *Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.

The words "downward course" and "course downward," contained in U. S. Rev. Stats. 2322 (U. S. Comp. Stats. 1901, p. 1425), are used interchangeably, and were evidently intended to signify the course of the vein from the surface toward the center of the earth, whether in a perpendicular course or on a dip or declination, and by downward course is meant a course more in the direction of the dip of the vein than of the strike or onward course of the vein. To pursue a vein in the direction of its strike at an angle of less than forty-five degrees to the course of such vein would clearly not be following the vein on its "downward course" as authorized by the statute, but would rather be following it on the course of its strike.—*Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.

Editorial Notes.

Extralateral rights: 58 Am. St. Rep. 263.

Right to follow vein on dip below surface lines: 53 L. R. A. 491.

(e) Location Notice and Certificate.

An agent or attorney in fact, who has located a mining claim for his principal, may do everything necessary to perfect such location, including the making of the affidavit required by R. S. 3104.—Dunlap v. Pattison, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504.

The reference to a natural object or permanent monument in a mining location notice must be such as to furnish reasonable certainty that the locus of the claim has not been, and could not well be, changed.—Brown v. Levan, 4 Idaho, 794, 46 Pac. 661.

In locating mining claims, the location notice must designate either natural objects or permanent monuments, as required by U. S. Rev. Stats. 2324.—Brown v. Levan, 4 Idaho, 794, 46 Pac. 661.

Under Laws 1899, page 26, amending R. S. 3101, prescribing the requisites of a mining location and providing, inter alia, that the location notice shall contain "the distance and direction from the discovery monument to such natural object or permanent monument as will fix and describe in the notice itself the location of the claim," a location notice, which does not give the direction from the discovery monument to the natural object or permanent monument to which it is attempted to tie the location is fatally defective.—Clearwater Short Line Ry. v. San Garde, 7 Idaho, 106, 61 Pac. 137.

R. S. 3104, requiring an affidavit to be attached to a mining claim location notice, is not in conflict with U. S. Rev. Stats., section 2322.—Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936.

An affidavit to a mining location notice, sworn to before a deputy district recorder, is of no effect under R. S. 3104, as amended, since there is no such officer.—Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936.

Mining location certificates should be liberally construed.—Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955.

Under U. S. Rev. Stats. 2324, requiring a mining location notice to contain "such description of the claim or claims located by reference to some natural object or permanent monuments as will identify the claim" and R. S. 3102, requiring "such a description of the locality of the claim, by reference to natural landmarks or fixed objects, and contiguous claims if there be any, as to render the situation of the same reasonably certain from the letter of the notice itself," reference may be made, in a notice of location of mining ground, to a located mining claim, since a mining claim is a natural object or landmark or fixed object within the meaning of the statutes.—Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955.

An amended certificate filed under Sess. Laws 1899, page 237 may cure a defective or erroneous original certificate, and relates back to the date of the original, except when such original certificate is absolutely void, or when the rights of others have intervened between the date of the original and amended locations.—Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955.

Under Laws 1899, page 237, section 5, allowing the amendment of original mining location certificates, erroneous or defective location certificates may be amended, provided such amended location does not interfere with the existing rights of others at the time of the amendment.—Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955.

A mining location notice stated that the locators "have located 600 linear feet along this lode or vein of quartz, by 300 ft. on each side of the middle of the vein or lode making 600 ft. in width. This claim so located is hereby named the 'Bullion Mine' and is situated in the French mining district Owyhee county, Idaho territory, and is described as follows: Commencing at this stake and notice which is situated about 300 ft. in a northwesterly direction from the Minnesota mine. This is an extension of the Red Jacket mine; and running thence along the vein or lode in a southerly direction to similar stake and notice. We the undersigned, claim 600 linear ft. in a southerly direction from this stake and notice to a similar stake and notice. This claim is 600 ft. long." Held, that such notice complied with U. S. Rev. Stats. 2324 and R. S. 3102.—Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955.

Location certificates or notices are prima facie evidence of all the facts required to be stated therein by the statute, in so far as they contain those facts.—Bismarck etc. Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14.

The natural objects or permanent monuments, referred to in the statutes governing mining locations, are not required to be on the ground located, although they may be.—Bismarck etc. Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14.

Mining location notices and records should receive a liberal construction, to the end of upholding a location made in good faith.—Bismarck etc. Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14.

The description of certain mining claims in the location notices thereof held sufficient, under the facts and under R. S. 3102 and U. S. Rev. Stats. 2324, requiring notices of location to contain such a description of the locality of the claim by reference to natural landmarks or permanent objects as to render the situation of the same reasonably certain from the letter of the notice.—Bismarck etc. Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14.

Amended mining locations, made under Laws 1899, page 238, section 5, relate back to the date of the original locations where

they do not interfere with existing rights.—*Bismarck etc. Min. Co. v. North Sunbeam Gold Co.*, 14 Idaho, 516, 95 Pac. 14.

Where one had actual notice of the location and boundaries of certain mining claims, neither he nor his grantees will be permitted to take advantage of some technical defect in the location notices, it appearing that said claims were located in good faith.—*Bismarck Min. Co. v. North Sunbeam Co.*, 14 Idaho, 516, 95 Pac. 14.

The affidavit of the locator attached to a mining location notice, setting forth the fact that the ground was unoccupied mineral land of the United States at the time of his location, when introduced in evidence in an adverse suit, makes a prima facie case of such fact.—*Bismarck etc. Min. Co. v. North Sunbeam Gold Co.*, 14 Idaho, 516, 95 Pac. 14.

Where it appears that a mining claim has been located in good faith, if by any reasonable construction the language used in the location notice describing the claim and referring to natural objects and permanent monuments imparts knowledge of the location of such claim to a subsequent locator, it is sufficient.—*Snowy Peak Min. Co. v. Tamarack etc. Min. Co.*, 17 Idaho, 630, 107 Pac. 60; *Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

Under R. C. 3207, the location notice is not required to describe the exterior boundaries of the claim.—*Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

(f) Marking Boundaries on the Ground.

A mining location with such indistinct markings that its boundaries cannot be readily traced is void as against a subsequent location made in good faith by a person who, after reasonable diligence, cannot find such boundaries.—*Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

Where a discovery is made by a mining prospector of such a character as to entitle him to make a valid location on September 16th, and he sets his discovery stake on that day, partially stakes and marks his claim on the next day, and completes his staking and marking of boundaries according to law on September 18th, his discovery and location will date from September 16th.—*Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98.

Permanent monuments may be erected for the purpose of tying a mining claim to them, but the courses and distances from them to the discovery or corner stakes, or some other object on the ground, must be stated with reasonable accuracy.—*Brown v. Levan*, 4 Idaho, 794, 46 Pac. 661.

(g) Record.

Where one of several colocators of a mining claim records a location notice in the name of all the locators, it will be presumed, in the absence of proof to the contrary, that the written consent of his colocators had been

seen, and a minute thereof made by the recorder, before recording such notice.—*Kramer v. Settle*, 1 Idaho, 485.

A district recorder of a mining district, whether he be appointed by the county recorder or selected by the resident miners of the district, has no authority to appoint a deputy.—*Van Buren v. McKinley*, 8 Idaho, 93, 66 Pac. 936.

(h) Development, Improvement and Assessment Work.

Failure to perform work as abandonment or forfeiture. See post, I, (B), 3, (i).

Pleading, evidence and instructions. See post, I, (B), 5.

Fees of recorder for recording proof of labor. See Clerk of Court, Auditor and Recorder.

Under section 6 of the act relating to mining claims within the territory, the work to be done must be performed within the time limited by the act, as a condition precedent, before the title can vest, and it cannot be kept good thereafter unless further work be done, as required by section 7, which provides that the notice of location shall be renewed at least once in twelve months, and \$50 worth of work performed annually for each claim so located.—*Kramer v. Settle*, 1 Idaho, 485.

The fact that annual labor performed on a mining claim has not been paid for is immaterial.—*Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

Where mining works are idle, the time and labor of a watchman and custodian of the property in taking care of it is labor done on the claim within the meaning of U. S. Rev. Stats. 2324, requiring \$100 worth of annual labor to be performed.—*Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

Evidence in an action to quiet title held sufficient to support a finding that the annual assessment work on certain mining claims had been performed.—*Smith v. Mountain Gulch Co.*, 12 Idaho, 219, 85 Pac. 918.

Affidavits of labor on certain mining claims for certain years make a prima facie case on the question of annual assessment work, even though the proof of labor filed contains a mistake in the name of the person at whose instance the work was done.—*Bismarck etc. Min. Co. v. North Sunbeam Gold Co.*, 14 Idaho, 516, 95 Pac. 14.

Where sufficient annual assessment work is done on a particular claim to represent such claim, and contention is made by a junior locator that the work was done for the purpose of representing several claims, and for that reason was insufficient to represent the particular claim, in determining the sufficiency of the work the court will apply the labor shown to have been done to the particular claim upon which the work was done.—*Swanson v. Kettler*, 17 Idaho, 321, 105 Pac. 1059.

There is no implied contractual relation between cotenants, and one cotenant cannot bind

the other without his consent for the expenses incurred in developing or improving their common mining property; but the delinquent cotenant may ratify such expenditure, and thereby become liable for his proportional part thereof.—*McDaniel v. Moore*, 19 Idaho, 43, 112 Pac. 317.

Under U. S. Rev. Stats. 2324, where a co-owner of a mining claim fails to do his assessment work or fails to contribute his proportion of the expenditure required in doing such work, his co-owners who have performed the labor may give such delinquent personal notice in writing or by publication, as provided in said statute, and if at the expiration of ninety days such delinquent should fail or refuse to contribute his proportion of such expenditure, his interest in the claim shall become the property of his co-owners who made such expenditures, and the defaulting co-owner is not personally responsible for any part of the assessment work, under the provisions of said section.—*McDaniel v. Moore*, 19 Idaho, 43, 112 Pac. 317.

An applicant for patent to mineral lands is not required to do annual assessment work after making and submitting his final proofs on his patent application and the acceptance and allowance of the same and the issuance to him of a receiver's receipt from the local land office in conformity with the statute and the rules and regulations of the general land office.—*Batterton v. Douglas Mining Co.*, 20 Idaho, 760, 38 L. R. A., N. S., 1121, 120 Pac. 827.

Editorial Notes.

Effect of performance of, or contribution to, assessment work by one not the owner of the legal title, nor his agent, to prevent forfeiture of mining claim: 9 L. R. A., N. S., 1136.

(i) Abandonment, Forfeiture and Relocation.

In an action to recover a quartz claim, acts of abandonment on the part of plaintiffs are a good defense.—*Atkins v. Hendree*, 1 Idaho, 95.

The failure to perform the work in a mining claim required by law amounts to an abandonment of the claim, and thereupon it may be occupied by another.—*Kramer v. Settle*, 1 Idaho, 485.

A party cannot make a valid relocation of mining claims legally possessed by another, until the owner's rights have been abandoned, forfeited or otherwise ended.—*Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

A person sustaining a fiduciary relation in respect of the owner of a mining claim cannot defeat the rights of his principal by relocating it for himself; and the benefits of such a relocation accrue to the owner.—*Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

Where one on the ground undertakes to procure a purchaser for a mining claim, owned by a nonresident who has no other agent to look after such claim, such person occupies

a fiduciary relation toward the owner.—*Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

Mineral ground covered by a valid location becomes segregated from the public domain and is the property of the locator, and, so long as the locator complies with the laws of the United States and the state and local regulations, such locator has the exclusive right and enjoyment to all the surface included within the lines of the location against all the world; and during such time such ground so segregated is not open to location by another, and any relocation of such ground during such time is void.—*Swanson v. Kettler*, 17 Idaho, 321, 105 Pac. 1059.

A mineral location was made covering in part land already covered by a valid mineral location. After the junior location was made, the senior location became abandoned and forfeited, after which the ground embraced in the senior location was located by a third party. Held, that the title and right of possession of the ground in conflict between the junior locator and such third party were with the third party.—*Swanson v. Kettler*, 17 Idaho, 321, 105 Pac. 1059.

A senior locator, possessed of a paramount right in mineral land for which a patent is sought, may abandon such right, and thereby render the ground covered by such location subject to relocation before the expiration of the statute of limitations prescribed, within which the annual labor must be performed.—*Swanson v. Kettler*, 17 Idaho, 321, 105 Pac. 1059.

A forfeiture of a mining claim does not occur by the mere failure to perform the assessment work for any particular year. To complete the forfeiture there must have been a relocation of such ground before a resumption of work. The right of the original location is terminated only by the entry of a new one, and resumption of work prior to the lawful inception of an intervening right prevents forfeiture.—*Snowy Peak Min. Co. v. Tamarack & Chesapeake Min. Co.*, 17 Idaho, 630, 107 Pac. 60.

Editorial Notes.

Abandonment and forfeiture of mining claims: 87 Am. St. Rep. 403.

Relocation of mining claim: 68 L. R. A. 833.

(j) Conflicting Locations.

See, also, ante, I, (B), 3, (i).

In an action to recover a quartz claim defendants may show that the lode which they claim is separate and distinct from the one held by plaintiffs.—*Atkins v. Hendree*, 1 Idaho, 95.

The claimant of the quartz claim is allowed to hold but one ledge by location, but the fact that other ledges may exist within the limits of such claim must first be established before a subsequent claimant has any lawful right to pass into the boundaries of a prior claim.—*Atkins v. Hendree*, 1 Idaho, 95.

A subsequent valid location of a mining claim in this state cannot be made on mineral land that is already covered by a valid location.—*Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

Under the evidence in an adverse suit, held, that the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, and that no technicalities will be resorted to to sustain his relocation of the same ground.—*Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

Editorial Notes.

Cross or intersecting lodes, what included in mineral patents and what rights vest in the patentee: 83 Am. St. Rep. 41.

4. Rights Acquired.

Where plaintiffs perform the acts required by law to locate a quartz claim, except the labor, and the year had not expired in which this could be done and the defendants took possession of the ground, they were trespassers, and the plaintiffs were entitled to their remedy to recover possession.—*Atkins v. Hendree*, 1 Idaho, 95.

Where a legal location of a quartz claim has been made, being a space of two hundred feet in length and fifty feet on each side of his stakes, the claimant becomes the owner as against any other claimant of the soil embraced in those limits.—*Atkins v. Hendree*, 1 Idaho, 95.

The right by which a mining claim is held before patent is a possessory right, which is acquired by discovery, location and compliance with the laws of Congress, and local laws or customs not in conflict with the laws of Congress.—*Burke v. McDonald*, 2 Idaho, 339, 13 Pac. 351.

A tunnel located and run for the development of veins and lodes, pursuant to U. S. Rev. Stats. 2323, becomes a mining claim, and entitles the owner thereof to make an adverse claim against one claiming to locate upon the line of the tunnel, and while the same was being prosecuted with reasonable diligence and such tunnel owner is entitled to proceed under U. S. Rev. Stats. 2326, providing for the prosecution of adverse claims. *Back v. Sierra Nevada Con. Min. Co.*, 2 Idaho, 420, 17 Pac. 83.

Under U. S. Rev. Stats. 2322, an owner of a mining claim has no right to follow a vein into an adjoining claim unless such vein has its apex within his own side lines.—*Gilpin v. Sierra Nevada etc. Co.*, 2 Idaho, 696, 23 Pac. 547, 1014.

Under United States Rev. Stats. 2322 providing that the locator or owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location," etc., such locator or owner may enjoin the removal of timber therefrom until the question of his

title is settled.—*Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67.

Where a person has been in open, notorious and adverse possession of unpatented mining property for more than five years, claiming possession under a deed thereto, an action against him to recover possession is barred by R. S. 4036.—*Bradley v. Johnson*, 11 Idaho, 689, 83 Pac. 927.

One who asserts his right to a mineral claim by adverse possession must show compliance with the statute in the matter of discovery and the performance of the annual assessment work, and, before he can acquire a patent therefor, must also show that he has done the required amount of work on such claim to entitle him to a patent therefor.—*Humphreys v. Idaho Gold Mines etc. Co.*, 21 Idaho, 126, 120 Pac. 823.

Under U. S. Rev. Stats. 2332 the claimant to mineral lands of the United States who has been in the open, exclusive adverse possession of a claim for a continuous period equal to that required by the local statute of limitations governing adverse possession of real estate, is relieved of the necessity of making proof of posting and recording a notice of location and such other proofs as are usually furnished by the county recorder; or, in other words, he is relieved of furnishing the evidence of record title.—*Humphreys v. Idaho Gold Mines etc. Co.*, 21 Idaho, 126, 120 Pac. 823.

Editorial Notes.

What possession by owner of surface estate constitutes adverse possession of severed mineral estate: 140 Am. St. Rep. 951.

Acquisition of title to mines by adverse possession: Ann. Cas. 1912D, 1199.

5. Actions to Determine and Establish Rights.

(a) Nature and Form of Action.

An action to quiet title to mining claims was removed to the federal court by defendant and thereafter remanded to the state court. While the suit was pending in the federal court, defendant made application for a patent to the mining ground involved in the suit, and plaintiff filed an adverse claim thereto under U. S. Rev. Stats. 2326. After the case went back to the state court plaintiff obtained leave to file a supplemental complaint, reaffirming the allegations of the original complaint and setting out the application for the patent, the adverse claim of plaintiff thereto and that such supplemental complaint was in support of such adverse claim. Held, that such suit may stand as a suit to support the adverse claim required by U. S. Rev. Stats. 2326, though begun before the application for patent.—*Jones v. Pacific Dredging Co.*, 9 Idaho, 136, 72 Pac. 956.

Under R. C. 4538, an action to quiet title may be brought by any person against another who claims an estate or interest in mining

property adverse to him for the purpose of determining such adverse claim.—*Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.

Editorial Notes.

Adverse: 50 L. R. A. 212.

(b) Right of Action and Defenses.

In an action brought under U. S. Rev. Stats. 2326 and the act of 1887, amendatory thereof, in support of an adverse mining claim, it is not enough that one claimant should show a superior right or title, as against the other, but one must show a clear right, as against the government, to a patent from the United States to the claim in dispute or some part thereof, before either party can prevail in the action.—*Rosenthal v. Ives*, 2 Idaho, 265, 12 Pac. 904.

In proceedings under U. S. Rev. Stats. 2325, 2326, to determine the right of adverse claimants to a mineral location, actual possession is not a material question.—*Burke v. McDonald*, 2 Idaho, 339, 13 Pac. 351.

In an adverse suit, the plaintiff must recover upon the strength of his own title, and not by reason of the weakness of the title of the applicant for patent; and the fact that a third person has made a subsequent location of all or a part of the territory covered by the location, for which patent is sought, will not avail the plaintiff in an adverse suit, not based upon such subsequent location.—*Snowy Peak Min. Co. v. Tamarack etc. Min. Co.*, 17 Idaho, 630, 107 Pac. 60.

(c) Injunction.

See, also, post, II, (A).

In mining cases an injunction pendente lite, upon proper application, should be granted, unless it appears that there is no reasonable ground for the assertion of title in the plaintiff.—*Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 280, 29 Pac. 932.

In an action by one mining company against another to restrain the working of the mine claimed to belong to the plaintiff, it is within the discretion of the court to substitute an indemnifying bond in lieu of the granting an injunction.—*Stewart Mining Co. v. Ontario Mining Co.*, 23 Idaho, 280, 129 Pac. 932.

(d) Inspection and View.

A complaint alleging that the plaintiff is a judgment creditor of the defendant, and has caused an execution to issue upon such judgment, and to be levied upon an interest of the defendant in a mining claim, does not show a state of facts sufficient to entitle the plaintiff to an order under R. C. 4542 permitting plaintiff to examine and inspect such property prior to the execution sale.—*Bacon v. Federal Mining etc. Co.*, 19 Idaho, 136, 112 Pac. 1055.

(e) Parties and Pleading.

Where a complaint to determine adverse claims to a mineral location alleges posses-

sion by plaintiffs when the action was commenced and also alleges ouster by defendants prior thereto, and continued possession by them, and such inconsistent averments are not questioned by motion or demurrer before trial, objection thereto will be deemed waived if the complaint states a cause of action.—*Burke v. McDonald*, 2 Idaho, 339, 13 Pac. 351.

In an action between claimants to determine the right of possession to a mining claim the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, including an allegation that the plaintiffs are citizens or have declared their intention to become such.—*Rosenthal v. Ives*, 2 Idaho, 265, 12 Pac. 904.

In an action for trespass on mining ground and for damages, where the legal title to the ground is in the United States, and the right of possession is made a material issue by the pleadings, the plaintiff, in order to recover, must plead and prove that he is a citizen of the United States or that he has declared his intention to become such.—*Bohanon v. Howe*, 2 Idaho, 453, 17 Pac. 583.

In an action of adverse claim on a mining location, it is a necessary allegation that such claim has been filed in the land office, but it does not necessarily follow that such allegation must be proven if not denied.—*Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

A complaint in an action under U. S. Rev. Stats. 2326 to contest an application for a patent for mining land must show that the plaintiff has filed his adverse claim in the land office within sixty days of the publication of the notice of application for patent, and also that said suit was brought in support of such adverse claim within thirty days of the filing of the same.—*Cronin v. Bear Creek Gold Min. Co.*, 3 Idaho, 614, 32 Pac. 204.

A complaint in an action under U. S. Rev. Stats. 2326 to contest an application for a patent for mining land must contain such a description of the property as will enable the court to determine to what extent, if at all, the claim of the plaintiff is covered by the claim of defendant upon which patent is applied for.—*Cronin v. Bear Creek Gold Min. Co.*, 3 Idaho, 614, 32 Pac. 204.

Under Laws 1899, page 70, sections 1, 2, providing that aliens not Chinese or persons of Mongolian descent may acquire mining lands, it is not necessary, in an action to quiet title to mining claims, to allege the citizenship of plaintiff as required in an action on an adverse claim under U. S. Rev. Stats. 2326, after application has been made for a patent, such laws not applying thereto.—*Buckley v. Fox*, 8 Idaho, 248, 67 Pac. 659.

(f) Evidence.

Presumptions arising from existence of patent. See post, I, (C).

Miners' customs and regulations once adopted are presumed to be existing and in force until the contrary is proven; and in actions concerning mining claims under Code of Civil Procedure, section 486, proof thereof

must be admitted, and, when not in conflict with the laws of the territory, must govern the decision of the action.—*Riborado v. Quang Pang Min. Co.*, 2 Idaho, 144, 6 Pac. 125.

In an action to determine the right of possession to disputed mining ground, the court excluded evidence on the part of defendant to show that a compromise point was erected by agreement, not for the purpose of establishing a location, but to show where the location was, as it was then understood by all the parties. The court permitted other evidence referring to the existence and location of this compromise monument. Held, that such evidence did not seek to establish the location of a mining claim by parol, and was admissible.—*Stemwinder Min. Co. v. Emma etc. Min. Co.*, 2 Idaho, 456, 21 Pac. 1040.

In an action in support of an adverse mining claim, any evidence tending to show the right of plaintiff to possession of the land is competent.—*Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

A mining location certificate is admissible in evidence unless its failure to make intelligent reference to natural objects or permanent landmarks, is apparent on its face.—*Morrison v. Regan*, 8 Idaho, 291, 67 Pac. 955.

Evidence of the indications miners had successfully followed in the same district and on contiguous ground in attempting to find a lode or mineral deposit is admissible on the question of whether or not a valid mineral discovery has been made by one who attempted to locate a lode claim on similar indications on adjacent ground.—*Ambergis Mining Co. v. Day*, 12 Idaho, 108, 85 Pac. 109.

Where one miner has discovered what he considers mineral indications and deposits and has followed up that discovery by staking his claim and doing the necessary location work, and subsequently another miner makes a discovery and locates all or a part of the ground covered by the prior location, and contests the senior location, and in such contest shows that the ground does in fact contain valuable mineral deposits, but at the same time contends that the senior locator had not made a mineral discovery, the courts will not examine the evidence of the senior discovery with very great strictness.—*Ambergis Mining Co. v. Day*, 12 Idaho, 108, 85 Pac. 109.

Where a litigant introduces evidence of the indications, conditions and formation existing in certain rich and valuable mining property over which he has absolute and exclusive control, and such evidence is for the purpose of comparison with other mining property involved in the litigation, it is error not to permit the opposing party to examine such property for the purpose of rebutting the evidence of comparison, and if the litigant is not willing that such examination be made, the evidence should be excluded.—*Ambergis Mining Co. v. Day*, 12 Idaho, 108, 85 Pac. 109.

Evidence held to show that the annual assessment work on certain mining claims for

the year 1902 was performed.—*Smith v. Mountain Gulch Min. etc. Co.*, 12 Idaho, 219, 85 Pac. 918.

The issues made by the pleadings were, whether the defendant had performed or paid his part of the assessment work on said mining claim, and whether a patent was issued to all of the parties to this suit for said mining claim by the government. Held, that the evidence shows or tends to show that the defendant failed to pay for his proportional part of the assessment work, at least for the years 1904 and 1905, and for his proportional part of the expense of procuring a patent, and the presumption arising from the issuance of a patent is that all of the requirements of the law in regard to its issuance have been complied with.—*McDaniel v. Moore*, 19 Idaho, 43, 112 Pac. 317.

One who claims the right to take ore bodies from beneath the surface boundaries of a mining claim not his own, under and by reason of the extralateral rights provision of U. S. Rev. Stats. 2322 (U. S. Comp. Stats. 1901, p. 1425), on the ground that the vein has its apex within the surface boundaries of his own location, should be required to prove clearly and satisfactorily to the court that he has the apex of such vein within the surface boundaries of his own location before being awarded the right to remove the ores from beneath the surface of the neighboring claim. *Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 724, 132 Pac. 787.

(g) Trial.

An instruction was requested that "work done outside of a mining claim, and with direct reference to the claim, may be considered as work done on the claim." The court added: "The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim, and no other," and gave the instruction so qualified. Held, that this was not erroneous.—*Kramer v. Settle*, 1 Idaho, 485.

Where an action to recover mining property is brought pursuant to U. S. Rev. Stats. 2326, and plaintiffs fail to show a valid location, a nonsuit is properly granted, but under act of March 3, 1881, no costs should be allowed where the title to the ground in controversy is not established by either party.—*Lalande v. McDonald*, 2 Idaho, 307, 13 Pac. 347.

In proceedings under U. S. Rev. Stats. 2325, 2326, to determine the right of adverse claimants to a mineral location, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, and the defendant does not challenge the complaint by motion or otherwise, but consents to calling a jury and proceeds to trial as in action at law, and both parties adduce their evidence on the question of fact involved, it is then too late for the plaintiff to move to have the case declared a proceeding in equity, and to have it decided as such, without the intervention of a jury.—*Burke v. McDonald*, 2 Idaho, 339, 13 Pac. 351.

In proceedings under U. S. Rev. Stats. 2325, 2326, to determine the right of adverse claimants to a mineral location, the right of possession of the ground in dispute is the gist of the action, and a jury may be demanded in such action as a matter of right.—Burke v. McDonald, 2 Idaho, 339, 13 Pac. 351.

In an action to determine the right to the possession of a mining claim on an adverse claim under the United States statutes, the court must find that the person in whose favor judgment is rendered was a citizen or had declared his intention to become such, even though such allegation is admitted in the pleadings.—Rosenthal v. Ives, 2 Idaho, 265, 12 Pac. 904; Burke v. McDonald, 2 Idaho, 679, 33 Pac. 49.

Under act of Congress March 3, 1881, providing that, if "title to the ground in controversy shall not be established by either party, the jury shall so find," the verdict in an action of adverse claim for mining property must show, not only that the successful party is entitled to the possession as against his opponent, but also as against all others, including the government and by a compliance with all the laws applicable.—Burke v. McDonald, 2 Idaho, 679, 33 Pac. 49.

Where the complaint alleges that a mining claim was located on behalf of the owner by duly authorized agents, and the answer admits the fact, it is error for the court to refuse to give an instruction to the effect that one might initiate the location of a mining claim through an agent.—Schultz v. Keeler, 2 Idaho, 568, 21 Pac. 418.

The sufficiency of mining location certificates with reference to natural objects or permanent monuments referred to therein is a question of fact.—Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955.

Whether mining location notices and descriptions of the mining claims were sufficient to apprise other prospectors of their precise location is a question of fact and not of law.—Bismarck etc. Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14.

The finding of the court to the effect that the respondent had performed the assessment work on the M. fraction for nine years, and that he had worked and was in possession of said fraction for more than five years, and that during said period of time there was no adverse claim made to said premises or to any part thereof, is fully sustained by the evidence.—Flynn Group Mining Co. v. Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851.

(h) Judgment and Review.

Under R. C. 4538, providing that an action to quiet title may be brought by any person against another who claims an estate or interest in any real property adverse to him for the purpose of determining such adverse claim, it was not error for the trial court to render and enter judgment in this case enjoining the appellant from "asserting any right, title, or interest of, in, or to the said

Ontario mining claim, or the ores or minerals therein, adverse to the defendant Ontario Mining Company."—Stewart Min. Co. v. Ontario Min. Co., 23 Idaho, 724, 132 Pac. 787.

(C) PATENTS.

Enforcement of grub-stake agreement. See *Specific Performance*, II.

In the absence of proof as to the course of the discovery vein on a patented mining claim, the existence of the patent to the claim raises the presumption that the location was laid along the course of the vein, and that the vein or lode crosses the end lines of the claim as marked on the ground, and that the side lines thereof are laid in the direction of the strike or onward course of the vein.—Stewart Min. Co. v. Ontario Min. Co., 23 Idaho, 724, 132 Pac. 787.

Editorial Notes.

Patents for mineral lands, what included therein: 58 Am. St. Rep. 263.

Rights of applicant for patent of mineral land under final receipt issued on void application: Ann. Cas. 1912D, 1317.

II. TITLE, CONVEYANCES AND CON-TRACTS.

Specific performance of contracts. See *Specific Performance*.

(A) RIGHTS AND REMEDIES OF OWNERS.

Right to injunction. See, also, ante, I, (B), 5, (c).

Where a party alleges that acts are being committed and threatened to be continued in violation of his rights, which will cause waste, great or irreparable injury, he is entitled under R. S. 4288, to a writ restraining the commission of such acts, particularly where the subject matter of the litigation is a mine and the act complained of is the removal of the ore therefrom, by underground workings, which would render the mine worthless.—Gilpin v. Sierra Nevada etc. Min. Co., 2 Idaho, 696, 23 Pac. 547, 1014.

Where a party makes a prima facie case that he is in possession of a claim, and his surface location shows a vein the apex of which is within the lines of the claim, and carries valuable ore, he is entitled to an injunction restraining the owners of contiguous claims from extracting ore from a vein within his lines until the matter can be determined on its merits.—Gilpin v. Sierra Nevada etc. Min. Co., 2 Idaho, 696, 23 Pac. 547, 1014.

Under Laws 1889, page 70, section 2, providing that aliens not Chinese or persons of Mongolian descent, may acquire, take, hold and dispose of mining claims, it is not necessary to allege or prove the citizenship of plaintiff in an action to quiet title to a mining claim.—Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659.

Where the Stewart Mining Company owns the Senator Setwart Fraction mining claim,

and it is claimed that a vein which apexes in said mining claim extends on its dip outside of the exterior boundaries of said claim and underneath the surface boundaries of the Ontario mining claim, and the Ontario Mining Company is working said Ontario mining claim and extracting large amounts of ore therefrom, which is claimed by the Stewart Mining Company as a part of the Stewart Fraction vein on its dip, and an action is brought to determine the rights of the parties, and application is made for an injunction pendente lite, the action of the court in refusing to grant such injunction will not be disturbed, unless it clearly appears that there has been an abuse of the discretion of the court in said matter.—*Stewart Min. Co. v. Ontario Min. Co.*, 23 Idaho, 280, 129 Pac. 932.

(B) CONVEYANCES IN GENERAL.

Sufficiency of delivery of deed. See *Deeds, I, (D)*.

Verbal transfers of mining claims, followed by actual change of possession, according to the local customs of miners previous to July 26, 1866, are valid.—*Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

Evidence of local customs of miners, as to the manner of transfers of interests in mining claims, previous to July 26, 1866, is admissible.—*Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

A deed conveying "all of the property, real, personal and mixed, belonging to said S., and located in the county of Bingham, Idaho," conveys the title to mining claims in said county owned by S. at the time of the execution of the deed.—*Idaho Gold Min. Co. v. Union Min. etc. Co.*, 5 Idaho, 107, 47 Pac. 95.

Where a contract for the purchase of mining claims provides that the purchaser shall work the mines, pay a royalty and pay the purchase price at a specified time and that the seller shall furnish an abstract of title and place in escrow a deed for the property, and time is expressly made of the essence of the contract, the seller is excused from furnishing the abstract and deed on default of the purchaser to perform the conditions of the agreement within the time specified.—*Idaho Gold Min. Co. v. Union Min. etc. Co.*, 5 Idaho, 107, 47 Pac. 95.

Under R. S. 2825, an easement of a right of way for a mining ditch through lands of another is real estate.—*Welch v. Garret*, 5 Idaho, 639, 51 Pac. 405.

The testimony of experts as to the value of mines is merely speculative and should not be given much weight, when considered with evidence showing how the owners themselves valued the mines as shown by actual sales made.—*Stewart v. Hauser*, 9 Idaho, 53, 72 Pac. 719.

Where the evidence showed that defendant executed his note, due in one year, and secured it by mortgage on unpatented mining property, and before it was due notified the payee that he was unable to pay it, and left

the state, the note and the mining deed having been placed in escrow with the condition that, if the maker of the note paid it, it should be returned to him with the deed, otherwise the deed was to be surrendered to the payee, and the maker did not demand the deed or offer to pay the note until twelve years after the payee had done the annual assessment work on the property and a large amount of development work, he is bound by his laches, and a cross-complaint by the maker of the note in an action by the payee of the note to remove a cloud attempted to be cast upon the title by the maker should be dismissed.—*Bradley v. Johnson*, 11 Idaho, 689, 83 Pac. 927.

Where a purchaser has heard that parties other than the vendor are asserting some claim to or interest in the property, and makes no investigation or inquiry as to the validity of such claim except from the vendor, and, on being assured by him that no claim exists, consummates the deal and secures a contract for a "grant" conveyance, he does not show such a degree of diligence and care in discovering the condition of the title as to enable him to defeat an action on the contract on the plea of false and fraudulent representations as to condition of title.—*Moore v. Pooley*, 17 Idaho, 57, 104 Pac. 898.

A contract provided that a specified sum of money was to be paid and a specified number of shares of the stock of a corporation was to be delivered within sixty days to the grantors named therein. The contract recited, "We hereby sell and dispose of all our right, title and interest in and to the following claims," describing certain mining claims, "to have and to hold the same free and clear of encumbrances, claims or liens, and the said H. and associates agree to do all assessment work and open up the claims to the best interests of the company." Held, that the contract was an option to purchase or an agreement to sell on certain conditions and was not an absolute sale.—*Ferguson v. McGuire*, 17 Idaho, 141, 104 Pac. 1028.

The stipulation in the foregoing contract to perform certain annual assessment work upon said claims was a part of the consideration for said contract.—*Ferguson v. McGuire*, 17 Idaho, 141, 104 Pac. 1028.

(C) LEASES, LICENSES AND CONTRACTS.

Plaintiff agreed with defendants, the owners of a certain mining bond, to furnish money to carry out the terms of the bond in consideration of the agreement of defendants to admit him as a one-third partner under such bond; and defendants obligated themselves to repay to plaintiff two-thirds of all money advanced by him. At the time the contract was made, defendants were working the mines and the money advanced by plaintiff went partly to the owners of the mines and partly to one of defendants for work done in the mines. Held, that the contract contemplated that the mines should be worked and therefore that plaintiff could

recover moneys advanced for that purpose.—*Haskins v. Curran*, 4 Idaho, 573, 43 Pac. 559.

Where the prospective purchaser of a mining claim has defaulted in the conditions of his contract by nonperformance thereof and time is of the essence of the contract, and thereafter with the knowledge of such purchaser the owner enters into a contract for the sale of the property with third persons, who expend several thousand dollars in developing and improving the property without objection by such defaulting purchaser, there is both a forfeiture and abandonment by him precluding him from enforcing his contract by reason of his want of vigilance and activity.—*Idaho Gold Min. Co. v. Union Min. etc. Co.*, 5 Idaho, 107, 47 Pac. 95.

Where a contract to purchase a mining claim makes time of the essence of the contract, the contract may be forfeited on failure of the purchaser to perform the conditions of the contract within the time specified.—*Idaho Gold Min. Co. v. Union Min. etc. Co.*, 5 Idaho, 107, 47 Pac. 95.

W. and B. entered into an agreement whereby B. secured an option to purchase certain mining property, and it was provided that the first payment of \$500 should be paid "on acceptance of this bond by said second party's eastern principals, and to be paid by 1st of April, 1903," and the agreement also contained a clause providing for abandonment and forfeiture of the option by B., and after the option had been forfeited W., B. and C. indorsed thereon an agreement in the following words: "The time of the payment of the first \$500 herein provided for is hereby extended thirty days and the said second party agrees that the same shall be paid on or before May 4, 1903. April 4, 1903"—and, after the date on which the payment fell due under the latter agreement, B. and C. abandoned and forfeited the option and W. sued them to recover the \$500 payment. Held, that the latter agreement was an unconditional and absolute agreement to pay the sum specified therein as the first payment.—*Williams v. Brooks*, 11 Idaho, 539, 83 Pac. 610.

Editorial Notes.

Right of lessee under mining lease to sublet premises: Ann. Cas. 1913B, 1102.

Mining lease as sale of land: 9 Ann. Cas. 524.

Nature of interest in lease: 25 L. R. A. 226.

When instrument creating right in minerals in land is to be regarded as a lease as distinguished from a license: 18 L. R. A. 492; 26 L. R. A., N. S., 614.

III. OPERATION OF MINES, QUARRIES AND WELLS.

Duties and liabilities, as employers, of those working mines. See Master and Servant.

Minority interest working mining claim and mingling ore with ore from another claim. See Confusion of Goods.

(A) STATUTORY REGULATION.

(No paragraphs.)

(B) MINING PARTNERSHIPS AND COMPANIES.

A corporation whose charter authorizes it to engage in the business of mining and smelting is not authorized to purchase choses in action, as such act is not necessary to the business of mining and smelting.—*Salmon River Min. etc. Co. v. Dunn*, 2 Idaho, 26, 3 Pac. 911.

An accounting of work done and metals extracted may be compelled by either of the parties holding a majority or minority interest in a mine.—*Hawkins v. Spokane etc. Min. Co.*, 3 Idaho, 241, 28 Pac. 433.

Plaintiff was the owner of a seven-eighths interest in a placer mining claim. Defendant owned a one-eighth interest therein. Held, that plaintiff had the right to control the means used and the method adopted in working said mine and was entitled to an injunction to restrain defendant from working the claim, except in the manner directed by defendant.—*Hawkins v. Spokane etc. Min. Co.*, 3 Idaho, 241, 28 Pac. 433; *Hawkins v. Spokane etc. Min. Co.*, 3 Idaho, 650, 33 Pac. 40.

While a partnership for the purpose of dealing in mining property may be proven by parol, the evidence to establish such partnership, when denied, must be clear and certain. *Mayhew v. Burke*, 3 Idaho, 333, 29 Pac. 106.

A partnership for the purpose of dealing in mining properties may be proven by parol. *Mayhew v. Burke*, 3 Idaho, 333, 29 Pac. 106.

Where it is sought to establish a mining partnership by parol testimony, it must appear, in order to take the case out of the operation of the statute of frauds, that the lands in controversy were purchased, or to be purchased, with the funds of the partnership. *Mayhew v. Burke*, 3 Idaho, 333, 29 Pac. 106.

Evidence examined and held insufficient to establish a mining partnership.—*Mayhew v. Burke*, 3 Idaho, 333, 29 Pac. 106.

Plaintiff agreed with defendants, the owners of a certain mining bond, to furnish money to carry out the terms of the bond in consideration of the agreement of defendants to admit him as an equal one-third partner in and under said bond, and in and to all property, rights, title and interest therein; and defendants obligated themselves to repay on or before a specified date, two-thirds of all moneys so advanced. Plaintiff advanced certain moneys and the parties actually engaged in working the mines. Held, that a mining partnership was formed. *Haskins v. Curran*, 4 Idaho, 573, 43 Pac. 559.

One partner in a mining claim has no right to use the partnership funds on his own motion, without authority of the other partners, to purchase an outstanding mortgage or trust deed given by his copartner on the mining

property, cause it to be foreclosed by notice and sale, to be bid in in the name of his agent, and then transferred to himself or to himself and another partner, and thereby obtain title in himself.—*Brown v. Bryan*, 5 Idaho, 145, 51 Pac. 995; 6 Idaho, 1, 51 Pac. 995.

An oral "grubstake" contract performed on plaintiff's part will be enforced by a court of equity when established.—*Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196.

A complaint to enforce an oral "grubstake" mining contract charged the defendants with fraud and conspiracy to cheat and defraud plaintiff of his interest in the claims and the court found for plaintiff on this issue. It was shown that one of the defendants prior to the commencement of the action had parted with practically all of his interests, while E., the other defendant, still retained an interest in all the properties in question. Held, that a decree that plaintiff have a one-sixth interest in each of the properties to be taken out of any interest retained by E. where the other defendant had parted with his interest and was not able to respond to the order and decree of the court, was proper.—*Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196.

The rule that one who seeks to establish an interest or trust in real property contrary to the terms of an express writing is required to produce more than a bare preponderance of evidence and must make out his case clearly and satisfactorily beyond a reasonable doubt is not controlling in the case of "grubstake" agreements, in which one of the parties seeks to enforce his right to an interest in mining claims located by another party thereto, under a parol "grubstake" contract.—*Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196.

Under R. S. 3300 to 3309, relating to mining partnerships, such co-owners as do not engage in the business of working the mine are not amenable to the law of mining partnership, but must be dealt with simply as cotenants.—*Madar v. Norman*, 13 Idaho, 585, 92 Pac. 572.

Under R. S. 3300 to 3309, in order to constitute a mining partnership, it is essential that the co-owners actually engage in the working of the mine or in the business of operating the mine, cotenancy alone not being sufficient to make the tenants mining partners.—*Madar v. Norman*, 13 Idaho, 585, 92 Pac. 572.

Editorial Notes.

Mining partnerships: 83 Am. Dec. 104.

Partnership in mines, relations of the partners: 28 Am. St. Rep. 488.

(C) RIGHTS AND LIABILITIES INCIDENT TO WORKING.

Constitutionality of law authorizing attorney's fee in lien case. See *Constitutional Law*, X.

In the absence of any agreement, regulation or custom authorizing it, one person has no

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right to run his tail-race or sluicing flume on the dumping ground of another who had a prior right thereto, and no damage can be claimed of the latter for filling up such race or flume, if he do not prevent the flume owner from dumping on his own ground.—*Ralston v. Plowman*, 1 Idaho, 595.

It is erroneous to instruct a jury to find a verdict according to mining customs "if such customs are not contrary to law," since the jury cannot determine whether or not such customs are contrary to law.—*Ralston v. Plowman*, 1 Idaho, 595.

Parol evidence cannot be given of a mining custom, when there are written rules or regulations of the mining district in force on the same subject.—*Ralston v. Plowman*, 1 Idaho, 595.

A statement in a notice of a lien that the materials furnished and the work and labor performed were so furnished and done and performed upon a certain mining claim, "the property of the defendant," is not a sufficient compliance with the provisions of R. S. 5130. *Steel v. Argentine Min. Co.*, 4 Idaho, 505, 95 Am. St. Rep. 144, 42 Pac. 585.

Where one unlawfully ousts the owner of mining claims and in working the same creates debts, such debts are not legal claims for liens on the property.—*Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 96 Am. St. Rep. 290, 59 Pac. 533.

The provisions of the lien law must be liberally construed to effect their object.—*Phillips v. Salmon River Min. etc. Co.*, 9 Idaho, 149, 72 Pac. 886.

Where a claim for lien is filed against three mining claims owned by the same person and the claim does not specify the amount due on each claim as required by Laws 1899, page 148, the lien claim is not thereby rendered void, but simply postponed to other lien claims.—*Phillips v. Salmon River Min. etc. Co.*, 9 Idaho, 149, 72 Pac. 886.

Where three placer mining claims are owned by one person and worked as one mine under one name, and a claim for a lien for work performed on such claims designated the mine by such name, it is error to reject any evidence tending to show that said mining claims were commonly known by that name.—*Phillips v. Salmon River Min. etc. Co.*, 9 Idaho, 149, 72 Pac. 886.

Under R. S. 3445 providing that every person who while in lawful possession of an article of personal property renders any service to the owner thereof by labor or skill, employed for the protection, improvement, etc., thereof, has a special lien thereon, dependent on possession for the compensation due him for such service, one who is placed in charge of real and personal mining property has a lien for his services on the personal property in his possession.—*Idaho Comstock etc. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975.

Where the evidence in a mining lien suit showed that four claims were used, worked and operated together as one mine, under one name, which name was also commonly ap-

plied by the owners and the public to the mill on the premises, a finding that the four claims constituted one mine and were "run, operated and mined and worked as a mine," is supported by the evidence.—*Thompson v. Wise Boy Min. etc. Co.*, 9 Idaho, 363, 74 Pac. 958.

Under R. S. 5125 granting a lien to every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, etc., or who performs labor in any mining claim or mine, one who performs labor in a quartz mill located upon a mine and belonging to the mine owners under employment by them, is entitled to a lien for such services.—*Thompson v. Wise Boy Min. etc. Co.*, 9 Idaho, 363, 74 Pac. 958.

Where F., the owner of mining claims and property, gave to a corporation an option to purchase the same and directed the agent of the corporation to post notice on the property, which notice contained the statement that the company was the owner of the mines, F. knew the contents of such notice and knew that miners and laborers were working in the mines and for the company on the faith of such notice, and F. permitted such notice to remain on the property during all the time the men were so employed and did not inform them as to the true ownership of said property and the men knew he was cognizant of the notice and its contents, F. will be estopped to claim that the record of his title imparted constructive notice to the miners and laborers and such title will be no defense in a suit to enforce their liens on the property.—*Eastwood v. Standard Mines etc. Co.*, 11 Idaho, 195, 81 Pac. 382.

Where a mining company had an open and running account with a mine and smelter supply company, and, for the purposes of procuring materials and supplies in order to construct mills and equipments for the operation of the mines, they made arrangements with the supply company, whereby the mining company should have an extended credit sufficient to cover the materials and supplies necessary in the construction of the proposed works and improvements, and nothing was said with reference to the general open account that had been running, and there was no further understanding with relation thereto, it will be presumed that the extended credit was intended to cover all future purchases and account as one account thereafter, rather than that there should thereafter be two accounts and two credits running at one and the same time; and, in the absence of proof and showing to the contrary, a lien should be allowed for the whole account as one continuing contract or transaction for the one general purpose.—*Mine etc. Co. v. Idaho Consol. Mines Co.*, 20 Idaho, 300, 118 Pac. 301.

A lien for materials and supplies furnished in the construction, alteration, or repair of buildings or mining structures or improvements relates back to the date of the com-

mencement to furnish the materials therefor. *Mine etc. Co. v. Idaho Consol. Mines Co.*, 20 Idaho, 300, 118 Pac. 301.

Editorial Notes.

Petroleum and natural gas as minerals: Ann. Cas. 1913B, 1214; 20 Ann. Cas. 937.

MISTAKE.

Affecting validity of contract. See Contracts, I, (E).

Correction of, in bill of exceptions. See Exceptions, Bill of.

As ground for reformation. See Reformation of Instruments.

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Of bank cashier in listing bank property for taxes. See Taxation, VII.

In name of owner in delinquent tax list. See Taxation, IX.

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In name of person in proof of annual labor. See Mines and Minerals, I, (B), 3, (h).

In abstract of title. See Abstracts.

MONEY LENT.

Promissory notes and other instruments in writing given for loans of money. See Bills and Notes.

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MORTGAGES.

- I. REQUISITES AND VALIDITY.
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See Acknowledgment; Assistance, Writ of; Chattel Mortgages; Subrogation.

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I. REQUISITES AND VALIDITY.

A deed or bill of sale of real or personal property, made by a debtor to his creditor, accompanied by a contemporaneous agreement between the parties for a reconveyance of the property upon payment of the debt, constitutes a mortgage.—*Kelley v. Leachman*, 3 Idaho, 392, 29 Pac. 849; *Pritchard v. Butler*, 4 Idaho, 518, 43 Pac. 73.

A deed absolute on its face given by A to B for real estate therein described and a bond given by B to A, agreeing to convey to A a portion of the same property at a stipulated time, although given on the same date and for the same price, if not intended to be a mortgage or security for money by the parties themselves and not appearing to be such on the face of the instrument, will be held to be an absolute bargain and sale, and not a mortgage.—*Winters v. Swift*, 2 Idaho, 61, 3 Pac. 15.

Where a deed absolute on its face is given for real estate and the grantee gives a bond agreeing to reconvey a portion of the same property at a stipulated time to the grantor, the intention of the parties as to whether the transaction is a sale absolute or a mortgage is to be ascertained from the instruments themselves or from parol testimony and, when ascertained, will be carried out by the courts. *Winters v. Swift*, 2 Idaho, 61, 3 Pac. 15.

Under act of January 12, 1875, section 1, and R. S. 2920, a mortgage is not invalid by reason of not being sealed.—*First Nat. Bk. v. Williams*, 2 Idaho, 670, 23 Pac. 552.

Under a deed absolute on its face and a separate agreement by the grantor to reconvey on payment of the consideration named in the deed, with interest, taxes, etc., by a specified time, ejectment will not lie by the grantee to obtain possession of the land from the grantor, the remedy being to foreclose the mortgage under R. S. 4520 et seq.—*Kelley v. Leachman*, 3 Idaho, 392, 29 Pac. 849.

Defendants executed and delivered a deed of land to plaintiff. At the same time plaintiff executed a contract to defendants agreeing to redeed said land on the payment of a specified amount with interest within one year, defendants giving plaintiff their note for said amount. Held, that the deed and contract constituted a mortgage.—*Wilson v. Thompson*, 4 Idaho, 678, 43 Pac. 557.

The statutes of Idaho requiring all persons engaged in the business of loaning money at interest to pay a license tax and obtain a license before commencing such business make it a misdemeanor to fail to obtain such license, and provide that suit may be instituted to recover the license tax, with stated damages. Plaintiff engaged in such business without obtaining the required license, loaned money at interest, and took notes secured by mortgage. Held, that plaintiff could recover on such instruments, the act of loaning money being neither *malum in se* nor *malum prohibitum*.—*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 37 L. R. A. 509, 49 Pac. 314.

A trust deed hypothecating real estate as security for the payment of a debt provided "that these trusts shall be and continue as security to the party of the third part and its assigns for the repayment of the moneys so borrowed by the party of the first part, and interest thereon," and gave the trustee power to sell at public auction on default in payment. Held, that such trust deed was a mortgage under R. S. 3350, which defines a mortgage as "a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession."—*Brown v. Bryan*, 6 Idaho, 1, 51 Pac. 975.

Defendants, holding a chattel mortgage and a real estate mortgage on the property of a firm, of which plaintiff was a member, foreclosed the chattel mortgage and the firm then gave them a deed to the real estate. Defendants at the time of receiving the deed made a written agreement to convey to the firm or either of them the personal and real property

covered by the mortgages on payment of the amount due from the firm within eight months. Held, that such agreement did not operate to make the deed a mortgage.—*Felland v. Vollmer Milling etc. Co.*, 6 Idaho, 120, 53 Pac. 268.

Where plaintiff alleges that he executed a deed to his interest in a mining claim to defendant as security for a loan, while defendant alleges that the deed was intended to absolutely convey the property, the issue is one of fact and properly submitted to the jury.—*Martin v. Dowd*, 8 Idaho, 453, 69 Pac. 276.

Where, in a mortgage, the husband's name appears only as a signer thereof, and its execution is duly acknowledged by him, it is as valid as though his name appeared wherever his wife's name appeared.—*Hadley v. Clark*, 8 Idaho, 497, 69 Pac. 319.

Laws 1899, page 147, section 11, requiring the court in its judgment to declare the rank or class of mechanics' liens in an action to enforce the same, apply to cases in which there are no intervening mortgage liens, and where such mortgage liens are involved the time or the date when the building was commenced or the laborer began work, or the materialman to furnish material, must be considered in determining the priorities of such liens over the mortgage liens.—*Pacific States etc. Co. v. Dubois*, 11 Idaho, 319, 83 Pac. 513.

In adjusting rights of lienholders under Laws 1899, page 147, where the erection of a building was not let to anyone, but the owner employed men to furnish rock and do the rock work and others to furnish the brick and others to lay them and others to do the plumbing and carpenter work, the court in its judgment must declare the rank or class of liens in accordance with section 11 of that act, and where a mortgage lien attached prior to the time that either of the lien claimants commenced work or furnished material the lien of such mortgage is prior to the liens of the last-mentioned laborers or materialmen.—*Pacific States etc. Co. v. Dubois*, 11 Idaho, 319, 83 Pac. 513.

In a suit to have a deed absolute in form declared a mortgage, evidence held sufficient to support a finding that no trust or fiduciary relation existed between the parties to the conveyance.—*Fountain v. Lewiston Nat. Bank*, 11 Idaho, 451, 83 Pac. 505.

Parol evidence is admissible to show that a deed absolute on its face is in fact a mortgage.—*Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

In an action to declare a deed a mortgage, the evidence to support the claim of the plaintiff must be clear and satisfactory, and show the intent of the parties to be that the instrument delivered is security for a debt, and not a conveyance of absolute title.—*Bergen v. Johnson*, 21 Idaho, 619, 123 Pac. 484.

Where an instrument in writing in the form of a deed of conveyance is executed and delivered as security for a debt, such instrument becomes a mortgage, and not a deed, notwithstanding the form of the instrument.—*Bergen v. Johnson*, 21 Idaho, 619, 123 Pac. 484.

Where B. and wife apply to J. to borrow money, and an agreement is entered into

whereby J. agrees to loan to B. \$75, payable on demand, on condition that B. and wife execute a deed to certain real property as security for such indebtedness, and B. and wife agree to such condition and execute such conveyance, and J. thereupon pays to B. the said sum of \$75, less expenses of preparing and recording said instrument and the cost of an abstract, and after deducting six months' interest on said principal at eight per cent, and such agreement is proven by the evidence of B. and wife and denied by J., and the evidence further shows that J. made no improvements upon said land or expended any money thereon, or asserted any rights as owner of said land or paid any taxes upon said land, or did any act by reason of his belief that the conveyance was a deed, and also the great difference between the money loaned and the value of the land, such evidence will support a finding of the trial court that such conveyance was, in fact, a mortgage.—*Bergen v. Johnson*, 21 Idaho, 619, 123 Pac. 484.

Editorial Notes.

Deeds absolute in form with agreements to reconvey: 17 Am. Dec. 300.

Deed absolute on face intended as mortgage: 11 L. R. A., N. S., 209; 22 L. R. A., N. S., 572.

Equitable mortgages, what constitute: 4 Am. St. Rep. 696.

II. RECORDING AND REGISTRATION.

Recording or failure to record as affecting priorities.

See post, III, (B).

Effect of failure of assignee to record assignment or give notice thereof to mortgagor. See post, V.

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

Under the statute of this state and the decisions of the court construing the same, a mortgage, or any contract or instrument made only as security for the payment of a debt, merely creates a lien on the real property therein described, and leaves the legal title in the mortgagor or grantor, which title can only be divested by judicial sale in a suit or action under and in conformity with the statute.—*Brown v. Bryan*, 6 Idaho, 1, 51 Pac. 595; *Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115.

Where the provisions of a note vary from the terms of the mortgage securing it, the provisions of the note must control.—*Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

It is a well-established principle of law that every contract in the nature of a deed, mortgage, or encumbrance affecting real property, is subject exclusively to the laws of the state or government within whose jurisdiction the real property is situated, and should be construed and interpreted in the light of the laws of the jurisdiction where the property is located.—*Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115.

A stipulation in a mortgage giving the mortgagor a right to declare the whole sum

due on default in the payment of the interest is not in the nature of a forfeiture or penalty.—*Mullen v. Gooding Implement etc. Co.*, 20 Idaho, 348, 118 Pac. 666.

A note and mortgage given to secure the payment of the same must be construed together as one contract; and, where the provisions of the two instruments can be so construed as to give effect to the provisions contained in both note and mortgage, such construction will be given to the contract.—*Clark v. Paddock*, 24 Idaho, 142, 132 Pac. 795.

Where there is an uncertainty or ambiguity in or inconsistency between the stipulation contained in a mortgage and a note given to secure the same providing for the acceleration of the maturity of the principal debt, the court should follow the rule of construction which requires every provision of the contract to be given force and effect, when it is possible so to do, and will place that construction upon the contract which is consistent with the provisions of both instruments, and accomplishes the apparent intention of the contracting parties.—*Clark v. Paddock*, 24 Idaho, 142, 132 Pac. 795.

Editorial Notes.

Mortgage to secure money advanced to purchase property as a purchase-money mortgage: 40 L. E. A., N. S., 272.

(B) LIEN AND PRIORITY.

Records as notice to subsequent purchasers. See *Vendor and Purchaser*, V, (C).

A settler on public lands, residing thereon with his wife, made a pre-emption filing therefor and, while so residing thereon, executed a mortgage to plaintiff to secure the repayment of money advanced to pay the government price of the land. Thereafter, on the day the mortgage was given he paid for the land with the money borrowed and obtained title from the government. Held, that such mortgage was a purchase price mortgage and was a valid lien, though not signed by the wife, and therefore took priority over any right of the wife thereto as community property under R. S. 3336 giving purchase price mortgages priority over all other liens.—*Kneen v. Halin*, 6 Idaho, 621, 59 Pac. 14.

Laws 1899, section 5, page 148 (R. S. 5114), provides that the liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage or other encumbrance of which the lienholder had no notice, and was unrecorded at the time the building, improvement or structure was commenced, work done, or materials were commenced to be furnished. Held, that all liens for labor commenced and materials commenced to be furnished prior to recording said mortgages are prior and superior liens to said mortgages, and the liens of all laborers for labor commenced, and materialmen for material commenced to be

furnished, subsequent to the recording of said mortgages, are subordinate thereto, when such work is done or material furnished by persons not theretofore connected with the construction of the building.—*Pacific States etc. Co. v. Dubois*, 11 Idaho, 319, 83 Pac. 513.

Laws 1899, section 5, page 148 (R. S. 5114), provides that the liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage or other encumbrance of which the lienholder had no notice, and was unrecorded at the time the building, improvement or structure was commenced, work done, or materials were commenced to be furnished. Held, that when mortgages and other liens are involved in the foreclosure of mechanics' and materialmen's liens, the time or date when the building was commenced or the laborer began to work, or the materialman commenced to furnish the material, must be taken into consideration in determining the priority of such liens over such mortgage lien.—*Pacific States etc. Co. v. Dubois*, 11 Idaho, 319, 83 Pac. 513.

On January 14, 1899, T. gave plaintiff a real estate mortgage on certain land to secure the payment of \$450 and the mortgage was duly recorded. On November 2, 1900, T. conveyed the land to defendant N., subject to said mortgage. On January 24, 1902, N. mortgaged this and other land to defendant bank to secure the payment of \$3,900, which mortgage was duly recorded. Subsequent to the execution of the last-mentioned mortgage, plaintiff brought an action to foreclose the first mortgage, which action was compromised by defendant N. giving a new mortgage on the same property for \$410, which mortgage was dated January 4, 1902, and recorded February 2, 1903. Held, that if the parties intended the last mortgage to be a renewal of the first mortgage the lien thereof would be prior and superior to that of the \$3,900 mortgage.—*Western Loan etc. Co. v. Kendrick State Bank*, 13 Idaho, 331, 90 Pac. 112.

Under R. C. 3159, in order that a recorded conveyance of real property may impart constructive notice of its contents to subsequent mortgagees, it must be "acknowledged or proved and certified" as well as recorded.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

The conveyance of real property, which R. C. 3159 provides shall constitute constructive notice to "subsequent purchasers and mortgagees," is a conveyance made by the person from whom such "subsequent purchaser or mortgagee" is compelled to deraign his title, and has no reference to and does not include conveyances made by strangers to the record title.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

Under R. C. 3159, a recorded conveyance of real property, which has not been acknowledged or proved and certified as required by law, does not impart constructive notice of its contents to subsequent mortgagees.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

Editorial Notes.

Mortgages to secure several notes, which entitled to precedence of payment: 38 Am. Dec. 440.

New mortgages, when may be enforced as a continuation of the lien of prior mortgages: 5 Am. St. Rep. 705.

Right of mortgagee to assert invalidity of previous mortgage: Ann. Cas. 1913B, 680.

IV. RIGHTS AND LIABILITIES OF PARTIES.

Insurance premiums, voluntarily paid by the mortgagee, who insures the mortgaged property, cannot be recovered by him in the absence of a provision in the mortgage authorizing him to insure the mortgaged property at the expense of the mortgagor.—*Miller v. Hunt*, 6 Idaho, 523, 57 Pac. 315.

Under R. C. 4520, providing that there can be but one action for the recovery of any debt secured by mortgage on real or personal property, the holder of a note secured by mortgage cannot maintain an action at law for the collection of his note without at the same time and in the same action proceeding to foreclose his mortgage, unless it be shown in such action that the security has become wholly valueless.—*Clark v. Paddock*, 24 Idaho, 142, 132 Pac. 795.

Editorial Notes.

Rents, mortgagee, when entitled to: 27 Am. St. Rep. 793.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

The owner of land executed a mortgage thereon to an investment company and the company thereafter assigned the mortgage and note secured thereby to plaintiff with a contract guaranteeing payment of the interest and principal and giving the right to the company to repurchase at any time, plaintiff agreeing not to foreclose for two years after the maturity of the note. The company collected from the mortgagor nine interest installments covering a period of five years and delivered coupons therefor to the mortgagee. Plaintiff neglected to file his assignment of mortgage for record and failed to notify the mortgagor of such assignment. Held, that the company was the agent of plaintiff in making the collections, and that on default of the company plaintiff must stand the loss.—*Pennypacker v. Latimer*, 10 Idaho, 618, 625, 81 Pac. 55.

Editorial Notes.

Assignment of mortgages and its effect: 14 Am. Dec. 512.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

Where the grantee of mortgaged premises buys in and takes an assignment of a mortgage on the premises conveyed, parol evidence

is admissible to show all the facts and circumstances attending the transfer to establish the intention of the purchaser of the mortgage as to merger.—*Westheimer v. Thompson*, 3 Idaho, 560, 32 Pac. 205.

Where the grantee of mortgaged premises buys in and takes an assignment of a mortgage upon the premises conveyed, the mortgage so purchased does not merge, except in the case where the grantee has assumed payment of the mortgage as part of the consideration for the conveyance, or has manifested or declared an intention to have it merge.—*Westheimer v. Thompson*, 3 Idaho, 560, 32 Pac. 205.

The claim of title of one who knowingly enters into an arrangement to defraud his vendor's mortgagee cannot avail as against the claim of such mortgagee.—*Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761.

One who buys property subject to a mortgage which he agrees to pay is estopped from denying the validity thereof.—*Anderson v. Oregon Mortgage Co.*, 8 Idaho, 418, 69 Pac. 130.

Where a deed recites that the premises conveyed are subject to a mortgage, the land conveyed is as effectually charged with the encumbrance of the mortgage debt as if the purchaser had expressly assumed the payment of the mortgage debt or had himself executed the mortgage.—*Hadley v. Clark*, 8 Idaho, 497, 69 Pac. 319.

Where a deed recites that the land conveyed is subject to a certain mortgage then existing against said land, the land is charged with the encumbrance of said mortgage debt. *Western Loan etc. Co. v. Kendrick State Bank*, 13 Idaho, 331, 90 Pac. 112.

Editorial Notes.

Purchaser of property subject to mortgage, when becomes liable for the payment of the mortgage debt: 62 Am. Dec. 141.

Assumption of mortgage by grantees, what amounts to and their liability under: 78 Am. Dec. 73.

Protection of one purchasing from apparent vendee in deed intended as a mortgage: 32 L. R. A., N. S., 1046; 38 L. R. A., N. S., 982.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE AND SATISFACTION.

Satisfaction of judgment of foreclosure. See post. X, (1).

A prior mortgage is not canceled or released by the giving of a new mortgage for the same indebtedness, unless there is an agreement between the parties to that effect.—*Willows v. Rosenstein*, 5 Idaho, 305, 48 Pac. 1067.

In a suit by a mortgagor under R. S. 3364 to recover the statutory penalty for failure to satisfy of record a mortgage, which has been fully paid, either party has a right to

trial by jury.—*Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779.

Where a mortgagor has sued to compel the satisfaction of a mortgage alleged to have been fully paid, the pendency of such suit is a ground for demurrer under R. S. 4174 to a complaint in a subsequent suit to foreclose the mortgage.—*Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779.

Under R. S. 4183, 4184, 4185, providing that the answer shall contain and when a counterclaim may be set up, it is the duty of defendant in an action to compel the satisfaction of a mortgage to set up in its answer the fact that the mortgage has not been fully paid.—*Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779.

In an action to compel the satisfaction of a certain mortgage, for damages and for the penalty provided by R. S. 3364 in cases of refusal to satisfy mortgages on payment thereof, a complaint stating that plaintiff has fully "paid and satisfied said notes and mortgage in so far as the holder of said notes and mortgage is concerned," does not sufficiently allege the payment in full of the sum secured by the mortgage, and is demurrable.—*Gamble v. Canadian and American Mortgage etc. Co.*, 6 Idaho, 202, 55 Pac. 241.

Under R. S. 3364, giving a mortgagor a right of action for damages and for a penalty on failure of the mortgagee to satisfy the mortgage, no right of action accrues until the mortgage debt has been fully paid; and therefore, where plaintiff's answer to defendant's cross-complaint clearly shows that such debt had not been paid at the date the suit was brought, plaintiff's action should be dismissed on motion.—*Barnes v. Pitts Agricultural Works*, 6 Idaho, 259, 55 Pac. 237.

In an action brought under R. S. 3364 to compel the satisfaction of a mortgage alleged to have been fully paid and for damages and the statutory penalty for refusal to satisfy such mortgage, it is not error to permit plaintiff's counsel to read such statute to the jury in making his opening statement.—*Barnes v. Pitts Agricultural Works*, 6 Idaho, 259, 55 Pac. 237.

A mortgage debtor who has paid the principal of a usurious debt is not prevented from maintaining an action to compel satisfaction of the mortgage by the fact that such action will defeat the penalty in favor of the school fund prescribed by R. S. 1266, which provides that such penalty can be adjudged in a case of a suit on a usurious contract to enforce it. *Cleveland v. Western Loan etc. Co.*, 7 Idaho, 477, 63 Pac. 885.

Where a mortgagor pays the principal of a usurious contract, the mortgage becomes satisfied and the mortgagor can compel the mortgagee to satisfy the mortgage under R. S. 3364.—*Cleveland v. Western Loan etc. Co.*, 7 Idaho, 477, 63 Pac. 885.

A new note and mortgage was given to secure payment of the same debt covered by a prior note and mortgage, the new mort-

gage reciting "this mortgage being a renewal of said mortgage." The second mortgage covered additional property, was for a greater amount, and the rate of interest and amount of attorney's fees stipulated in the notes was not the same. Held, that the new note and mortgage were not a new contract, but a renewal of the old contract, and hence that the contention that the new mortgage was void as to subsequent creditors by reason of the wife's failure to sign the same, must fail. *Vollmer v. Reid's Estate*, 10 Idaho, 196, 77 Pac. 325.

Where B. purchases real estate, and assumes the payment of a mortgage debt thereon as part of the purchase price, and thereafter pays such mortgage, he cannot thereafter assign or have the same assigned to another person as security for the payment of a debt due him.—*Ellis v. Bashor*, 17 Idaho, 259, 105 Pac. 214.

Under R. C. 3402, authorizing the recovery of damages for failure to satisfy a mortgage, held, that the plaintiff is not entitled to recover any damages in this action.—*Machold v. Farnan*, 20 Idaho, 80, 117 Pac. 408.

VIII. FORECLOSURE BY ENTRY, POSSESSION AND NOTICE.

-(No paragraphs.) >

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

Under R. S. 3325 to 3354 specifying and defining different liens and R. S. 4520, 4523, providing the remedy for the enforcement of any right secured by mortgage, a trust deed given to secure payment of a debt is a mortgage and can be foreclosed by judicial decree and not by notice and sale, though the trust deed prescribes the latter remedy.—*Brown v. Bryan*, 6 Idaho, 1, 51 Pac. 995.

Editorial Notes.

Foreclosure by exercise of power of sale: 92 Am. St. Rep. 573.

Necessity for sales under powers to be for reasonable price: 103 Am. St. Rep. 51.

Distinction between trust deed and power of sale mortgage of realty: Ann. Cas. 1913A, 1045.

X. FORECLOSURE BY ACTION.

Presentation of claim to administrator not a bar to right of foreclosure. See *Executors and Administrators*, VI, (B).

(A) NATURE AND FORM OF REMEDY.

Defendant and another executed a joint and several promissory note. Defendant was a surety thereon, though such fact did not appear on the face of the note. As an inducement to defendant to sign the note, his comaker agreed to and did execute a mortgage on real estate to secure the note. The note and mortgage were assigned after maturity to plaintiff. Held, that an action should have been brought to foreclose the mortgage and not upon the note alone, as was done, the

security not being valueless and R. S. 4520, providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, etc.—*First Nat. Bk. v. Williams*, 2 Idaho, 670, 23 Pac. 552.

The foreclosure of a mortgage and the reformation of a certificate of acknowledgment may be demanded in a single cause of action under a complaint containing the proper averments.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 102.

A mistake in the description of land intended to be conveyed or mortgaged by a married woman may be corrected upon a proper showing.—*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

A mortgage may be reformed and foreclosed in the same action.—*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

Editorial Notes.

Foreclosure of subsequent mortgage, effect of upon prior: 80 Am. Dec. 714.

Right to successive foreclosures of mortgage payable in installments: Ann. Cas. 1912C, 846.

Proceedings to enforce mortgage for part of debt: 37 L. R. A. 737.

(B) RIGHT TO FORECLOSE AND DEFENSES.

R. S. 3325 to 3354, specifying and defining different liens, and R. S. 4520, 4523, providing the remedy for the enforcement of any right secured by mortgage are to be construed as in pari materia so as to give effect to all of said statutes and to carry out their general policy and evident intent.—*Brown v. Bryan*, 6 Idaho, 1, 51 Pac. 995.

In an action to foreclose a mortgage securing a note given in consideration of a transfer of a water right, a breach of a covenant against encumbrances contained in such transfer is a valid defense.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

Where defendant executed a mortgage to M., containing a provision that, if default be made in the payment of any of the interest installments at the time such interest became due, it was optional with the mortgagee to consider the whole of said principal due and payable, and an installment of interest was not paid when due, and the mortgagee brought his action to foreclose the mortgage, and served summons thereof on the mortgagor, the commencement of such action was an exercise of said option, and the mortgagee thereby declared the principal sum due and payable.—*Mullen v. Gooding etc. Co.*, 20 Idaho, 348, 118 Pac. 666.

Certain negotiations for the payment of the interest due held not a waiver on the part of the mortgagee of the right given him by the mortgage to declare the principal debt due.—*Mullen v. Gooding etc. Co.*, 20 Idaho, 348, 118 Pac. 666.

Where a promissory note provides that interest shall be paid annually, "and if not so paid the whole sum of both principal and interest to become immediately due and collectible," and a mortgage given to secure the payment of the same provides that, "if the interest be not paid as therein specified, then and from thenceforth it shall be optional with the said party of the second part . . . to consider the whole of said principal sum expressed in said notes as immediately due and payable," etc., the provisions of the note and mortgage will be construed together with a view to giving effect to the intention of the contracting parties, and when so construed held, that a default in payment of any interest payment when due will mature the whole indebtedness of both principal and interest at the option of the holder of the note and mortgage, and that a tender of the overdue interest made before the holder elects to declare the whole debt due is in time, and prevents the subsequent exercise of the option by the holder of the note and mortgage.—*Clark v. Paddock*, 24 Idaho, 142, 132 Pac. 795.

(C) JURISDICTION AND VENUE.

(No paragraphs.)

(D) LIMITATIONS AND LACHES.

Right to redeem. See post, XI.

Where an action is brought to foreclose a mortgage for default in the payment of coupon interest notes, which are declared to be usurious and void, and the principal note is not yet due, the action is prematurely brought.—*Vermont Loan etc. Co. v. Tetzloff*, 6 Idaho, 105, 53 Pac. 104; *Vermont Loan etc. Co. v. Maxwell*, 6 Idaho, 108, 53 Pac. 1130.

Editorial Notes.

Limitations, statute of, effect of upon mortgages: 95 Am. St. Rep. 664.

(E) PARTIES AND PROCESS.

Where the pleadings in a mortgage foreclosure action show that the notes and mortgage were executed by both husband and wife, but the record fails to show whether the mortgaged premises were the separate property of either husband or wife, or their community property, the presumption is that the premises were community property and the husband is therefore a necessary party to the action under R. S. 4093.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

Editorial Notes.

Mortgagor who has conveyed interest in premises as necessary or proper party to foreclosure: Ann. Cas. 1913A, 83.

Necessity of making junior encumbrancer a party to a suit for foreclosure of a senior mortgage: 36 L. R. A., N. S., 426.

(F) PLEADING AND EVIDENCE.

In an action to foreclose a mortgage it is not necessary to allege in the complaint notice to the mortgagor that the plaintiff has

elected to consider the whole sum due, according to the tenor of the mortgage, for default in payment of installments or interest.—Broadbent v. Brumback, 2 Idaho, 366, 16 Pac. 555.

On foreclosure, where the indebtedness claimed is acknowledged in the mortgage, and no evidence is offered to disprove it, a verdict for defendant cannot be sustained on appeal.—Montandon v. Wingert, 5 Idaho, 185, 47 Pac. 814.

The mortgagors of certain property signed a contract reciting that the mortgagors did thereby turn over to the mortgagees the possession of the mortgaged premises upon the condition that said mortgagees should "apply all rents or profits in leasing or using it on actual expenses, taxes, insurance and interest and principal of their mortgage note." Held that parol evidence was not admissible to show a contract on the part of the mortgagees to keep the property insured in the sum of \$25,000, their mortgage being for \$10,000.—First Nat. Bank v. Bews, 5 Idaho, 678, 51 Pac. 777.

A complaint for the reformation and foreclosure of a mortgage alleged that the parties to the mortgage intended that certain described land should be described in and conveyed by such mortgage, but that in drawing the mortgage the draftsman by mistake omitted the number of the section in which the land lay. Held, sufficient to authorize testimony as to such intention and mistake.—Christensen v. Hollingsworth, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

Plaintiff brought an action under R. S. 3364 to compel the discharge of a mortgage alleged to have been fully paid and for the penalty and damages provided for in said statute. Defendant denied the payment of the mortgage debt in full and by cross-complaint prayed for the foreclosure of the mortgage for the unpaid balance. Plaintiff answered the cross-complaint by denying that there was anything due on the mortgage and averred that it had been paid in full; and as a separate defense, admitted that the mortgage debt had not been paid in full and set up a counterclaim, the amount of which was to apply on the balance due on the mortgage. Held, that a demurrer to plaintiff's answer was properly sustained.—Barnes v. Pitts Agricultural Works, 6 Idaho, 259, 55 Pac. 237.

In a suit to foreclose a mortgage, where there is no allegation in the complaint showing that the mortgage debts were created for the benefit of the separate estate of the wife, the presumption is that such debts were community debts for which the husband alone is personally liable.—Miller v. Hunt, 6 Idaho, 523, 57 Pac. 315.

In an action by the assignee of a promissory note and mortgage, the answer pleaded total failure of consideration for said note and mortgage and also breach of covenant against encumbrances in the deed, which was given as consideration for the note and mortgage. Held, that it was error to strike such

defenses from the answer.—Warren v. Stoddart, 6 Idaho, 692, 59 Pac. 540.

Where, in a suit to foreclose a mortgage, there is no showing that the mortgaged premises were used as a residence or constituted a homestead at the date of the mortgage, the court will presume that they were not so used and hence that the wife's signature was not necessary to the validity of the mortgage.—Northwestern etc. Bk. v. Rauch, 7 Idaho, 152, 61 Pac. 516.

It is not error to refuse evidence offered by defendant of assignment of a mortgage securing a note, where the answer denies title in the assignee.—Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650.

Where in a foreclosure suit, one of the defendants does not claim anything from plaintiff, but does claim that the property involved is subject to a prior mortgage lien of which such defendant is assignee, the defendant must answer denying the superiority of plaintiff's lien and set his own out by cross-complaint.—Western Loan etc. Co. v. Smith, 12 Idaho, 94, 85 Pac. 1084.

In a foreclosure suit one of the defendants filed a cross-complaint claiming a prior mortgage lien, stating the facts leading up to the assignment of the note and mortgage to cross-complainant, and praying judgment for a specific amount and for general relief. Held, sufficient to entitle cross-complainant to relief.—Western Loan etc. Co. v. Smith, 12 Idaho, 94, 85 Pac. 1084.

A complaint alleging that defendant S. executed and delivered to plaintiff certain promissory notes and that thereafter a mortgage on certain mining claims was executed by S. and three other defendants for the purpose of securing said notes, that such notes have not been paid and that the amount thereof is due, states a cause of action against S. personally and against the other defendants for the foreclosure of the mortgage.—McCornick v. Brown, 22 Idaho, 52, 125 Pac. 197.

(G) INJUNCTION AND RECEIVER.

(No paragraphs.)

(H) TRIAL OR HEARING AND REFERENCE.

Plaintiff sued to foreclose a mortgage, the mortgagors and subsequent purchasers being defendants. The subsequent purchasers were in default. The mortgagors denied the execution and acknowledgment of the mortgage and asked affirmative relief. At the close of the evidence, plaintiff moved to dismiss the action as to the mortgagors, waiving any claim for a deficiency judgment, which motion was granted by the court. Held, that it was error to grant the motion to dismiss.—Northwestern etc. Bank v. Rauch, 5 Idaho, 752, 51 Pac. 764.

Where an action is brought to foreclose a mortgage against several parties, and the complaint alleges that the mortgage was executed by such persons, and the answer denies

such execution, and it appears from the proof that such execution was by power of attorney, and the court makes a finding that the defendants did execute such mortgage, such finding is sufficient upon the issues made by the plaintiffs, and it was not reversible error on the part of the court in failing to find whether the attorney in fact was duly authorized to sign the mortgage as such attorney in fact. The finding of the ultimate fact in issue in the case, to wit, that the defendants executed the mortgage, was sufficient under the issues made by the pleadings. *McCornick v. Brown*, 22 Idaho, 52, 125 Pac. 197.

(I) JUDGMENT OR DECREE AND EXECUTION.

Appeal from order setting aside satisfaction and ordering execution for fees of plaintiff's attorney. See Appeal and Error, III, (D).

The writ for the enforcement of a decree of foreclosure, authorized by R. S. 4473, may be amended on proper showing.—*Wilson v. Gray*, 5 Idaho, 218, 47 Pac. 942.

Where plaintiff in a mortgage foreclosure action has paid taxes on the mortgaged property, the amount thereof should be included in the decree of foreclosure.—*Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

It is essential to the validity of a decree foreclosing a mortgage that it ascertain the amount due to the plaintiff and to be realized from a sale of the mortgaged premises.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

Where suit is brought to foreclose several mortgages securing several distinct debts on separate pieces of property, a decree directing the joint sale of all the property embraced in the several mortgages for the aggregate amount due upon all the several mortgage debts, is erroneous.—*Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893.

A judgment in a foreclosure suit awarding attorney's fees to the judgment creditor may be collected in full by the judgment creditor, and satisfaction thereof may be entered by him in conformity with R. C. 4461, unless the attorney has previously given notice to the judgment debtor and taken steps to establish the equity of his lien upon the original judgment procured by him for the security and payment of the fees earned by him in obtaining the original judgment.—*Dahlstrom v. Featherstone*, 18 Idaho, 179, 110 Pac. 243.

In an action to foreclose a real estate mortgage, where the defense made is fraud and payment of the note and mortgage, and demand has been made for the surrender of the note and the release of said mortgage, and the trial court finds that the mortgage was fraudulent and has been fully paid, the findings of the trial court, which invokes the penalty of \$100 as provided in R. C. 3402, and renders judgment in accordance therewith, will not be disturbed.—*Blackfoot State Bank v. Crisler*, 20 Idaho, 379, 118 Pac. 775.

H. held a mortgage against the property of the G. Co., and thereafter, at the instance of a creditor of such company, a receiver was appointed to take charge of the property and assets of the company. H. instituted an action for the foreclosure of his mortgage, and brought in parties asserting some lien, claim, or encumbrance upon the property covered by H.'s mortgage, and such proceedings were thereafter had that a decree was entered, ordering and adjudging that the property should be sold by the receiver without and free from the right of redemption, and that the costs and expense of the sale should first be paid out of the proceeds, and thereafter the receiver's certificates and such liens and claims as had been adjudged prior to H.'s mortgage, and thereafter H.'s mortgage should be paid out of any residue left from such sale. No appeal was taken from such order and decree, and the same was allowed to become final, and H. thereafter joined with all the other parties to the foreclosure suit in filing his judgment and decree with the receiver in the receivership case, and petitioned to be admitted as a creditor, and the district court thereafter made an order admitting such creditors, and adjudging the same priorities in the receivership case as had been adjudged in the foreclosure case, and ordered a sale of all the property in the hands of the receiver and the payment of costs, expense and judgments in the order of their priorities, as adjudicated in both the foreclosure case and the receivership proceedings, and directed that such sale be without the right of redemption. Held, that H. and all other parties to the foreclosure proceeding will be bound by such order and decree, and that a sale, made thereunder, will be without the right of redemption to any person who became a party to such proceeding.—*Hewitt v. Walters*, 21 Idaho, 1, Ann. Cas. 1913C, 35, 119 Pac. 705.

In an action to foreclose a mortgage given to secure notes executed by S., where such mortgage is executed by S. and three other defendants, the decree should run against S. personally; and against the other defendants for a foreclosure of their right, title and interest in the property mortgaged.—*McCornick v. Brown*, 22 Idaho, 52, 125 Pac. 197.

(J) SALE.

Right of purchaser under unrecorded conveyance to move for vacation of writ of assistance. See Assistance, Writ of.

The writ of assistance is the appropriate remedy to place in possession the purchaser at a foreclosure sale, and may be issued against any and all persons concluded by such judgment.—*Harding v. Harker*, 17 Idaho, 341, 134 Am. St. Rep. 259, 105 Pac. 788.

(K) DEFICIENCY AND PERSONAL LIABILITY.

Where, in a suit to foreclose a mortgage, a foreclosure is denied, the plaintiff is, nevertheless, entitled to judgment for the amount

of the mortgage debt shown by the pleadings and proof to be due him against the defendants personally liable therefor.—*Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399.

In an action to recover on a deficiency judgment, the complaint showed that defendants executed a mortgage to plaintiff, that the mortgage was foreclosed, that the property mortgaged was sold as provided by law, that at such sale the property did not sell for the amount due, that the sheriff made his return on the order of sale showing a deficiency, that the deficiency judgment remained unpaid, and that the court rendering judgment had jurisdiction of the parties and subject matter. Held, not demurrable.—*First Nat. Bk. v. Sampson*, 7 Idaho, 564, 64 Pac. 890.

A mortgagor is personally liable only after foreclosure and then only for the balance shown to be due by the return of the sheriff, unless it is made to appear that the property has been destroyed or otherwise become valueless without the fault of the mortgagee.—*Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63.

(L) DISPOSITION OF PROCEEDS AND SURPLUS.

(No paragraphs.)

(M) REVIEW.

Where the pleadings in a mortgage foreclosure action show that the notes and mortgage were executed by both husband and wife, but the record fails to show whether the mortgaged premises were the separate property of either husband or wife, or their community property, the court will presume that the mortgaged premises were community property.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

(N) FEES AND COSTS.

Allowance of attorneys' fees in suit on usurious mortgage. See *Usury*, I.

Iden of attorney for compensation. See *Attorney and Client*, IV.

A stipulation in a mortgage for an allowance for attorney's fee in case of foreclosure is valid, but should be enforced only for a reasonable amount.—*Broadbent v. Brumbach*, 2 Idaho, 366, 16 Pac. 555; *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

A stipulation in a mortgage for allowance of an attorney's fees in case of foreclosure is valid, but should be enforced only for a reasonable amount; and in determining what amount is reasonable the court should allow no more than is actually received or contracted for by the attorney for his services.—*Broadbent v. Brumbach*, 2 Idaho, 366, 16 Pac. 555.

In a suit on a usurious contract, it is error to allow plaintiff, under the stipulations of a mortgage securing the debt, an attorney fee, since such fee is no part of the debt, but is extraordinary costs, and as such cannot be

recovered, under R. S. 1266.—*Fidelity Sav. Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022.

In determining what amount is a reasonable attorney's fee in case of foreclosure of a mortgage, the court must consider the amount actually paid or agreed to be paid or the nature, value and extent of the services actually performed in case no agreement was made.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

Where the evidence in a suit on a note and to foreclose a mortgage amounting to \$11,000 shows a contract to pay \$2,000 attorney's fees, half of which has already been paid and there is evidence to show the reasonableness of the attorney's fees allowed, it is not error to allow an attorney's fee of \$1,000.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

Where two promissory notes each provide that in case suit is brought thereon a reasonable fee shall be allowed, and a mortgage given to secure said notes fixes the attorney's fees at \$50 in case of foreclosure thereof, the court cannot allow any attorney's fee in excess of \$50, which sum must be proved to be reasonable.—*Lewis v. Sutton*, 21 Idaho, 541, 122 Pac. 911.

Editorial Notes.

Validity and enforceability of provision in mortgage fixing attorneys' fees on foreclosure: 19 Ann. Cas. 1068.

(O) OPERATION AND EFFECT.

Under R. C. 4520, where the court acquires jurisdiction of the mortgagor in an action to foreclose a mortgage, the court also acquires jurisdiction of all persons who hold unrecorded conveyances or contracts from the mortgagor, so as to conclude such persons by the judgment entered in the foreclosure proceeding; and in like manner, where the court acquires jurisdiction of a grantee of a mortgagor, the court also acquires jurisdiction of all persons who hold unrecorded conveyances or contracts with such grantee of the mortgagor, so as to conclude such persons by the judgment of foreclosure.—*Harding v. Harker*, 17 Idaho, 341, 134 Am. St. Rep. 259, 105 Pac. 788.

XI. REDEMPTION.

R. S. 4492, amended by Laws 1895, page 34, extending the time given to the judgment debtor or redemptioner to redeem real estate sold under execution or foreclosure from six months to one year, does not affect sales under foreclosures of mortgages executed and recorded prior to the passage of the act.—*Wilder v. Campbell*, 4 Idaho, 695, 43 Pac. 677.

A mortgagor executed to the mortgagee a warranty deed to the premises for the stipulated consideration of the amount of principal and interest then due on the debt, taking at the same time a contract giving an option to repurchase within a certain time. Afterwards, in consideration of a further sum, the mortgagor executed a release of the contract for repurchase, all the parties under-

standing and believing that the release, together with the previous conveyance, amounted to a transfer of the title. The mortgagee and its successors in interest with the knowledge and consent of the mortgagor entered into the sole, exclusive and open possession of the premises, and so continued without objection. Held, that the possession by the mortgagee and its successors was adverse and upon the lapse of the statutory period was a complete bar to an action to redeem the property.—*Fountain v. Lewiston Nat. Bank*, 11 Idaho, 451, 83 Pac. 505.

Where a deed, absolute on its face, has been executed to secure the payment of a debt and it is clearly and satisfactorily established that the instrument was intended only as security, and that it is, therefore, only a mortgage, the title to the property remained in the grantor, and under R. C. 3385, every person having an interest in such property has a right to redeem it from the lien at any time after the claim is due and before his right of redemption is foreclosed.—*Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115.

Where a deed, absolute on its face, is taken to real property, and a contract is entered into to purchase the same, and it is alleged in the complaint that said transaction was in effect an equitable mortgage, and the plaintiff prays to have the same so declared, and the court finds that the deed was a mortgage, and no application is made to foreclose said mortgage, the proper and usual form of the decree is that the plaintiff be allowed to redeem upon the payment of the sum found due within a reasonable time to be fixed by the decree, and that upon such payment the mortgage shall be adjudged to be satisfied, and that in default of such payment the title shall be quieted in the defendant.—*Machold v. Farnan*, 20 Idaho, 80, 117 Pac. 408.

There is a clear distinction between a statutory redemption, which is from the sale and not from the mortgage, and an equitable redemption established by the court. In the latter case the redemption is from the mortgage and not from the sale; from which the rule is deduced that the redemptioner must do equity and pay all that is due under the mortgage before he is entitled to redeem and receive a conveyance of the property.—*Machold v. Farnan*, 20 Idaho, 80, 117 Pac. 408.

The tender made in the second amended complaint, on the theory that the deed and contract was a mortgage, of the exact amount theretofore tendered, on the theory that the transaction was a sale and not a mortgage, was not a sufficient tender to stop the run-

ning of interest, and the amount deposited having been withdrawn without leaving in lieu thereof any offer in writing to pay it, such tender was not a compliance with R. C. 6110.—*Machold v. Farnan*, 20 Idaho, 80, 117 Pac. 408.

Within R. C. 4494, relating to redemptions, and providing that a tender is "equivalent to payment," the phrase "equivalent to payments" means equal in power and effect to payment, since "equivalent" is defined as equal in value, force, power and effect.—*Kelley v. Clark*, 23 Idaho, 1, 31, 129 Pac. 921.

Under R. C. 4494 if the purchaser at a foreclosure sale refuses to accept a lawful tender of the redemption money, he does so at his own risk, and his refusal will not prevent the legal effect of the tender to defeat the sale and to extinguish the purchaser's interest in the mortgage lien, as the tender ipso facto discharges the mortgage lien and is equivalent to payment of the mortgage debt so far as the mortgage lien is concerned; and the debtor is not required to keep the tender good, but the purchaser at such sale is remitted to his action at law for the recovery of the money which still remains due on the mortgage debt, provided the debtor refuses to pay it.—*Kelley v. Clark*, 23 Idaho, 1, 31, 129 Pac. 921.

Editorial Notes.

Equity of redemption, contracts between mortgagor and mortgagee for the release of: 55 Am. St. Rep. 100.

Right to redeem as incident of mortgage: Ann. Cas. 1912D, 959.

Right of tenant for years to redeem premises from mortgage: 4 Ann. Cas. 807.

MOTIONS.

See, also, Attachment; Continuance; Dismissal and Nonsuit; New Trial; Costs; Judgment.

Relating to parties, process, pleadings, and other proceedings in actions. See Parties; Process; Pleadings; and other specific heads.

To quash summons. See Process, III.

Voluntary appearance of an attorney and participation in the argument of a motion waives notice of such motion.—*Curtis v. Walling*, 2 Idaho, 416, 18 Pac. 54.

A motion is defined by R. C. 4880, as an "application for an order," and is not required in terms to be signed, but it is the proper practice for the counsel or the party to sign it.—*Nobach v. Scott*, 20 Idaho, 558, 119 Pac. 295.

MUNICIPAL CORPORATIONS.**I. CREATION, ALTERATION, EXISTENCE AND DISSOLUTION.**

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Municipal regulations of railroad. See Railroads, X, (B).

Regulation and control of bridges. See Bridges.

Townsites on government land, entry and rights of city and inhabitants. See Public Lands, II, (B), 4.

I. CREATION, ALTERATION, EXISTENCE AND DISSOLUTION.**(A) INCORPORATION AND INCIDENTS OF EXISTENCE.**

Under R. S. 4, the proceedings of a county board under R. S. 2224 in incorporating a town should be liberally construed.—State v. Inhabitants of Pocatello, 3 Idaho, 174, 28 Pac. 411.

Where the board of county commissioners incorporates a town under R. S. 2224, but fails to designate the metes and bounds of said town in the order of incorporation, merely referring to the petition and granting the petitioner's prayer therein contained, without change or modification, and the metes and bounds are sufficiently explicit in the petition, the petition will be considered as part of the board's proceedings and in pari materia therewith, and, therefore, the order of incorporation will be upheld.—State v. Inhabitants of Pocatello, 3 Idaho, 174, 28 Pac. 411.

Under Const., article 12, section 1, providing that the legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns, in proportion to the population, which laws may be altered, repealed or amended by the general laws, the legislature has power to enact general laws for the incorporation of cities, towns and villages and for the organization of cities from towns.—State v. Steunenberg, 5 Idaho, 1, 45 Pac. 462.

Const., article 12, section 1, gives the legislature power to provide by general laws for the organization, etc., of cities and towns and provides that cities and towns heretofore incorporated may become organized under such general laws whenever a majority of the electors at a general election shall so determine, under such provision therefor as may be made by the legislature. Laws 1893, page 97, provides for the organization, government and powers of cities and villages. Held, that where the people of a town have proceeded to elect a mayor, city council and all other city officers to complete a city organization and this action has been acquiesced in by the people for nearly three years, and all the provisions of the act have been complied with, the corporate existence of such city is

not open to attack.—*State v. Steunenberg*, 5 Idaho, 1, 45 Pac. 462.

Petitioners applied for a writ of prohibition to restrain village officers from collecting certain license taxes, alleging the act under which the village was incorporated to be void and that it does not appear from the order of incorporation that the petition praying therefor was signed by a majority of the taxable male inhabitants of the village. The application also attacked the validity of the village ordinance, imposing license tax on various kinds of business. The petition for the writ failed to negative the fact that a majority of the taxable male inhabitants petitioned for the incorporation of the village pursuant to R. S. 2224 and further failed to set forth the license taxes which the village was about to collect. Held, that the petition for the writ did not state a cause of action. *In re Francis*, 7 Idaho, 98, 60 Pac. 561.

Sess. Laws 1893, page 97, section 40, an act to provide for the organization, government and powers of cities and villages, re-enacted by Sess. Laws 1899, page 192, authorizes the incorporation of towns containing more than one thousand inhabitants.—*City of Wardner v. Pelkes*, 8 Idaho, 333, 69 Pac. 64.

A petition and order for the incorporation of a town or village which substantially complies with Sess. Laws 1893, page 97, section 40 (re-enacted by Sess. Laws 1899, p. 192), will not be declared void, because they erroneously refer to and are brought under R. S. 2224 instead of under the above Session Laws.—*City of Wardner v. Pelkes*, 8 Idaho, 333, 69 Pac. 64.

Where the order incorporating a town as a village under Sess. Laws 1893, page 97, section 40 (re-enacted by Sess. Laws 1899, page 192), uses the words "taxable inhabitants," and it is shown that four hundred and twenty-eight of the taxable inhabitants signed the petition for incorporation, there is a sufficient showing that two hundred or more "actual residents" signed the petition.—*City of Wardner v. Pelkes*, 8 Idaho, 333, 69 Pac. 64.

Under R. S. 2224 (repealed by Laws 1893, page 97, and Laws 1899, p. 192), providing that the petition and order for incorporation of a town or village must "set forth the metes and bounds," etc., a petition for incorporation is insufficient which describes the boundaries as follows: "Commencing at the center of the main street of W., where it intersects with the E. & L. patent and then running 500 feet west; thence 500 feet east; thence running north with Main street, or county road to the town of K., to the street in the town of M. bounding the private residence of J. on the north; thence running from the center of said street 500 feet east; and thence 500 feet west."—*City of Wardner v. Pelkes*, 8 Idaho, 333, 69 Pac. 64.

Under Sess. Laws 1893, page 97 (Sess. Laws 1899, p. 192), authorizing the petitioners for the incorporation of a town or village to designate in their petition the metes or

bounds thereof, and making it the duty of the board of county commissioners to definitely fix the bounds and metes if the prayer of the petition be granted, and giving a remedy to any person aggrieved thereby, there is a sufficient delegation of power by the legislature to the board to authorize such board to fix the boundaries of towns or villages on proper proceedings had for that purpose.—*City of Wardner v. Pelkes*, 8 Idaho, 333, 69 Pac. 64.

Even though the organization of a town is not made in strict compliance with the statutes, it may still be a municipal corporation by prescription.—*Town of Juliaetta v. Smith*, 12 Idaho, 288, 85 Pac. 923.

Laws 1903, page 216, section 1, providing for the change of village government into that of a city of the second class, requires a petition signed by a number of the qualified electors of said village equal to three-fifths of the total vote as shown by the last preceding general village election. Held, that the statute was directory and not mandatory, and hence, where no election had ever been held in the village, the fact that the requisite number of signatures was contained on the petition should be ascertained by the usual modes of proof.—*Boyd v. Bickel*, 13 Idaho, 191, 89 Pac. 631.

On an appeal from an order of the board of county commissioners incorporating a village, the proper title of the cause is "In the matter of the petition for the incorporation of the village of," etc.—*Gardner v. Blaine County*, 15 Idaho, 698, 99 Pac. 826.

An order incorporating a village under R. C. 2222 is appealable to the district court by any person aggrieved thereby or by any taxpayer within the territory affected by such incorporation.—*Gardner v. Blaine County*, 15 Idaho, 698, 99 Pac. 826.

On an appeal from an order of the board of county commissioners incorporating a village, the matter must be heard anew under R. C. 1953, and, therefore, it devolves on the petitioners to show all the necessary facts required to be shown to the board and it is error to require the appellant to take the affirmative and disprove the judgment and order made by the board.—*Gardner v. Blaine County*, 15 Idaho, 698, 99 Pac. 826.

Under Const., article 12, section 1, cities incorporated by special charter do not come under the general laws of the state until the majority of the electors of such city at a general election for that purpose shall so determine.—*Boise City Nat. Bk. v. Boise City*, 15 Idaho, 792, 100 Pac. 93.

R. C. 2222, authorizing the incorporation of a village, must be liberally construed.—*Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126.

R. C. 1950 provides that an appeal may be taken from any act, order or proceeding of the board of county commissioners by any person aggrieved thereby, or by any taxpayer of the county when he deems any such

act, order, or proceeding illegal or prejudicial to public interest. Held, to authorize an appeal from an order of the board of county commissioners incorporating a village.—*Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126.

Editorial Notes.

Collateral attack on legality of municipal organization: Ann. Cas. 1913A, 592; 3 Ann. Cas. 242; 11 Ann. Cas. 1060.

(B) TERRITORIAL EXTENT AND SUBDIVISIONS, ANNEXATION, CONSOLIDATION AND DIVISION.

Townships on government lands. See Public Lands, II, (B), 4.

A city ordinance approved in April, 1904, including an addition within the corporate limits, was not void on account of an intervening strip of land two thousand six hundred and sixty-three feet in length by two and eight-tenths feet wide at one end, and sixty-seven feet wide at the other, since Laws 1899, page 109, section 9, which was in force at the time of the adoption of the foregoing ordinance, provided that land or territory laid off or subdivided, as provided by statute "shall be regarded and treated as contiguous to such city or town, notwithstanding any stream or embankment or any strip or parcel of land not more than two hundred feet in width may be or lie between such land or territory, and the corporate limits of such city or town."—*Hatch v. Consumers' Co.*, 17 Idaho, 204, 104 Pac. 670.

Where the city authorities have by ordinance extended the city limits so as to include an addition or tract of land, and the inhabitants thereof and all parties affected thereby have acquiesced in the action of the city authorities and have transacted their business upon the theory that such territory was included within the city limits, a public service corporation will not be allowed to question the validity of such action of the city council in a collateral attack after the lapse of five years.—*Hatch v. Consumers' Co.*, 17 Idaho, 204, 104 Pac. 670.

Editorial Notes.

Necessity that property annexed to municipality shall be adjacent or contiguous thereto: Ann. Cas. 1913D, 401.

Power of legislature to annex territory to municipalities: 27 L. R. A. 737.

(C) AMENDMENT, REPEAL OR FORFEITURE OF CHARTER AND DISSOLUTION.

Act amending charter as special or local law. See Statutes, II.

Expression of subject in title of act amending charter. See Statutes, III.

Effect of adopting commission form of government on annual tax levy. See post, XIII, (D).

There is no method provided under our statute whereby the trustees of a town can dissolve the corporation or effect a disincor-

poration, and it is not within the power of such trustees to abandon such incorporation and procure a reincorporation.—*People v. Bancroft*, 3 Idaho, 356, 29 Pac. 112.

All acts done by a board of trustees of a lawfully incorporated town in an attempt to abandon or disincorporate such municipality and set up a new government are without authority of law and void.—*People v. Bancroft*, 3 Idaho, 356, 29 Pac. 112.

Towns and villages are created by authority of the legislature, and the only manner in which such municipal corporations can be dissolved is by act of the legislature.—*People v. Bancroft*, 3 Idaho, 356, 29 Pac. 112.

The board of county commissioners cannot dissolve an incorporated town and erect a new town out of the same and additional territory, or out of the same territory, or any part of the same territory.—*People v. Bancroft*, 3 Idaho, 356, 29 Pac. 112.

Under Const., article 21, section 2, the special charters under which certain cities in the state had been incorporated were continued in force—*Boise City Nat. Bk. v. Boise City*, 15 Idaho, 792, 100 Pac. 93.

Under the constitution, the special charter of the city of Lewiston may be amended by a special law enacted for that specific purpose, or by a general law which declares a state policy concerning police regulations or in regard to matters affecting the state at large.—*Mix v. Board of Commrs.*, 18 Idaho, 695, 112 Pac. 215.

Special charters issued to cities by the territorial legislature prior to the adoption of the constitution of this state can only be amended by special acts of the legislature, and the general laws relating to purely municipal affairs of local concern to the government of cities do not apply to those cities operating under special charters without the consent of the electors of such municipality. *Kessler v. Fritchman*, 21 Idaho, 30, 119 Pac. 692.

Laws 1911, page 280, section 12, authorizing cities of two thousand five hundred inhabitants or over to adopt a commission form of government and requiring an election on such question on petition of twenty-five per cent of the electors, is not in conflict with Const., article 12, section 1, providing that the legislature shall provide by general laws for the incorporation, organization and classification of cities and towns, and that cities and towns heretofore incorporated may become organized under the general laws whenever a majority of the electors at a general election shall so determine.—*Kessler v. Fritchman*, 21 Idaho, 30, 119 Pac. 692; *Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

The words "general election," as used in Const., article 12, section 1, mean that the general election should be a general election for the purpose of changing the form of government, at which the people having the general qualifications of electors to vote should have a free and open opportunity of express-

ing themselves upon the questions submitted, and that such qualification should not be limited to any special qualification, and does not mean that such election shall be at the time of a general election under either the general election laws of the state or the municipality holding such election.—*Kessler v. Fritchman*, 21 Idaho, 30, 119 Pac. 692.

Const., article 12, section 1, reserves the right to the people of a city organized under special charter issued prior to the adoption of the constitution to change the form of government by vote of a majority of the electors at an election held for such purpose.—*Kessler v. Fritchman*, 21 Idaho, 30, 119 Pac. 692.

Laws 1911, page 280, authorizing the commission form of government for cities is a general law of the state, but it in no way changes or alters or amends the powers of cities previously organized either under a special charter or the general laws, unless such law is adopted by the electors of such cities and approved as the form of government for such cities.—*Kessler v. Fritchman*, 21 Idaho, 30, 119 Pac. 692.

Under the commission government act (Laws 1911, c. 82, sec. 3), a special charter city which has decided by popular vote in accordance with the provisions of the act to adopt the commission form of government is thereafter subject to and governed by all the general laws of the state governing or pertaining to cities of the second class which are not inconsistent with the provisions of the commission government act.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

The words "such cities" as used (Laws 1911, c. 82, sec. 3) mean cities of the class to which the one adopting the new form of government belongs, if existing under the general laws, or would legally belong if it were organized and operating under the general laws of the state.—*Swain v. Fritchman*, 21 Idaho, 183, 125 Pac. 319.

Under Const., article 12, section 1, providing that cities and towns organized prior to the adoption of the constitution may become organized under the general laws when a "majority of the electors at a general election shall so determine under such provisions therefor as may be made by the legislature," it is not necessary that the legislature submit to the electors the question as to whether they will surrender a special charter, but they may submit the question as to whether they will adopt some general legislative act and become organized and operate thereunder.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

Under the general incorporation laws of the state, a city of the second class was the highest class of cities which was recognized or provided for by the law-making body at the time of the adoption of R. C. 2170, and the fact that the statute provided that cities of a population of from one thousand to fifteen thousand should be known as cities of the second class does not signify that the

law-making body meant or contemplated that a city should become disorganized or disincorporated by reason of its growth to exceed the maximum population of fifteen thousand, and a city so incorporated would continue to exercise the powers and functions of a city of the second class although its population should exceed the maximum of fifteen thousand.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

Under Laws 1911, chapter 82, section 1, known as the commission government act, it is specifically provided that any city within the state organized under a special charter may adopt the provisions of the new form of government, and section 3 of the same act recognizes that the provisions thereof may be adopted by a special charter city and provides "that no provisions of any special charter or other special act or law which any such city may be operating under at the time of its becoming organized under this act shall thereafter be applicable to such city," etc.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

Laws 1911, chapter 82, known as the commission government act, does not tend or purport to repeal any of the provisions of any bonding ordinance of Boise City, and does not purport or attempt to impair any bond or other obligation of the city, but on the contrary, specifically provides that the new form of government, if the same shall be adopted by any city, shall still be liable for all the outstanding obligations of the city as they then existed.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

Editorial Notes.

Charters, amendments to are binding without acceptance: 53 Am. Dec. 470.

Validity of statute conferring on municipality power to amend or adopt new charter: Ann. Cas. 1913C, 788.

Right of municipality to adopt commission form of government: Ann. Cas. 1912C, 999.

Combining in single question to voters question of charter amendments: 26 L. R. A., N. S., 673.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL

Incorporated cities and towns of this state possess a double character, the one governmental, legislative or public, and the other in a sense proprietary or private.—*Baillie v. City of Wallace*, 24 Idaho, 706, 135 Pac. 850.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS AND LIABILITIES

The legislature has power to vacate streets, or direct the laying out of new ones and to permit the use of them for certain purposes, as canals, ditches, railways, etc.—*Boise City Canal Co. v. Pinkham*, 1 Idaho, 790.

Under Const., article 12, section 1, granting to the legislature the power to provide by general laws for the incorporation, organization and classification of cities and towns of the state, the legislature may specify and denominate what offices may be united and how such offices may be filled.—*Vineyard v. City Council*, 15 Idaho, 436, 98 Pac. 422.

Where a street has been legally dedicated, it remains a street free from any interference by legislative authority, and the municipal authorities are the proper persons to say when the times and conditions are such that such property should be used for street purposes.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

Editorial Notes.

Power of the legislature to impose liabilities upon and to validate invalid contracts of municipal corporations: 80 Am. Dec. 731.

Legislative control over property of municipal corporations: 35 Am. St. Rep. 529.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

Power of city council to grant or refuse liquor license. See *Intoxicating Liquors*, IV.

Regulation and control of sale of liquors. See *Intoxicating Liquors*.

(A) MEETINGS, RULES AND PROCEEDINGS IN GENERAL.

Where there is a quorum present at a special meeting of the city council, called without giving the written notice required by Laws 1899, page 193, section 13, an ordinance regularly passed at such meeting will not be held invalid for failure to give such written notice.—*Sommercamp v. Kelly*, 8 Idaho, 712, 71 Pac. 147.

Laws 1899, page 193, section 13, providing for special meetings of the city council, does not specify the length of time that notice shall be given to members of the council nor the circumstances or conditions under which a special meeting may be called.—*Gale v. City of Moscow*, 15 Idaho, 332, 97 Pac. 828.

Under Laws 1899, page 193, section 13, providing for special meetings of the city council, a special meeting was called by the mayor. All the members were present except two, one of whom was notified personally and excused from attendance by the mayor on his request, and the other was out of the county and at such a distance from the city and place of meeting that he could not be notified within the time and that he could not have attended if he had been notified. Held, that the mayor and councilmen present constituting a quorum had power and authority to transact the business for which the meeting was called.—*Gale v. City of Moscow*, 15 Idaho, 332, 97 Pac. 828.

An entry made by the city clerk upon the journal at the time of a special meeting,

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setting forth that a call for a special meeting of the council was made and the object of the meeting and the action taken thereon by the council and mayor at such meeting, is a sufficient compliance with Laws 1899, page 193, section 13.—*Gale v. City of Moscow*, 15 Idaho, 332, 97 Pac. 828.

In the absence of an ordinance regulating the manner, time and method of calling special meetings of the city council, it will be presumed that a call for a special meeting made by the mayor was in conformity with the rules and regulations of the city council and pursuant to the statute.—*Gale v. City of Moscow*, 15 Idaho, 332, 97 Pac. 828.

Editorial Notes.

Legality of meeting of municipal council held outside of municipal limits: Ann. Cas. 1912B, 646.

(B) ORDINANCES AND BY-LAWS IN GENERAL.

No judicial notice of city ordinances. See *Evidence*, I.

An ordinance may be void as to an exclusive grant of a franchise and valid as to the remaining portion.—*Bellevue Water Co. v. City of Bellevue*, 3 Idaho, 739, 35 Pac. 693.

A village ordinance entitled "An act regulating and licensing liquor dealers within the village of St. A.," required the payment of a fixed license fee for retail liquor dealers only, regulated the sale of all intoxicating liquors, prohibited any other business in the same room or in connection therewith, provided that the doors be closed on Sunday, and prohibited dancing, music, singing, etc., on the premises. Held, that the ordinance was not obnoxious to Laws 1893, page 122, section 79, and Laws 1899, page 209, section 83, providing that an ordinance shall contain no subject which shall not be clearly expressed in its title.—*Village of St. Anthony v. Brandon*, 10 Idaho, 205, 77 Pac. 322.

The title to a city ordinance, to wit: "An ordinance regulating the hours in which intoxicating liquors shall be sold in Boise City, and for Sunday closing, and providing for a penalty for the sale thereof during prohibited hours," expresses the object and purpose of said ordinance, and is sufficiently comprehensive to include all the provisions of said ordinance.—*State v. Calloway*, 11 Idaho, 719, 114 Am. St. Rep. 285, 4 L. R. A., N. S., 109, 84 Pac. 27.

R. C. 2274, providing, "The style of all ordinances shall be: 'Be it ordained by the mayor and council of the city of _____ or the chairman and board of trustees of the village of _____,' " is directory, and the enacting clause of a village ordinance as follows: "Be it ordained by the town of Post Falls," is sufficient.—*Best v. Broadhead* (on rehearing), 18 Idaho, 11, 108 Pac. 333.

Under R. C. 2276, providing that "No ordinance or section thereof shall be revised or amended unless the new ordinance contain

the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed," an amendatory ordinance which purports to amend an ordinance by inserting therein particular language without indicating where such insertion shall be made, or containing the entire ordinance as amended or the particular section amended, is void.—*Best v. Broadhead* (on rehearing), 18 Idaho, 11, 108 Pac. 333.

Where the provisions of an amendatory ordinance are illegal and void, and it is apparent that such amendment is to be substituted for the ordinance repealed, or for a particular part thereof, the illegal and void character of the repealing ordinance will also render void the repealing clause.—*Best v. Broadhead* (on rehearing), 18 Idaho, 11, 108 Pac. 333.

The title of an ordinance, "An act relating to domestic animals and prohibiting their running at large," is sufficient to authorize the incorporation in such ordinance of provisions incident to and regulating animals running at large, such as naming the kind, the territory or place in which they shall not run at large, the impounding and sale, the fees to be collected, and the penalty.—*Best v. Broadhead* (on rehearing), 18 Idaho, 11, 108 Pac. 333.

Title to ordinance No. 361 of the city of Moscow examined and considered, and held sufficient to embrace the subject matter contained in the body of the ordinance.—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

Editorial Notes.

Ordinances, general limitations upon power to enact: 34 Am. Dec. 627.

Necessity that title of municipal ordinance fully express subject matter: Ann. Cas. 1912C, 192.

Right of municipal council to reconsider and adopt defeated ordinances: Ann. Cas. 1913B, 804.

Propriety of exercise of power by municipality by resolution: Ann. Cas. 1913C, 1321; 3 Ann. Cas. 654.

V. OFFICERS, AGENTS AND EMPLOYEES.

(A) MUNICIPAL OFFICERS IN GENERAL.

Legislative control of offices. See ante, III.

A municipality can act only through officers and agents, and notice to an officer, agent or employee concerning the condition or status of a particular and specific business for and about which he is engaged is notice to the municipality itself.—*Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541.

The remedy provided by R. S. 7445 to 7459 for the removal of city officers is not an exclusive remedy and does not prohibit village trustees from removing appointive officers.—*Conwell v. Village of Culdesac*, 13 Idaho, 575, 92 Pac. 535.

Laws 1903, page 187, section 6, providing that the police judge should be elected at the biennial election, contained a proviso to the effect that the council might provide by ordinance that the city clerk should be ex-officio police judge. Prior to a regular election the city council passed an ordinance to the effect that after the date on which said election should be held, the city clerk should be ex-officio police judge. Held, that it was unnecessary to elect a police judge at such election.—*Vineyard v. City Council*, 15 Idaho, 436, 98 Pac. 422.

(B) MUNICIPAL DEPARTMENTS AND OFFICERS THEREOF.

Where the corporate existence of a city is assailed, and the city has no attorney, the mayor and council thereof may employ counsel to protect its interests in the litigation, and their action therein will not be defeated on account of failure to comply with all the technical details incident to the employment of counsel in ordinary cases.—*Rice v. Gwinn*, 5 Idaho, 394, 49 Pac. 412.

There is no statutory restriction prohibiting a city from employing special counsel when a necessity therefor arises or the interests of the municipality require it.—*Boise City v. Randall*, 8 Idaho, 119, 66 Pac. 938.

Editorial Notes.

Right of municipality to employ counsel to assist its regularly retained counsel: Ann. Cas. 1913D, 921, note.

Under Laws 1899, page 201, section 64, providing that if the village treasurer neglect or fail from ten days from the end of each month to render an account, the office shall be declared vacant, the board of village trustees must first find the fact to exist that the treasurer has failed or neglected to make the reports required by law before they can declare the office vacant.—*Village of Kendrick v. Nelson*, 13 Idaho, 244, 12 Ann. Cas. 993, 89 Pac. 755.

Laws 1899, page 201, section 64, authorizing the board of village trustees to appoint a successor to the village treasurer in certain contingencies and providing that such appointee shall hold "until the next election for city or village officers," clearly indicates the legislative intent to make the term of office of the village treasurer the same as the term of the board of trustees.—*Village of Kendrick v. Nelson*, 13 Idaho, 244, 12 Ann. Cas. 993, 89 Pac. 755.

The removal of a village marshal by the board of trustees is not such an exercise of judicial power as to be repugnant to Const., article 5, section 2.—*Conwell v. Village of Culdesac*, 13 Idaho, 575, 92 Pac. 535.

The mayor of a city has no authority to enter into a contract for the purchase of waterworks by the city without any authorization by the city council or any approval or ratification on the part of said city.—*Woodward v. City of Grangeville*, 13 Idaho, 652, 92 Pac. 840.

R. C. 2190, providing "the mayor . . . shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and of this title are complied with," is not sufficient to give the mayor authority to appoint policemen upon his own motion or in a manner other than that provided in R. C. 2186.—*Moore v. Hupp*, 17 Idaho, 232, 105 Pac. 209.

Under R. C. 2186, the mayor of a city is authorized to appoint policemen by and with the consent of the council; and this is the only method by which policemen of a city can be appointed.—*Moore v. Hupp*, 17 Idaho, 232, 105 Pac. 209.

(C) AGENTS AND EMPLOYEES.

(No paragraphs.)

VI. PROPERTY.

Estoppel of city to claim title to lot on which it collected taxes. See *Adverse Possession*.
Questions relating to townsites on government lands. See *Public Lands*, II, (B), 4.

Where a city acquired certain land outside its limits for park purposes, a person claiming to have appropriated the waters of a certain spring thereon, but not claiming any of said lands, is not in a position to attack the right of the city to purchase the same.—*City of Pocatello v. Bass*, 15 Idaho, 1, 96 Pac. 120.

Under the townsite law, U. S. Rev. Stats. 2387, land cannot legally be acquired for farm purposes.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

VII. CONTRACTS IN GENERAL.

Contracts for public improvements. See post, IX, (A), (C).

The letting of a contract for public work by the city council is an administrative and not a judicial or quasi-judicial act.—*Adleman v. Pierce*, 6 Idaho, 294, 55 Pac. 658.

Where the mayor of a city authorizes a person to select detectives or policemen to act for and on behalf of the city, and such persons are so selected and serve in such capacity and are paid by such person, who thereafter presents a claim against the city for the money so expended, and the city council allows such claim and orders and directs that a warrant issue in payment therefor, the acts of the council are a ratification of the mayor's acts in authorizing the selection of such person to act for and on behalf of the city, and the expense thereby incurred becomes a city charge, which the city is authorized to pay.—*Moore v. Hupp*, 17 Idaho, 232, 105 Pac. 209.

Editorial Notes.

Validity in absence of statute of contract by municipal council in which member of council is interested: Ann. Cas. 1912D, 659.

Liability of municipality under executed contract in which municipal officer is interested: Ann. Cas. 1912D, 1132.

Construction of "lowest responsible bidder" or similar phrase in statute providing for letting of municipal contracts: Ann. Cas. 1913A, 500.

Remedy of lowest bidder for refusal of authorities to award contract to him: 30 L. R. A., N. S., 126.

VIII. MUNICIPAL EXPENSES AND CHARGES AND STATUTORY LIABILITIES.

Fiscal management, bonds and warrants. See post, XIII.

IX. PUBLIC IMPROVEMENTS.

Condemnation of lands for sewer purposes. See *Eminent Domain*.

(A) POWER TO MAKE IMPROVEMENTS OR GRANT AID THEREFOR.

Where a city is authorized by a legal vote of the taxpayers to provide waterworks for the city, and to expend therefor the sum of \$80,000 if necessary, the city can construct a new system or purchase, enlarge or improve an old one.—*Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286.

The special charter of Boise City, as amended and re-enacted in 1907, contains all of the powers that that city has in regard to the construction of sewers and the method of levying assessments and collecting taxes for the payment of such sewers.—*Boise City Nat. Bk. v. Boise City*, 15 Idaho, 792, 100 Pac. 93.

Under R. C. 2238, subd. 3, authorizing cities and villages to establish grades on streets and alleys, and R. C. 2315, as amended by Laws 1909, p. 174, conferring authority upon cities and towns to issue bonds for the grading, paving, construction and laying out of streets and alleys, cities and villages have ample power to establish the grade of their streets and to reconstruct the roadbed on the grade thus established.—*City of Nampa v. Nampa etc. Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979.

R. C. 2238, as amended by Laws 1911, chapter 81, page 266, grants full power to cities and villages organized under the general law of the state to make contracts for the construction and building of such public improvements enumerated in such act, and to levy special assessments within an improvement district formed, for the full debt thereof, in proportion to the benefits derived to said property by said improvements, sufficient to cover the total cost of and expenses of the work to the center of the street, and includes the construction of sidewalks, curbs, paving and gutters.—*Byrns v. City of Moscow*, 21 Idaho, 398, 121 Pac. 1034.

R. C. 2323, as amended by Laws 1911, chapter 12, page 28, and the subsequent sections of the Revised Codes, which were originally adopted by Laws 1895, page 41, relating to street improvement bonds, are in conflict with and repealed by Laws 1911, chapter 81, page 266, amending R. C. 2238,

relating to the powers of cities and villages. *Byrns v. City of Moscow*, 21 Idaho, 398, 121 Pac. 1034.

It is within the power and authority of the legislature of the state to provide for the incorporation and organization of cities and villages, and to authorize such cities and villages to make public improvements, such as paving, grading and guttering streets and the building of sidewalks and the construction of curbing, and providing that the cost of such improvements may be paid from the general levy of taxes, or by means of special assessments made against the property specially benefited, and that municipal bonds may be issued for the purpose of raising such revenue with which to pay for such improvements, and that all such regulations and matters are entirely within the power of the legislature, and may be provided for by proper legislation. *Byrns v. City of Moscow*, 21 Idaho, 398, 121 Pac. 1034.

R. C. 2238, as amended by Laws 1911, page 266, in subdivision 5, and paragraph 4 of subdivision 6, gives to municipalities and city councils the power to lay out, establish, open and improve streets and alleys, and to create special improvement districts; and paragraph 4 of subdivision 6 authorizes and empowers the city council to pass two ordinances: First, a resolution or ordinance declaring its intention to make such improvement, and stating in such resolution or ordinance the name of the street or alley to be improved, the points between which such improvement is to be made and the general character of the proposed improvement, and the estimate of the cost of the same, and that the cost is to be assessed against the property abutting, fronting, contiguous or tributary, etc.; and, second, an ordinance providing for the establishment of a local improvement district, for the assessment of the abutting, contiguous or tributary lands and lots, and the payment of other expenses provided for in the ordinance. Held, that such provisions are intended to give the city council exclusive control of the streets and highways within the city, and the grading, paving and improvement of streets may be directed by the council, either upon petition, or by affirmative vote of either three-fourths or four-fifths of the city council.—*McEwen v. City of Coeur d'Alene*, 23 Idaho, 746, 132 Pac. 308.

Under R. C. 2238, as amended by Laws 1911, page 266, the city council is clearly authorized to make specifications and plans for the entire improvement intended, and invite bids and let the contract to the lowest bidder upon the plans and specifications adopted by the council.—*McEwen v. City of Coeur d'Alene*, 23 Idaho, 746, 132 Pac. 308.

R. C. 2238, as amended by Laws 1911, page 266, vests power in the city council to determine the character and kind of pavement and the material to be used, and under such authority the council may adopt bitulithic pavement as a suitable pavement for the improvement described in ordinances Nos. 344

and 361. Bitulithic pavement is only a part of the cost of the entire improvement. The principle of competition is retained by the agreement filed by the company, and the cost of the patented article is made the same to every bidder, and the complete cost of the improvement will not only be the cost that is paid to the patentee, but will necessarily include additional cost and expenses, such as labor, other materials, tools, machinery, etc., with reference to which there can be the freest competition; and every bidder may compete as a bidder as to the aggregate cost of the improvement.—*McEwen v. City of Coeur d'Alene*, 23 Idaho, 746, 132 Pac. 308.

Editorial Notes.

Streets, change of grade of, liability of municipal corporations for: 30 Am. St. Rep. 835; 14 L. R. A. 371; 36 L. R. A., N. S., 1194.

Streets, changing grade of, compensation to be paid for damages: 4 Am. St. Rep. 401.

(B) PRELIMINARY PROCEEDINGS AND ORDINANCES OR RESOLUTIONS.

The fact that a city council authorized the making of a contract by "resolution" instead of an "ordinance" is immaterial where the resolution was passed in the same manner and under all the formalities required for the passage of an ordinance.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

R. C. 2353, providing for what shall be contained in an ordinance giving notice of intention to construct a sewer system, must be liberally construed, and a substantial compliance with the provisions of the statute is all that is required of the council, in view of the fact that its passage constitutes merely a preliminary step leading up to the final issue of the bonds, in case the voters should decide at the special election in favor of such improvement being undertaken.—*Platt v. City of Payette*, 19 Idaho, 470, 114 Pac. 25.

Ordinance No. 154 of the city of Payette, giving notice of intention to create a local sewerage improvement district, held, to sufficiently describe the property sought to be charged with the cost of the improvement, and the general character of the proposed sewer system and sewerage disposal works, and the estimated cost of such improvement. *Platt v. City of Payette*, 19 Idaho, 470, 114 Pac. 25.

A sewer committee appointed under R. C. 2343 should not comprise any of the members of the city council; but the fact that members of the council have been appointed and have acted will not annul or defeat the action which has been taken by such committee, and will not defeat the right and power of the council to issue bonds in payment for a sewerage system that has been constructed by and under the direction of such committee. Even though the members of the committee did not possess the requisite statutory qualifications to act on such

committee, they would at least constitute a de facto committee, and their acts could not be collaterally attacked.—*Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519.

Where an affidavit of publication is required to be made and filed as proof that the publication has actually been made, the actual existence of the fact required to be shown by the affidavit is the thing which confers the jurisdiction, and the affidavit is merely the proof that the jurisdictional facts do exist, and a failure to make the proof will not obviate the facts, and such proof may be subsequently made showing that the jurisdictional facts did exist at the time the action was taken.—*Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519.

Where an ordinance declaring the intention of the city council to organize a sewer district and construct a sewerage system is published in conformity with R. C. 2353, subdivision 3, and the publisher fails to file his affidavit of publication on or before the time fixed for the hearing of protests, such error or omission does not go to the jurisdiction of the council to hear protests or to further act, and does not oust or defeat the jurisdiction of the council to proceed further in accordance with the provisions of the statute.—*Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519.

A city ordinance declaring the intention of the council to organize a sewer district and to construct a sewerage system and issue bonds therefor, which states "that said sewerage district shall not include for assessment property occupied by the cross streets and alleys in said district," is defective for failure to comply with R. C. 2353, subdivision 3, requiring such ordinances to state that the sewer district "shall not include for assessment property occupied by streets, cross streets and alleys in said district," but such error or defect is not jurisdictional, and will not oust the council of jurisdiction to proceed further in accordance with the provisions of such ordinance.—*Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519.

Where a city ordinance declaring the intention of the council to organize a sewer district and construct a sewer system states that "the character of the proposed lateral sewer system shall be that of gravity and according to the plans and specifications now on file in the office of the city engineer," it is a sufficient compliance with R. C. 2353, subdivision 3, which requires that the ordinance of intention shall state the "general character of the proposed sewerage system and sewerage disposal works." In such case the reference to the plans and specifications is sufficient to give notice to all parties interested of the general character of the proposed works.—*Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519.

Where it is ascertained that under the provisions of an ordinance proper connection cannot be made by lot owners with the sewer system, such ordinance may be amended or

changed so as to provide a reasonable method for such connection.—*Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 200.

A city ordinance declared the intention of the city council to organize a sewer district and to construct a sewer system and provided as follows: "The character of the proposed lateral sewer system shall be that of gravity according to the plans and specifications now in the office of the city engineer of the city of Caldwell, Idaho." Held, a sufficient compliance with R. C. 2353, subdivision 3, which requires that the ordinance of intention shall state "the general character of the proposed sewerage system and sewerage disposal works," and that the reference in the ordinance to the plans and specifications is sufficient to give notice to all parties interested of the character of the proposed system.—*Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 200.

A gross estimate of the cost of the construction of a sewer system inserted in the ordinance of intention is sufficient.—*Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 200.

A single ordinance may provide for more than one improvement, and a single sewer district may consist of two noncontiguous tracts of land, and, as it does not appear from the record that appellant was injured by having these tracts included in one sewer district, he has no cause of complaint.—*Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 200.

An initial ordinance declaring that the intention of the city council to make certain street improvements in describing such improvement stated that the streets shall be paved the full width thereof, which the plans show to be fifty-six feet, but the ordinance thereafter passed ordering and directing the work, and providing the contract therefor showed that a portion of a certain street is to be paved to the width of eighteen feet only. Held, that if such change is in any way fatal to the final ordinance and contract for doing the work or is in any manner prejudicial to anyone, it can only be prejudicial to such persons as own property abutting on the portion of the street where the width of the pavement is reduced from that originally proposed.—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

The provision contained in ordinance No. 365 of the City of Moscow authorizing the mayor, by and with the consent of the council to appoint a committee of three citizens and taxpayers of the city to aid and assist the mayor and city council, and be advisory to them in the construction of the improvements described in the ordinance, is not fatal to the ordinance, and does not render the ordinance invalid.—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

Laws 1911, chapter 81, section 4, makes it the duty of the city council before entering upon the grading, paving or improvement of a street, where the cost is to be assessed

against the property benefited, to first pass an ordinance or resolution declaring the intention of the council to make such improvement, stating the names of the streets and alleys to be improved and the general character of the proposed improvement. Held, a sufficient compliance with this statute for the city council to pass an ordinance giving the names and description of the streets to be improved and the character of the improvement to be made, and reciting that the public interest and convenience demand that such improvement be made, and designating a time on or before which protests may be made and filed with the city clerk against such proposed improvement.—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

The resolution or ordinance of intention, mentioned in R. C. 2238, subdivision 6, paragraph 4, is for the purpose of giving notice to the property owners, who will be subjected to costs and assessments, of the intention of the council; and the property owners are given the right to protest against the proposed intention of the city council, and the council are given power to act on the protest and may accept the same, or, by a vote of three-fourths (or, in case there are only five regular members of the city council or trustees, then four-fifths) of the members of said council or board of trustees, reject the same, and proceed further with the work.—*McEwen v. City of Coeur d'Alene*, 23 Idaho, 746, 132 Pac. 308.

R. C. 2238, subdivision 6, paragraph 4, as amended by Laws of 1911, page 266, provides that in the ordinance of intention the city council shall declare its intention to make such improvement, and shall state the general character of the proposed improvement. Held, that the "general character of the proposed improvement" does not mean that a special, particular, minute, or detailed description of the work should be stated, but that a general statement should be made pertaining to a whole class or order, belonging to a whole rather than a part, and that the legislature did not intend that the ordinance of intention should provide in detail the system the council would adopt in providing for and carrying out the improvement, but only to declare a liability upon the part of the city when it directs the paving of a street or some portion of it upon which abuts property held by private parties and subject to taxation or special assessment for the purpose of paying for such improvement, and leaves it optional with the council whether it should adopt any system of universal application, or pursue any plan which it may deem best suited to the improvement contemplated at a given time.—*McEwen v. City of Coeur d'Alene*, 23 Idaho, 746, 132 Pac. 308.

Where the city council of a municipality organized under the laws of this state enacts an annual appropriation bill, and therein provides for public improvements in the sum of \$12,500, and a levy is made of twenty mills, as authorized by R. C. 2238, as amended by Laws 1911, page 266, for the purpose of

raising a general fund for the fiscal year, and such levy, together with the other revenues, such as fines, taxes and licenses provided by law, will produce a sufficient sum to cover all sums which are provided for in the annual appropriation bill, including the \$12,500, and such appropriation was intended by the council to be for the purpose of making certain improvements in the paving of cross-sections of streets and other improvements, this court will not hold void the ordinance of intention and the ordinance creating the improvement district and the making of assessments, as provided for by R. C. 2238.—*McEwen v. City of Coeur d'Alene*, 23 Idaho, 746, 132 Pac. 308.

Under R. C. 2238, subdivision 6, paragraph 4, as amended by Laws of 1911, page 266, it is made the duty of the clerk to cause the resolution of intention to be published, and an affidavit of such publication should be filed on or before the time for the filing of the protest. Held, the mere failure to file the affidavit of publication is not jurisdictional, and in such case, where the publication was actually made, full notice was in fact given, as required by the statute, and no property owner was in any way injured.—*McEwen v. City of Coeur d'Alene*, 23 Idaho, 746, 132 Pac. 308.

(C) CONTRACTS.

Implied contract to furnish materials in accordance with paving ordinance. See *Contracts*, II, (A). **Contracts for patented pavement.** See *ante*, IX, (A).

Where a contract is entered into for the construction of sewerage works to be paid for out of a fund arising from special assessments levied against the property within the district, the liability becomes a liability in rem against the property, and is not a liability of the person or municipality.—*Broad v. City of Moscow*, 15 Idaho, 606, 99 Pac. 101.

A contract for the construction of sewerage works, under Laws 1903, page 26, authorizing cities and villages to construct a sewerage system and sewerage disposal works, should be made with the chairman of the sewerage committee, where the expense of such improvement is to be raised by special assessments against the property benefited.—*Broad v. City of Moscow*, 15 Idaho, 606, 99 Pac. 101.

Where a contract is entered into for the construction of sewerage works, under Laws 1903, page 26, authorizing cities and villages to construct a sewerage system and sewerage disposal works, to be paid for by special assessments, the contractor must look to the property of said district for the payment of the contract price, and if the city or village authorities fail to deliver the bonds agreed to be delivered in payment of the contract price, the remedy of the contractor is against such officers to compel them to perform their duty, and no right of action lies against the city for damages for failure to deliver such bonds.—*Broad v. City of Moscow*, 15 Idaho, 606, 99 Pac. 101.

Where a sewerage district is created, under Laws 1903, page 26, authorizing cities and villages to construct a sewerage system and sewerage disposal works, and special assessments are made to pay the entire cost of such improvement, the city is merely the agent or instrumentality for the collection and disbursement of the fund so collected, and is not liable for damages upon the contract for the construction of such works, where the officers fail to perform their duty. *Broad v. City of Moscow*, 15 Idaho, 606, 99 Pac. 101.

Where a city ordinance providing for the paving of streets recites that the description and character of the improvement shall be a pavement done with "brick, asphalt, sheet asphalt, bitulithic, hassam, asphalt concrete, asphalt macadam, or other standard pavement," and the contract made thereunder provided for a "Dolarway" pavement, and the evidence of the witnesses shows that "Dolarway" pavement is a standard pavement, the contract is in conformity with the notice given in the ordinance, and is covered by the term "standard pavement."—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

An estimate in an initial ordinance or ordinance of intention reciting that the cost of paving the street together with curbs and curbing will be the sum of \$2.10 per square yard throughout will be held to include both the curb and paving, and such estimate will not prevent the city from contracting at a lower rate than the estimate so made.—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

Laws 1911, chapter 81, section 16, providing that all contracts which are made by the city or village for any improvement authorized under such statute shall be made by the council in the name of the city, is substantially complied with by the council passing and the mayor approving an ordinance providing for the contract and authorizing its execution, and prescribing the terms and conditions thereof, and further providing that a formal contract shall be executed by the city, and signed and attested by the mayor and city clerk.—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

(D) DAMAGES.

One owning land not abutting on the part of the street vacated cannot recover damages, although such vacation may tend to lessen the value of his land.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

Where a street is so vacated or discontinued as to cut off the property owner's ingress to or egress from his property, that would be a loss or damage not common to the rest of the community, and he would have an action for the recovery of whatever damages he might sustain by reason of such vacation. *Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

(E) ASSESSMENTS FOR BENEFITS AND SPECIAL TAXES.

Special assessment as indebtedness or liability required to be submitted to vote. See post, XIII.

Constitutional limitation of indebtedness as applying to assessments for improvements. See post, XIII.

The services of an engineer in making surveys, preparing estimates, maps and plats of a proposed sewer district and preparing plans and specifications for a proposed sewer improvement, is a legitimate part of the expense of constructing such sewer system, and the expense thereof may properly be included in the assessment levied on the property within such district for that purpose.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under Lewiston city charter, Laws 1903, page 105, section 75, providing that the cost of constructing a sewer system shall be assessed on the lots and parcels of land benefited in proportion to the benefits received, it is not necessary that the lots or parcels of land should abut on the sewer improvement, all lots within the district and capable of drainage by means of the improvement being subject to assessment in proportion to the benefits received.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Where a city council, pursuant to notice, meets on a specified date for the purpose of equalizing sewer assessments and hearing objections to previous assessments, it is not necessary that they confirm the assessment on that day, but they may adjourn from time to time finally confirming the same.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

An objection that a resolution of the city council was passed March 23d and approved March 26th, but delivered to the clerk on March 24th, whereas Lewiston city charter, Laws 1903, page 105, section 75, subdivision 4, provides that it shall be delivered to the clerk "within two days after the passage and approval, etc." is untenable as the clerk is supposed to have had the resolution in his possession from the time of its first reading. *McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

A notice was sent out fixing January 5th as time for hearing objections to assessments for sewer improvements. Owing to an error in the notice, a subsequent notice was sent out fixing January 25th as the time for holding the meeting. The council met on both dates and everyone was given an opportunity for hearing. Held, not to invalidate the sewer assessments.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under Lewiston city charter, Laws 1903, page 105, section 75, subdivision 3, if the city council determine to divide a sewer assessment into installments running over a number of years, they must make those installments equal.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under Lewiston city charter, Laws 1903, page 105, section 75, the city council was

authorized to make the interest on sewer district warrants payable annually and to provide that the interest on the annual installments of the assessment should be paid annually.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under Lewiston City Charter, Laws 1903, page 105, section 75, a property owner may redeem his property from sewer assessments by payment of the installments not yet due and interest thereon to the date of payment. *McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Where a city council passes a resolution providing for the maturity of the first installment of an assessment for sewers thirty days after the completion of the work, and subsequently adopts another resolution providing for the maturity of the first installment on May 2, 1907, the latter resolution will be controlling.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under Lewiston city charter, Laws 1903, page 105, section 75, authorizing the city council to levy special assessments for sewer improvements on the lots or parcels of land benefited in proportion to the benefits received, the determination of the manner and method of arriving at the benefits to be derived by any lot or parcel of land is left to the judgment and determination of the city council.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under the Lewiston city charter, Laws 1903, page 105, section 75, authorizing the city council to create and organize sewer districts and levy assessments on the property to be benefited, the city council has authority to divide the sewer district into sub-districts for the purpose of levying assessments.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

In imposing and levying assessments for a sewer on property within the sewer district, the assessments are properly made on the valuation of the ground exclusive of the valuation of the improvements thereon.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Lewiston city charter, Laws 1903, page 105, authorizing the creation of sewer districts and the levy of special assessments on the lots or parcels of land to be benefited, provides that "the funds raised by such assessment shall be applied solely toward the payment of such improvements and construction and the redemption of the warrants and bonds issued therefor." Held, that to entitle warrants to be drawn for such improvement it is not necessary that the city council first pass an ordinance making an appropriation therefor, the levy of the assessment being all the appropriation necessary.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under the sewerage improvement law, Laws 1905, page 340, section 12, all special assessments levied for the purpose of making such improvement become and are a lien upon the property on which they are levied, the same as any other tax, and are subject to collection and penalties in the same manner

and under the same conditions as any other tax.—*Blackwell v. Village of Coeur d'Alene*, 13 Idaho, 357, 90 Pac. 353.

Under the sewerage improvement law, Laws 1905, page 340, section 12, subdivision 11, any property owner may redeem his property from the lien of an assessment for sewer improvements by paying the whole of the assessment with interest accrued up to the date of such redemption.—*Blackwell v. Village of Coeur d'Alene*, 13 Idaho, 357, 90 Pac. 353.

Laws 1905, page 340, section 12, subdivision 3, authorizing the formation of sewer districts within cities, towns and villages and the levy of special assessments for the purpose of constructing sewer systems, provides that the assessment shall be made upon the respective lots and parcels of land in proportion "to the front-feet of such lands or lots included in said sewerage improvement district and in proportion to the benefits derived by said sewerage improvement." Held, that the assessment should be made both with reference to the frontage of the lots and the benefits derived.—*Blackwell v. Village of Coeur d'Alene*, 13 Idaho, 357, 90 Pac. 353.

Also held under said Laws 1905, page 340, section 12, subdivision 3, that an assessment made with reference to the frontage alone will be upheld where it does not appear that the assessment has not been just and proportionate with the benefits to be derived from such improvement.—*Blackwell v. Village of Coeur d'Alene*, 13 Idaho, 357, 90 Pac. 353.

R. C. 2353, subdivision 7, does not prescribe any particular form for an order which must be made by a city council confirming sewer assessments. Any action of the council which discloses their purpose to approve any given act or adopt and pursue a given course is sufficient without reference to form.—*Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519.

The burden of proof is on the party who attacks an assessment, and it will be presumed, in the absence of evidence to the contrary, that the official acts connected therewith were performed regularly and in substantial compliance with the provisions of the statute.—*Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 200.

Under the evidence in an action to confirm a sewer assessment, held that the plans and specifications of said sewer system had been properly prepared and were on file in the office of the city engineer at the time fixed for the hearing of protests against the organization of such district, and that the engineer who prepared said plans and specifications and superintended the construction of said system was at least a de facto city engineer and performed the duties of city engineer.—*Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 200.

R. C. 2354 provides, among other things, that, in event that the assessment or assessment-rolls therein provided for shall not be confirmed, then the contract for the construction of sewers shall be of no force or effect. Held, that under that provision the con-

tractor took his chances on proceeding to construct sewers prior to the confirmation of such assessment; but, when the council did confirm the assessment, such contract was in full force and effect.—*Dement v. City of Caldwell*, 22 Idaho, 62, 125 Pac. 200.

R. C. 2238, subdivision 6, provides that the expense of all improvements in the space formed by the junction of two or more streets, wherein one main street terminates in or crosses another main street, and all street crossings or crosswalks shall be paid by the city, but this statute does not include spaces in streets opposite alleys or intersections with alleys, and the city at large is not required to pay for the paving of such portions of the street. Alleys are conveniences to the lots on which they abut and afford means of ingress and egress from the main streets to the rear of lots, and the paving of the street in front of such alleys should be borne by the improvement district rather than by the city.—*Clyde v. City of Moscow*, 23 Idaho, 592, 131 Pac. 381.

R. C. 2238, as amended by Laws 1911, page 266, governing special assessments and the issuance of bonds for special improvements contemplates that the interest on such indebtedness shall be paid at least annually.—*Veatch v. City of Moscow*, 24 Idaho, 461, 134 Pac. 551.

R. C. 2238, subdivision 11, as amended by Laws 1911, page 266, relating to the powers of cities and villages, provides that "the owner of any piece of property liable for any special assessments may redeem his property from such liability by paying the entire assessment chargeable against his property, upon the city or village clerk having published a printed notice in three consecutive issues of the official weekly newspaper, which notice shall state the time for payment to begin and the time for the payment to close, the last day of said notice to be not less than thirty days before the issuance of the bonds, or after the issuance of the bonds by paying all the installments of the assessments which have been levied and also the amount of unlevied installments with interest on the latter" at the rate which said indebtedness bears, as stated in the bonds representing such indebtedness. Held, that under said section the interest which such bonds may bear is limited to seven per cent per annum, and, if municipal bonds are issued which draw but six per cent, the person who desires to redeem his property from such liability is not required to pay a higher rate of interest than he would be required to pay if the bonds were permitted to run until the installments all became due; and therefore, a peremptory writ of prohibition will issue to restrain the defendants from collecting more than six per cent interest per annum to the date of the maturity of installments of the principal from the property owner who desires to redeem his property from the lien created by such assessments.—*Veatch v. City of Moscow*, 24 Idaho, 461, 134 Pac. 551.

Editorial Notes.

Assessments, power of municipal corporations to levy: 55 Am. Dec. 285.

Assessments and taxes, purposes for which municipal corporations may levy: 16 Am. St. Rep. 365.

Assessment for local improvements, public property, whether subject to: 33 Am. St. Rep. 400.

Right to impose on abutting owners expense of sprinkling or cleaning streets or sidewalks: 24 L. R. A. 412.

(F) ENFORCEMENT OF ASSESSMENTS AND SPECIAL TAXES.

Liability of city for negligence of officers in collecting assessment. See post, XII, (B).

Laws 1899, page 209, section 86, requires the council or trustees of each city or village to certify to the county tax collector the percentage of tax to be levied for city or village purposes, including all special assessments, etc. Laws 1903, section 12, subdivision 10, provides that assessments thereunder shall be known as special assessments for sewerage and shall be levied and collected as separate taxes in addition to the taxes for general revenue purposes to be placed on the tax-roll for collection, etc. Held, that city assessments for sewerage purposes properly were certified for collection to the county tax collector.—*Denning v. City of Moscow*, 11 Idaho, 415, 83 Pac. 339.

Under Laws 1905, page 340, section 12, subdivision 11, providing that no suit to set aside the special assessment for sewers therein provided for or to enjoin the making of said assessment shall be brought or any objection to the validity thereof shall be allowed after the expiration of thirty days from the date of confirmation of the assessment, an objecting property owner must make his protest or initiate his proceedings within the time designated by the statute or he will be precluded from thereafter doing so.—*Blackwell v. Village of Coeur d'Alene*, 13 Idaho, 357, 90 Pac. 353.

Under the sewerage improvement law, Laws 1905, page 340, section 12, subdivision 12, the purchasers or holders of bonds or warrants issued for the purpose designated in the act have two remedies for the collection of the principal and interest of these obligations; the first, to compel the village authorities by writ of mandate to collect the tax or assessment by the usual or ordinary methods; the second, to foreclose the lien of the bonds in the same manner as any other mortgage or lien.—*Blackwell v. Village of Coeur d'Alene*, 13 Idaho, 357, 90 Pac. 353.

Where a sewerage district is created, under Laws 1903, page 26, authorizing cities and villages to construct a sewerage system and sewerage disposal works, and the works to be constructed therein are to be paid for out of special assessments made against the property of said district, the indebtedness thereby created becomes and is an indebtedness against the property of said district, and is not an obligation of indebtedness of the city or village in which, or out of a portion of which, such district is created.—*Broad v. City of Moscow*, 15 Idaho, 606, 99 Pac. 101.

X. POLICE POWER AND REGULATIONS.

Regulation of sale of liquors. See *Intoxicating Liquors*.

Conviction for violation of city ordinance not a defense to prosecution under state law. See *Criminal Law*, VII.

Ordinance fixing fine for violation of saloon regulations not void as providing excessive penalty. See *Intoxicating Liquors*, II.

Ordinance requiring license to sell farm products. See *Licenses*, I, and *Hawkers and Peddlers*.

Municipal corporations may pass ordinances for the punishment of and may punish for the same acts as are punishable under the Penal Code, when authorized so to do by the law under which such towns and villages are organized.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

Under Const., article 12, section 2, prohibiting municipal ordinances in conflict with the general laws of the state, a city ordinance authorizing and licensing gambling is unconstitutional.—*In re Ridenbaugh*, 5 Idaho, 371, 49 Pac. 12.

Laws 1897, page 53, prohibiting gambling, repeals that provision of the city charter of Boise empowering the city council to license gambling.—*In re Ridenbaugh*, 5 Idaho, 371, 49 Pac. 12.

Under Const., article 12, section 2, empowering cities and towns to make and enforce sanitary and police regulations, a city may make and enforce police regulations punishing misdemeanors though there is a general law of the state defining and punishing the same offense.—*State v. Quong*, 8 Idaho, 191, 67 Pac. 491.

Under Laws 1905, page 113, section 15, the cities and villages of the state have power and authority to pass ordinances to prevent the running at large of horses within corporate limits.—*Best v. Broadhead*, 18 Idaho, 11, 108 Pac. 333.

When the general law prohibits or makes a certain business criminal, the city cannot make such business lawful by licensing it.—*Mix v. Board of Commrs.*, 18 Idaho, 695, 112 Pac. 215.

Editorial Notes.

Health, laws and regulation of and their validity: 47 Am. St. Rep. 541.

Cemeteries, power of municipal corporations to regulate, prohibit or discontinue: 87 Am. St. Rep. 678.

Municipal regulation of billboards and signs: Ann. Cas. 1913D, 958.

Keeping of billiard or pool table as subject of exercise of police power: Ann. Cas. 1913D, 1052.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY AND WORKS.

Right to construct railroad within corporate limits. See *Railroads*, V.

Dedication of streets and alleys. See *Dedication*.

Necessity of affirmative action by city as affecting dedication of streets and alleys. See *Dedication*.

Legislative control. See *ante*, III.

Limitation of action to annual ordinance vacating streets. See *Limitation of Actions*, I, (B).

Equitable estoppel. See *Estoppel*, III.

Supplying municipalities with water. See *Waters and Watercourses*, IX.

Incorporated towns or villages as separate road districts are under the exclusive jurisdiction and control of the trustees thereof.—*City of Genesee v. Latah County*, 4 Idaho, 141, 36 Pac. 701.

R. S. 2230, subdivision 16, giving towns and villages the right to keep in repair all highways, streets and alleys, confers exclusive jurisdiction therein on towns and villages and therefore the board of county commissioners cannot authorize its road overseer or any road overseer to go within the limits of any organized town or village to repair, or in any way interfere with its streets or alleys.—*City of Genesee v. Latah County*, 4 Idaho, 141, 36 Pac. 701.

The unauthorized acts of an officer in assessing streets and alleys cannot impair the right of the public thereto, nor confer any right of ownership of such streets upon the person paying such taxes.—*Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167.

The owner of a lot abutting on a street or highway has a special and peculiar right in that particular street or highway not common to other citizens, and such right is a property right appurtenant to his lot, and affords him the means of ingress and egress and thereby enjoying the common right to use the streets and highways.—*Village of Sandpoint v. Doyle*, 14 Idaho, 749, 17 L. R. A., N. S., 497, 95 Pac. 945.

Where the city council of Boise city had dedicated a street to the public immediately after the mayor had made the townsite entry under U. S. Rev. Stats. 2387, and nearly four years thereafter the mayor of the city executed a deed to an individual conveying a portion of said street, such conveyance was unauthorized and void.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

The townsite of Boise City was entered under U. S. Rev. Stats. 2387. The legislature by act approved January 13, 1871 (6th Terr. Sess. Laws, p. 67), vacated a certain street within said townsite. Held, that no street or alley of said city could be vacated by legislative act or by conveyance of the trustee who entered the townsite for the use of the inhabitants thereof.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

In the absence of a positive statute, the presumption is that the public takes simply an easement in the streets.—*Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

The word "regulate," as used in Laws 1880-81, page 404, section 7, authorizing the city to regulate cellarways and cellar-lights and sidewalks, means to put or keep in order, and to regulate sidewalks includes the control thereof.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

The proceedings in relation to the discontinuance or vacation of streets or alleys are not void on account of the village board

not having provided by ordinance some method or manner for determining any damages that might occur to property owners because of such vacation or discontinuance.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

One whose property does not abut on the part of the street vacated by ordinance cannot maintain an action to enjoin the enforcement of the ordinance, though he, in common with others, may be inconvenienced by such vacation.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

Where by ordinance a town or village vacated certain streets and alleys in the year 1900, with the understanding that the C. Lumber Company would establish and maintain a large lumber manufacturing establishment upon certain blocks owned by it in the city of C., and said company proceeded and expended in the establishment of said plant on said blocks and on parts of the streets vacated over \$100,000, and the plaintiff had actual notice of the passage of such ordinances and the expenditure of money in the construction of said plant, and made no objection thereto until the commencement of this action on June 15, 1909, she is estopped from maintaining this action.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

The right to vacate a street, or a part thereof, is largely in the discretion of the body possessing that power, and such body may determine as to the public convenience and necessity of such discontinuance; and where there has been no glaring informality or illegality in the proceedings its judgment should not be disturbed.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

While such vacation may cause one to travel further and in a more circuitous route, in order to get to the business portion of the city, that is an inconvenience different in degree only from that suffered by other persons, and it furnishes no ground for injunctive relief.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

Whenever a street or alley is vacated or discontinued, it reverts to the abutting property owners.—*Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho, 77, 120 Pac. 830.

Editorial Notes.

Streets, vacation of, its effect and the remedies of parties prejudiced thereby: 46 Am. St. Rep. 493.

Grant by city of right to use streets and sidewalks for a private purpose: 125 Am. St. Rep. 343.

Method of lighting streets as resting in municipal discretion: Ann. Cas. 1912D, 432.

Right of municipality to use or permit to be used part of sidewalk for planting of grass, trees, etc.: Ann. Cas. 1912D, 1236.

Power of municipality to remove shade trees from streets: Ann. Cas. 1913C, 1013.

Vacation of streets: 26 L. R. A. 821.

XII. TORTS.

Measure of damages, and pleading and evidence affecting same. See Damages.

(A) EXERCISE OF GOVERNMENTAL AND CORPORATE POWERS IN GENERAL.

The fact that an injury occurred to plaintiff on the Sabbath day, through the negligence of defendant in not keeping its streets in proper condition, will not prevent a recovery.—*Black v. City of Lewiston*, 2 Idaho, 276, 13 Pac. 80.

A provision in a city charter that "all demands and accounts against the city must be presented to the clerk with the necessary evidence in support thereof, and he must submit the same to the council, who shall by a vote direct whether the same shall be paid or any part thereof," does not apply to torts but only to demands upon which actions *ex contractu* may be brought.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Where a city owns and operates an electric light system and sells light to its inhabitants, it is responsible for injuries received on account of its negligent conduct of the business the same as a private corporation or individual would be in the same business.—*Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541.

Plaintiff, a school boy seventeen years of age was traveling along a public street on horseback and was injured by contact with an electric light wire, which the village allowed to remain sagging over the street in such position that it was likely to come in contact with persons traveling on the highway. The city owned the electric light system and had notice of the condition of the wire in time to have remedied the same before turning on the current. Held, sufficient to support a verdict for plaintiff.—*Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541.

A city owning its own electric lighting plant is bound to exercise such diligence and care in maintaining and using its plant and wires as is commensurate with the dangers of the force it is handling, in order that it may avoid and prevent injury to those rightfully engaged in their various employments. *Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541.

Notice to the employees of a city who had charge and control of its electric light system, and whose duty it was to keep it in order and to repair wires and the like, was notice to the city.—*Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541.

A municipality is not liable for an accident, where its officers and agents have not been guilty of some negligent or wrongful act for which the law makes it responsible.—*Smith v. City of Rexburg*, 24 Idaho, 176, 132 Pac. 1153.

Editorial Notes.

Liability for consequential injuries arising from work authorized by law: 53 Am. Dec. 366.

Liability for damages occasioned in the execution of governmental or sovereign powers: 66 Am. Dec. 434.

Liability of municipal corporation for negligence in operation of electric light plant: 9 Ann. Cas. 851; 5 L. R. A., N. S., 536.

Statute requiring "claim" or "demand," against municipality to be presented to council as including claim for tort: 19 Ann. Cas. 1113.

(B) ACTS OR OMISSIONS OF OFFICERS OR AGENTS.

Where public works are to be paid for from special assessments, and the city or village does not agree to obligate itself to pay any part of such assessment, but the entire expense is to be paid from special assessments, then and in such case the city is not liable in an action for damages because its officers have failed to do their duty, either in collecting such special assessments or paying them over to the contractor.—*Broad v. City of Moscow*, 15 Idaho, 606, 99 Pac. 101.

Where a city or village organized under the laws of this state grants a right of way to a railway company to lay its tracks along the streets in said city or village, such city or village is exercising its governmental powers granted to it by the constitution and the statutes of the state, and by such acts does not in any way create a liability against the municipality for damages occasioned by the railway company exercising the right so granted; and the damages resulting from exercising the right so granted by the city or village cannot be recovered in an action against the city or village, and whatever liability there is is against the person to whom such right of way is granted.—*Trueman v. Village of St. Maries*, 21 Idaho, 632, 123 Pac. 508.

Editorial Notes.

Liability of municipal corporations, as affected by the employment of contractor: 74 Am. Dec. 761.

Streets, independent contractors, liability for acts and neglects of in: 27 Am. Rep. 647; 66 L. R. A. 126.

Liability for negligence and other misconduct of their officers and agents: 30 Am. St. Rep. 376; 2 L. R. A., N. S., 147.

(C) DEFECTS OR OBSTRUCTIONS IN STREETS AND OTHER PUBLIC WAYS.

Action for special damage caused by obstruction of street or road. See Nuisance.

Aggravation of previous injury, disease or disability by fall on sidewalk. See Damages, III, VII.

Liability of lot owner to city for judgment recovered against city for injuries to pedestrian. See Indemnity.

Liability of landlord for injuries due to carelessness of tenant in keeping sidewalk in repair. See Landlord and Tenant.

Excessive damages, fall on sidewalk. See Damages, VII.

A provision in a city charter that the city "shall be liable to anyone for any loss or in-

jury to person or property growing out of any casualty or accident happening to any such person or property on account of the condition of any street or public ground therein" does not deprive the city of the ordinary defense of contributory negligence in an action for damages brought against it under such charter provision.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

In an action against a city to recover for an injury received by reason of the defective condition of a sidewalk, it is error to permit plaintiff to show that soon after the accident the defect in the sidewalk was remedied by defendant.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

In an action against a city to recover for personal injuries due to a defective sidewalk, the court instructed the jury that "if the plaintiff was guilty of such negligence as contributed to the injury and without which accident would not have happened, still the defendant would be liable in this case provided you further believe from the evidence that the defendant had notice of the danger to which plaintiff was exposed, in time to have averted it, and, by the exercise of ordinary reasonable care and prudence, could have averted the injury." Held, error, as it took from the jury the defense of contributory negligence.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Under a city charter providing that the city shall be liable to anyone for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of the condition of any "street or public ground" therein, a city is liable for injuries received through defects in one of its sidewalks, negligently left unprotected and unrepaired.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Though a person injured on account of a defective sidewalk may have known of the defect complained of, such knowledge will not prevent him from recovering damages in an action against the city, provided he has used reasonable care to prevent the injury.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

In an action against a city for injuries resulting from a defective sidewalk, an instruction that "if the jury believe from the evidence that the city had provided a good light on the street at the place in question, and it had been affording adequate light at the place in question, and that it was burning the night before the accident, even if the jury should find that from some cause it failed to burn at the time of the alleged accident, the city should not be charged with negligence in the matter of the absence of the light," was properly refused, as it would tend to confuse the jury and the jury might conclude therefrom that the existence of a light at the place of the accident would be a defense to the action.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

In an action for damages sustained by falling into a ditch on a public highway in a

city, the evidence showed that plaintiff in the exercise of reasonable care was attempting to reach the sidewalk from the middle of the highway where she had been forced to alight by an accident to the vehicle in which she was riding. It was night and the immediate locality was but dimly lighted. The ditch appeared dark, snow being on both sides, and plaintiff, thinking the ditch to be the sidewalk, stepped into it and was injured. Held, sufficient to support a verdict for plaintiff.—*Horn v. Boise City Canal Co.*, 7 Idaho, 640, 65 Pac. 145.

A city charter providing that the city shall be liable to anyone for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of the condition of any street or any public ground therein, includes injuries due to defective sidewalks though sidewalks are not mentioned therein. *McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478.

Where plaintiff in action for injuries received on account of a defective sidewalk testifies that she had known the sidewalk to be in bad condition for some time, that she was passing over it in the night-time and "didn't even think about those holes," that she had not been over the walk from one to two weeks previous to the accident, that she was walking along "just the same as anyone would walk up the street," and that she did not know that the holes were still there or that the walk was still out of repair, the question of contributory negligence was for the jury.—*Carson v. City of Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862.

Previous knowledge of a dangerous place in a street or sidewalk is not per se evidence of such negligence as will preclude a recovery except in those cases where the known defect is so great as to prevent a reasonably diligent person from attempting to pass over such street or sidewalk in any usual manner. *Carson v. City of Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862.

Incorporated cities and villages are liable in damages for injuries resulting from failure to keep their streets and alleys in a reasonably safe condition for travel.—*Carson v. City of Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862.

A municipal corporation organized under the general laws of the state is liable for damages sustained by reason of its negligence in the care and keeping of its streets.—*Moreton v. Village of St. Anthony*, 9 Idaho, 532, 75 Pac. 262.

There is no distinction between the liability of cities and the liability of villages in respect of damages sustained through negligence in the care and keeping of their streets.—*Moreton v. Village of St. Anthony*, 9 Idaho, 532, 75 Pac. 262.

Cities and villages are liable in damages for a negligent discharge of the duty of keeping their streets and alleys in a reasonably safe condition for use by travelers in the usual modes, where such negligence results in injury to persons traveling thereon.—

Carson v. City of Genesee, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862; *Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541.

The question of the unsafe condition of a sidewalk, caused by age and decay, is a question of fact for the jury, depending upon the special circumstances of the particular case.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

The question of the frequency of the inspections and examinations of sidewalks and street crossings that should necessarily be made by municipal authorities is a question of fact, to be determined by the jury under the particular conditions and circumstances of each case.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

Where there is no dispute as to the particular place at which an injury occurred on a sidewalk, evidence of the defective or unsafe condition of the sidewalk at other places in that vicinity is incompetent, except where it is claimed that the defect was not a special one, but was due rather to the general decayed and bad condition of the whole walk, of which the particular place where the injury was suffered was a part.—*Miller v. Village of Mullan*, 17 Idaho, 28, 104 Pac. 660.

R. C. 2263, requiring that an itemized statement of a "claim" against a city or village, duly verified by the oath of the claimant, must be presented to the city or village authorities before suit is commenced thereon, does not apply to an action in tort for a personal injury sustained on account of defective streets or sidewalks.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

Municipalities cannot be held chargeable with notice of the time when, and conditions under which, a wooden sidewalk or cross-walk will cease to be safe for pedestrians, merely on account of age and consequent decay, where no patent and obvious defect is apparent.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

In order to impose liability on the municipality for injuries sustained on a cross-walk by reason of the rotten and decayed condition of the lumber and boards out of which the walk was constructed, and where there is no particular or specific patent defect, it must appear that the condition of the walk was such that danger might reasonably be apprehended at any time, and that a reasonably prudent person would have repaired it and guarded against the danger.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

In order to hold a village liable for an injury sustained through defects in a street crossing, of which defect it had no actual notice, it should be shown that the defect was so obvious, and existed for such a length of time, as to indicate that the authorities knew, or ought to have known, of the danger, and had known it long enough to have repaired it.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

Where the village asked an instruction that, "A village is not guilty of negligence for a failure to build sidewalks on all its streets; but, where it has constructed a walk, it must be kept in a reasonably safe condition"—it was error for the court to strike out the word "reasonably," and then give the requested instruction as thus modified, since municipalities are not insurers of the condition of their streets and walks, and the most that can be required is to maintain them in a "reasonably safe" condition.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

While it is the duty of villages and cities to maintain their sidewalks and cross-walks in a reasonably safe condition, the care and precaution which would constitute reasonable diligence with reference to the repair and safety of a walk in a remote part of the town or village, where the walk is but little used, would not ordinarily amount to reasonable care and diligence with reference to a walk or crossing in the heart of the town, where the entire population passes over it daily.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

Where ice and snow have not accumulated upon a sidewalk so as to create an obstruction, mere slipperiness and unevenness caused by tramping, thawing and freezing, in case of an accident, will not render the municipality liable.—*Wilson v. City of Idaho Falls*, 17 Idaho, 425, 105 Pac. 1057.

In an action against a city for injuries alleged to have been caused by a slippery sidewalk occasioned by the melting and freezing of snow, the travel over the sidewalk and the melting and freezing of the ice and snow thereon having left the sidewalk in a rough and slippery condition, held, that the evidence is not sufficient to show the negligence of the city or its liability.—*Wilson v. City of Idaho Falls*, 17 Idaho, 425, 105 Pac. 1057.

The obligation and duty to keep the streets and sidewalks in a safe condition is placed by the provisions of its charter upon the city of Lewiston, and the city has been provided by said charter with authority and power to discharge such duty, and, in case it fails to perform such duty, the city is made expressly liable, under said charter, Laws 1880-81, page 404, section 93, for any damage to person or property.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

The owner of a city lot is not liable, either at common law or by the terms of the charter of the city of Lewiston, for injuries received by a third person because of a defect in the sidewalk in front of his property, where such defect was not caused by the lot-owner's willful neglect of a duty enjoined by law or gross negligence.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

Laws 1880-81, page 404, section 7, expressly authorizes the construction of cellarways and the placing of doors thereover, and it is the duty of the city to keep such doors, which are a part of the sidewalk, in repair, if the owner fails to do so, and assess the expense thereof to the abutting lot.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

As to whether the city has constructive knowledge of obstructions or defects in streets and sidewalks is a question for the jury.—*Powers v. Boise City*, 22 Idaho, 286, 125 Pac. 194.

Where a street or sidewalk is obstructed by other persons, and the city has either actual or constructive notice thereof, it is primarily liable for injuries resulting therefrom, regardless of whether the abutting owner or a police officer or the person who placed the same there is liable to the city.—*Powers v. Boise City*, 22 Idaho, 286, 125 Pac. 194.

Boise City must exercise reasonable care to discover obstructions or defects in its streets and sidewalks, and, if such obstructions or defects remain for any considerable length of time, it is at least constructive notice to the city of such obstructions or defects.—*Powers v. Boise City*, 22 Idaho, 286, 125 Pac. 194.

Under the charter of Boise City, the city had power to manage and regulate its streets and sidewalks, and the privilege or power so granted imposes a corresponding obligation on the part of the city, and such power is coupled with the implied obligation that ordinary care at least will be exercised in keeping the streets and sidewalks clear of obstructions and defects, and, if it fails to do so, it is liable for personal injuries occasioned thereby.—*Powers v. Boise City*, 22 Idaho, 286, 125 Pac. 194.

Evidence examined and held sufficient to go to the jury as tending to establish the fact that the plaintiff sustained injuries from falling on a defective sidewalk, and that the fall was the primary cause of the injuries sustained.—*Jones v. City of Caldwell*, 23 Idaho, 467, 130 Pac. 995.

Where a city lays out and maintains a street sixty-seven feet wide between the sidewalks, and grades and prepares a driveway in the center of the street thirty feet wide, and maintains such driveway in good and safe condition, and covers over a drain ditch crossing such street for the length of thirty feet, being the entire portion of the ditch crossing the graded and traveled part of the street, the city is not guilty of negligence in failing to cover such drain ditch throughout its full length, or for a greater length than the width of the graded, prepared, and traveled portion of the street.—*Smith v. City of Rexburg*, 24 Idaho, 176, 132 Pac. 1153.

A city, town, or village opening a street for public travel is not under the necessity of grading and preparing the full width of the street, so as to render the same fit for travel, but is vested with a certain discretion in respect to such matters.—*Smith v. City of Rexburg*, 24 Idaho, 176, 132 Pac. 1153.

In an action for personal injuries due to the alleged negligence of a city in failing to properly cover a drain, held, that the "last clear chance" doctrine was inapplicable.—*Smith v. City of Rexburg*, 24 Idaho, 176, 132 Pac. 1153.

Where a teamster was driving an oil wagon drawn by a span of draft horses along a street that was graded, prepared, and which had been traveled for a width of thirty feet,

and the street was in no way blocked, and the passage was in no way hindered or obstructed, and such driver failed to observe the end of a bridge or culvert, or boards covering a drain ditch, and allowed his wagon to run off the end of such culvert, and he received injuries thereby, he is guilty of negligence and cannot recover.—*Smith v. City of Rexburg*, 24 Idaho, 176, 132 Pac. 1153.

Under the statutes of this state, power is conferred upon municipal corporations in respect to streets within their limits, and it is their duty to keep them in a reasonably safe condition for use by travelers in the usual mode of travel, and they are liable in damages for injuries resulting from the neglect of such duty, and this rule extends not only to the surface of the street or sidewalk but also to structures over them.—*Baillie v. City of Wallace*, 24 Idaho, 706, 135 Pac. 850.

A city may be held liable for permitting private parties negligently to place signs over the sidewalk or street, when injuries to others occur therefrom.—*Baillie v. City of Wallace*, 24 Idaho, 706, 135 Pac. 850.

In an action against a city for injuries received by a pedestrian through a collision with a sign projecting over the sidewalk, held, that the city had constructive notice of the existence of said sign.—*Baillie v. City of Wallace*, 24 Idaho, 706, 135 Pac. 850.

In an action against a city for injuries received by a pedestrian through a collision with a sign projecting over the sidewalk, the question as to whether such collision or another alleged cause was the proximate cause of the injury was a matter for the jury.—*Baillie v. City of Wallace*, 24 Idaho, 706, 135 Pac. 850.

In an action against a city for injuries received by a pedestrian through a collision with a sign projecting over the sidewalk, the question whether the city had constructive notice of the extension of said sign over the sidewalk was for the jury.—*Baillie v. City of Wallace*, 24 Idaho, 706, 135 Pac. 850.

Editorial Notes.

Streets, liability for injury from grading or regrading: 43 Am. Dec. 723.

Liability for injuries caused by horses becoming frightened at objects in streets and highways: 98 Am. Dec. 608.

Streets, liability for defects in causing injury to or by a runaway horse: 27 Am. Rep. 398; 15 L. R. A. 365.

Streets, liability for neglect to keep in repair: 7 Am. Rep. 43.

Streets, ice upon sidewalks, when constitutes a defect in: 7 Am. Rep. 206.

Streets and ways, liability for defects in: 24 Am. Rep. 25.

What municipal corporations are answerable for injuries due to defects in streets and other public places: 108 Am. St. Rep. 136.

Streets, liability for injuries due to excavations in: 17 Am. St. Rep. 735.

Liability of for defects in, and want of repair of streets: 103 Am. St. Rep. 257; 108 Am. St. Rep. 136.

Right to damages of one injured while using street closed to travel: Ann. Cas. 1912B, 957.

Liability of municipality for injuries caused by smooth or slippery condition of sidewalk resulting from wear or nature of material used: Ann. Cas. 1913A, 670.

Liability of municipality for defect in street or highway as dependent on notice or knowledge where statute makes municipality liable for failure to repair: Ann. Cas. 1913A, 691.

Right of person injured by defect in street to recover therefor from one who is bound by contract, statute or ordinance to keep street in repair: Ann. Cas. 1913C, 217.

Municipal liability as to stationary obstructions in streets: Ann. Cas. 1913C, 532.

Liability of municipality for injuries caused by icy street crossing: Ann. Cas. 1913C, 1068.

Liability of municipal corporation for defects and obstructions in streets: 20 L. R. A., N. S., 516.

(D) DEFECTS OR OBSTRUCTIONS IN SEWERS, DRAINS AND WATER-COURSES.

Where the city authorities, in order to protect the streets from floods, decide to change the course of a natural stream by building an artificial channel sufficient to carry away the waters of such stream, their act is quasi-judicial; but their acts in carrying out this plan are ministerial.—*Wilson v. Boise City*, 6 Idaho, 391, 55 Pac. 887.

Where a city diverted the waters of a natural stream into an artificial channel, in order to protect its streets from damage during the high-water season, the fact that plaintiffs, whose lands were injured by the overflow of such channel, bought the lands after the construction of such artificial channel will not estop them from recovering for such injury, due to the negligent construction thereof, whereby their lands are overflowed.—*Wilson v. Boise City*, 6 Idaho, 391, 55 Pac. 887.

Where a city diverted the waters of a natural stream into an artificial channel in order to protect its streets from damage during the high-water season, the fact that the artificial channel was constructed outside the city limits will not render the acts of the city officers ultra vires.—*Wilson v. Boise City*, 6 Idaho, 391, 55 Pac. 887.

Where a city diverted the waters of a natural stream into an artificial channel in order to protect its streets from damage during the high-water season, the duty devolved on it to construct and keep such artificial channel in such a manner that it would be capable of conveying the waters of such stream at all times and in quantities that

might be reasonably anticipated and for failure to so construct the channel whereby lands adjacent to the canal were overflowed and damaged, the city is liable in damages to the person injured.—*Wilson v. Boise City*, 6 Idaho, 391, 55 Pac. 887.

Where a city diverts a stream of water from its natural channel and undertakes to convey the same by means of an artificial channel or canal, it should be held liable for the exercise of reasonable care and diligence in constructing a channel of sufficient size to carry the volume of water that may be reasonably anticipated or expected to flow down the same and for the maintenance of the same in a reasonably safe condition.—*Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115.

A municipality will not be exempt from liability for damages on account of failure to maintain a sufficient artificial channel to carry off the water of a stream that it has diverted from its natural channel, merely on the grounds that the flooding and overflow was caused by an unusually heavy rainfall or cloudburst the like of which has not usually occurred, where it appears that a number of such rainfalls or cloud-bursts have occurred in the same locality within the last preceding fifteen or twenty years.—*Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115.

A rainfall or cloudburst which has irregularly and infrequently occurred a number of times within the memory of man in a particular locality, and has caused heavy freshets in a particular stream, is a thing that can reasonably be expected to occur again, and is therefore not classed as vis major or the "act of God," for which the law of negligence and damages does not hold any human agency responsible.—*Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115.

Where a city, to prevent damage by floods of a stream, diverted it where it issued from the canyon into an artificial channel, which was not made large enough to carry off the water in times of heavy floods, whereby plaintiff's lands were damaged, the city cannot escape liability therefor, because after the diversion the owner of lands, at the point of diversion, through which the original channel ran, raised the wall of the new channel so as to prevent flood water from damaging the lands, thereby throwing the entire volume of flood water into the new channel.—*Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115.

Editorial Notes.

Sewers, liability for damages caused by overflow of: 24 Am. Rep. 556.

Sewers, liability for defects in: 20 Am. Rep. 626.

Liability for defects in and want of repair of sewers: 29 Am. St. Rep. 737.

Municipal liability for damages caused by use of stream for sewerage purposes: Ann. Cas. 1912B, 450; 6 Ann. Cas. 177; 11 Ann. Cas. 588; 61 L. R. A. 703; 1 L. R. A., N. S., 124.

(E) CONDITION OR USE OF PUBLIC BUILDINGS AND OTHER PROPERTY.

Property for park outside city limits. See ante, VI.—Action to abate village dumping grounds as a nuisance. See Nuisances.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES AND TAXATION.

(A) POWER TO INCUR INDEBTEDNESS AND EXPENDITURES.

Const., article 8, section 3, provides that no county, city, etc., shall incur any indebtedness exceeding, in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors, nor "unless, before or at the time of incurring said indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Held, that a city ordinance, providing for an annual tax sufficient to pay the interest as it accrues on the municipal funding bonds issued under the ordinance and further providing for the levy of an annual tax after a specified year to constitute a sinking fund for the payment of the principal of the bonds within twenty years, complied with the constitutional requirements, so as to create a valid indebtedness against the city.—*Boise City v. Union Bank & Trust Co.*, 7 Idaho, 342, 63 Pac. 107.

Under Const., article 6, section 4, providing that "the legislature may prescribe qualifications, limitations and conditions for the right of suffrage additional to those prescribed in this article," the legislature may prescribe property qualifications in elections to create an indebtedness.—*Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286.

The Lewiston city charter, section 20, as amended by act March 6, 1899, provides that if at a city election to determine the creation of an indebtedness, issue of bonds, etc., two-thirds of the qualified electors who are taxpayers assent to the issue of bonds and the incurring of the indebtedness thereby created, said bonds shall be issued in the manner hereinafter provided. Held, not to contravene Const., article 8, section 3, which provides that no county, city, etc., shall incur any indebtedness exceeding in that year the income and revenue provided for it for such year without the assent of two-thirds of the qualified electors voting at an election held for that purpose, though such constitutional provision provides no property qualification for voters, since such property qualification of a voter to create such an indebtedness is already prescribed by Const., article 1, section 20.—*Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286.

Const., article 8, section 3, prohibits cities from incurring indebtedness exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors, nor unless provision shall be made for the collection of an

annual tax sufficient to pay the indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal. Held, not to prohibit the issuance of funding bonds to take up outstanding warrant indebtedness of the city incurred for the current pay of officers and ordinary expenses of the city.—*Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234.

Obligations required to be paid out of special assessments levied against the property particularly benefited are not an "indebtedness or liability" of the city within the contemplation of Const., article 8, section 3, requiring the submission of the question of incurring such indebtedness to a vote of the people.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Under the Lewiston city charter, Laws 1903, page 105, section 75, authorizing the city council to create and organize sewer districts and levy assessments on the property to be benefited, the objection that the tax levied amounts to more than fifteen mills annually and is therefore in excess of the constitutional debt limitation, is not tenable, as the indebtedness or liability is not an obligation of the city.—*McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

The real estate valuation of a city for a certain year was \$240,452 and its bonded indebtedness was \$5,000. A contract for the sale of a waterworks to the city fixed the price thereof at \$32,000. Laws 1899, page 29, prohibited the city from issuing municipal bonds to exceed, in the aggregate, fifteen per cent of the real estate value, according to the assessment of the preceding year, for such and other purposes. The city passed an ordinance authorizing the issue of \$30,000 worth of bonds, but made no provision for paying or collecting the \$2,000 excess called for by the contract. At an election called for that purpose, more than two-thirds of the electors of the city voting thereat voted in favor of the issuing of said \$30,000 of bonds. Held, that the contract for the purpose of the waterworks was void as in contravention of Const., article 8, section 3, fixing the limits of indebtedness to be incurred by counties, villages, etc.—*Woodward v. City of Grangeville*, 13 Idaho, 652, 92 Pac. 840.

The powers of Boise City in regard to creating an indebtedness and paying the same and the method and manner of doing so, must be determined by the provisions of its charter.—*Boise City Nat. Bk. v. Boise City*, 15 Idaho, 792, 100 Pac. 93.

The issuance of refunding bonds is not the creation of a new indebtedness within the meaning of Const., article 8, section 3, when it does not increase the indebtedness or liability of the municipality.—*Veatch v. City of Moscow*, 18 Idaho, 313, 21 Ann. Cas. 1332, 109 Pac. 722.

The proviso to Const., article 8, section 3, "that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state,"

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may properly be construed by the legislature to authorize the law-making body to include within the term "ordinary and necessary expenses" any expenditure rendered necessary by casualty or accident, which has impaired or injured municipal property that is necessary for the protection of the city against fires, or for the health and welfare of the city.—*Hickey v. City of Nampa*, 22 Idaho, 41, 124 Pac. 280.

The word "liability," as used in Const., article 8, section 3, is to be read, construed, and accepted in the usual and ordinary sense in which that term is commonly employed, and, when so used, means and signifies the state of being bound or obligated in law or justice to do, pay, or make good something. *Feil v. City of Coeur d'Alene*, 23 Idaho, 32, 129 Pac. 643.

Where a city was indebted up to the maximum debt limitation, and while so indebted an ordinance was passed authorizing and directing the proper officers to purchase a water system and pay therefor the sum of \$180,000, and issue the bonds of the city for the same, payable in twenty years, with interest thereon at six per cent, and providing that the city should not be liable, in any manner or form, for the payment of such bonds, except that it bound and obligated itself to maintain water rates high enough to collect an annual income from the water consumers to pay all the running expenses of the waterworks system, and to raise a sufficient fund thereby to pay interest at six per cent and the entire principal within the period of twenty years, and at the same time covenanted and agreed not to sell or encumber any of the property purchased, until full payment should be made therefor, such ordinance and contract, if carried out, would create a liability in violation of Const., article 8, section 3.—*Feil v. City of Coeur d'Alene*, 23 Idaho, 32, 129 Pac. 643.

Under Const., article 8, section 3, a city may anticipate both the income and revenue provided for it for such year, and incur debts or liabilities against the city which can be met and discharged out of the aggregate income and revenue for that year; but the city has no right to anticipate, set aside, and hypothecate either the income or revenue of the city, or any part thereof, for a special purpose, for a period of twenty years in advance.—*Feil v. City of Coeur d'Alene*, 23 Idaho, 32, 129 Pac. 643.

Editorial Notes.

Implied power of municipal corporations to borrow money: 30 Am. Dec. 190; Ann. Cas. 1913D, 77.

Indebtedness, what is within meaning of prohibitions against: 44 Am. St. Rep. 229; 23 L. R. A. 404; 37 L. R. A., N. S., 1058.

Right of municipality to contract for periodical payments throughout term of years where aggregate payments exceed authorized debt limit: Ann. Cas. 1913B, 1177; 7 Ann. Cas. 150.

(B) ADMINISTRATION IN GENERAL, APPROPRIATION, WARRANTS AND PAYMENT.

Warrant or special tax bill for assessment for improvement. See ante, IX, (B).

Under Const., article 8, section 3 and Laws 1893, page 124, sections 82, 86, providing for an annual appropriation bill and also a tax levy for general and incidental expenses of cities and villages, a city indebtedness incurred during one fiscal year cannot be paid from the income or revenue of a future fiscal year, unless a fund is especially provided for that purpose and collected therefor in such future year.—*Theiss v. Hunter*, 4 Idaho, 788, 45 Pac. 2.

Where a city owns a waterworks system or fire extinguishing appliances and apparatus and a fire occurs, and in attempting to control and extinguish the same the waterworks system and other property of the city is so damaged, impaired, or destroyed as to render it of no further practical value for fire protection, the city council has authority, under R. C. 2270, to issue warrants for the repair and improvement thereof, where the same is done in good faith for an actual necessity which confronts the municipality.—*Hickey v. City of Nampa*, 22 Idaho, 41, 124 Pac. 280.

The failure of a city council to include in its annual appropriation bill or ordinance a specific appropriation for the payment of outstanding warrant indebtedness, as required by R. C. 2268, does not oust the council of the power or authority to thereafter make such appropriation and collect revenue for the payment of such outstanding warrant indebtedness.—*Stanrod v. Case*, 24 Idaho, 365, 133 Pac. 651.

Editorial Notes.

Appropriation of public moneys, what constitutes valid: 22 Am. St. Rep. 638.

(C) BONDS AND OTHER SECURITIES AND SINKING FUNDS.

Act authorizing bond issue as special or local law. See Statutes, II.

Laws 1899, page 30, section 2, provides that the ordinance submitting the question of the issuing of bonds "to the qualified electors, who are taxpayers of such city or town," where the object is "to fund or refund any existing business, it must be described," etc. Held, that a description in an ordinance submitting the question of issuing bonds "that the purpose of issuing of said municipal funding bonds is to fund the outstanding indebtedness of said Boise City, other than municipal bonds" does not sufficiently show the nature or character of the indebtedness sought to be funded.—*Coffin v. Richards*, 6 Idaho, 741, 59 Pac. 562.

Under Lewiston city charter, article 20, as amended by act of March 6, 1899, authorizing the city to issue bonds not to exceed fifteen per cent of the value of all the taxable property of the city, both real estate and personal property should be considered in estimating

the value of taxable property in the city.—*Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286.

The Lewiston city charter, section 20, as amended by act of March 6, 1899, provides that if at a city election to determine the creation of an indebtedness, issue of bonds, etc., two-thirds of the qualified electors, who are taxpayers, assent to the issue of bonds and the incurring of the indebtedness thereby created, said bonds shall be issued in the manner hereinafter provided. Held, not to contravene Const., article 6, section 2, giving the right to vote to male citizens twenty-one years old, residents of the state for six months and of the county for thirty days, since such constitutional provision only prescribes the qualifications of a voter at general elections and since there is a further constitutional provision, article 1, section 20, providing that no property qualification shall be requisite for any person to vote or hold office except in school elections or elections creating an indebtedness.—*Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286.

Act of February 2, 1899, providing that every city or incorporated town shall have power to issue municipal coupon bonds not exceeding fifteen per cent of the real estate value of said city or town, does not repeal act of March 6, 1899, amending section 20 of the charter of the city of Lewiston, providing that the city shall have the power to issue bonds not exceeding fifteen per cent of the value of all the taxable property therein, since act of February 2, 1899, applies to cities and towns of the state not operating under a special charter, and the Lewiston city charter excepts it from the general provisions.—*Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286.

Under Laws 1899, page 30, providing that whenever coupon bonds, etc., of a city are to be issued, an election shall be held of which thirty days' notice, to be provided for in the ordinance, shall be given, a proclamation of the mayor for thirty days in local newspapers, giving full information of the object and purpose of the election and publication of the ordinance itself in such newspapers for more than thirty days prior to the election is sufficient.—*Sommercamp v. Kelly*, 8 Idaho, 712, 71 Pac. 147.

R. S. 2244 provides that inhabitants petitioning, etc., may be incorporated as a "town or village." Const., article 12, section 1, provides that "the legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns in proportion to the population," etc. Laws 1890-91, page 59, makes no distinction between the words "town" and "village." Laws 1899, page 29, section 1, provides that every town or city incorporated under the state law shall have the power to issue municipal coupon bonds, etc. Held, that a village, incorporated under the general laws, has authority to issue municipal bonds, as the legislature has always used the words "town" and "village" as synonymous terms.—*Brown*

v. Village of Grangeville, 8 Idaho, 784, 71 Pac. 151.

Municipal bonds voted by the electors of a city to raise revenue to make payment under a void contract become void when the contract is declared void.—Woodward v. City of Grangeville, 13 Idaho, 652, 92 Pac. 840.

Laws 1905, page 297, providing for the issuance of bonds for improvement of streets and laying of sewers in incorporated cities, towns and villages, is a general law applicable to cities, towns and villages incorporated under the general laws of the state, and is not applicable to cities incorporated under special charter.—Boise City Nat. Bk. v. Boise City, 15 Idaho, 792, 100 Pac. 93.

Under R. C. 2315, a municipality has the authority to issue refunding bonds for the purpose of redemption of outstanding indebtedness when the same can be done to the profit and benefit of the municipality, and this may be done without the submission of the question of the issuance of such bonds to the electors of the municipality.—Vestch v. City of Moscow, 18 Idaho, 313, 21 Ann. Cas. 1332, 109 Pac. 722.

The word "any," as used in R. C. 2315, as amended by Laws 1909, page 174, and R. C. 2316 authorizing the issue of municipal coupon bonds for any of the following purposes, should be considered in connection with the entire body of existing statutory law relating to municipal improvements, keeping in mind the purpose of such legislation and the object to be attained, and should not receive a technical or limited construction, but should be construed in harmony with the evident intention of the law-making body in enacting such legislation.—Platt v. City of Payette, 19 Idaho, 470, 114 Pac. 25.

R. C. 2316, does not require a separate election ordinance for each proposed issue of municipal bonds. Different propositions for different objects may be embodied in one ordinance, provided that each proposition is so clearly and distinctly submitted to the electors of the municipality that they may adopt or reject it independently of the others. Whether several such propositions are submitted in one ordinance or in separate ordinances is immaterial, so long as the voters are not deceived or misled, or prevented from voting upon each proposition separately.—Platt v. City of Payette, 19 Idaho, 470, 114 Pac. 25.

Under R. C. 2353, subdivision 11, a city council cannot issue bonds for the construction of a sewerage system in excess of the "contract price and expense of such work or improvement."—Williams v. City of Caldwell, 19 Idaho, 514, 114 Pac. 519.

The fact that a village ordinance and notice of election proposing the issuance of municipal coupon bonds state incidental and auxiliary purposes to be accomplished, and for which money must be expended in the construction of a complete waterworks system, does not render the ordinance or notice of election of an omnibus character, or include

more than one purpose within the purview of R. C. 2316.—Corker v. Village of Mountainhome, 20 Idaho, 32, 116 Pac. 108.

A village ordinance and a notice of election, which state the purpose of a proposed bond issue as follows: "To provide the funds necessary to pay the cost and expense of the installation and construction of a complete waterworks system for the village of Mountainhome, and to purchase a site and location for a power-house and water power right for the purpose of pumping water or any other power or machinery that may be found necessary, for the purchase of materials for said works and improvements, and for the construction of the same"—are in substantial compliance with R. C. 2316, and state and propose only a single purpose, namely, the installation and construction of a complete waterworks system for the village.—Corker v. Village of Mountainhome, 20 Idaho, 32, 116 Pac. 108.

An ordinance which states the purpose of a proposed issue of municipal bonds as follows: "That it is the purpose and intention of the chairman and board of trustees of the village of Salmon City to incur such indebtedness and issue such bonds in the total amount of fifty thousand (50,000) dollars, thirty thousand (30,000) dollars of which amount shall be used for the purchase of the waterworks, water rights, system and franchises of the Salmon City Water Company, Limited, and that an amount not to exceed the sum of fifteen thousand (15,000) dollars of such indebtedness and bonds shall be used to enlarge and extend the said waterworks and water system, and an amount not to exceed the sum of five thousand (5,000) dollars shall be used for the purchase, erection, construction and furnishing of a public building and building site for the use of such village," states two separate and distinct purposes and questions, and the ballot used at the election which requires the voter to designate thereon his vote either for or against the single proposition of favoring or disapproving the issue of the aggregate amount of the bonds proposed does not give the voter an opportunity of expressing his will upon each of the purposes and questions incorporated in the ordinance.—Ostrander v. City of Salmon, 20 Idaho, 153, 117 Pac. 692.

Under R. C. 2238, subdivision 36, cities and villages are given full power to "acquire, by purchase or otherwise, waterworks or plants, and illuminating plants, and to supply the municipalities and the inhabitants thereof with water and light, ..." and such power is not circumscribed or affected by R. C. 2315, subdivision 1, as the power to issue bonds under said section for the construction and maintenance of waterworks and supplying the same with water also includes the power to issue bonds for the purchase of waterworks already constructed.—Ostrander v. City of Salmon, 20 Idaho, 153, 117 Pac. 692.

Where streets are paved and the assessments are made against the abutting property according to the benefits, as provided in R.

C. 2238, improvement district bonds may be issued by the city upon the council passing proper ordinance authorizing the same without submitting the question of issuing the bonds to the electors or taxpayers of either the improvement district or the city, but where the cost and expenses are to be paid by the city, and bonds are to be issued for the purpose of raising revenue to pay the same, then such question must be submitted to the electors and taxpayers of the city, and must be by them authorized by proper vote as provided by R. C. 2315 et seq., as amended by Laws 1909, page 174.—*Byrns v. City of Moscow*, 21 Idaho, 398, 121 Pac. 1034.

Where several propositions with reference to the issuing of municipal bonds are to be submitted to the electors for vote, the same may be done in a single ordinance for that purpose, by stating such propositions separately, so that the electors may express their desire and vote upon each singly. Where, however, the propositions to be determined are distinct and different propositions, and are to be determined under different provisions of the statute, then there should be a separate ordinance with reference to each proposition.—*Byrns v. City of Moscow*, 21 Idaho, 398, 121 Pac. 1034.

Under R. C. 2315, subdivisions 4, 8, a city council has the right and authority to authorize and issue municipal coupon bonds for the funding or refunding of outstanding warrants and indebtedness, without submitting the question to a vote of the people, where the funding or refunding of such outstanding indebtedness will be to the profit and benefit of the city.—*Hickey v. City of Nampa*, 22 Idaho, 41, 124 Pac. 280.

Editorial Notes.

Bonds of municipal corporations and defenses thereto: 98 Am. Dec. 664.

Bonds of municipal corporations in the hands of bona fide holders: 51 Am. St. Rep. 822.

Implied power of municipality to issue bonds: Ann. Cas. 1913E, 37.

Bonds, construction of statutory prohibition against sale of municipal bonds for less than par: Ann. Cas. 1913E, 85.

Recitals in municipal bond that debt limit has not been exceeded as affecting validity thereof in hands of purchasers: 17 Ann. Cas. 1245.

(D) TAXES AND OTHER REVENUE AND APPLICATION THEREOF.

Rights between city and county. See *Taxation*, XIV.

Under Laws 1911, chapter 82, sections 25, 26 and 74, known as the commission government act, it was clearly the intention of the legislature that "ordinances making the annual tax levy and appropriations" should go into effect immediately upon their passage and that they should not be subject to the referendum provisions of that act.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

R. C. 2238, as amended by Laws 1911, chapter 81, page 266, authorizing cities and villages to levy a tax for general revenue purposes not to exceed twenty mills on the dollar in any one year, repealed that part of R. C. 2265, which fixed the maximum levy of cities and villages for general and incidental expenses at ten mills on the dollar.—*Stanrod v. Case*, 24 Idaho, 365, 133 Pac. 651.

Where a city council has failed to include in its annual appropriation ordinance a specific appropriation for the payment of outstanding warrant indebtedness, as required by R. C. 2268, such failure did not oust the council of jurisdiction to certify a sufficient levy therefor within the ten mill limit fixed by R. C. 2265 for the redemption of outstanding warrants.—*Stanrod v. Case*, 24 Idaho, 365, 133 Pac. 651.

(E) RIGHTS AND REMEDIES OF TAXPAYERS.

Where a municipal corporation has paid money on a void contract and the properly constituted authorities of such corporation refuse to bring an action to recover back the money so illegally paid, an action therefor on behalf of the corporation may be maintained by any taxpayer thereof.—*Independent School District v. Collins*, 15 Idaho, 535, 128 Am. St. Rep. 76, 98 Pac. 857.

A resident taxpayer of a city is a real party in interest, and may maintain an action to enjoin the payment of claims by the city, alleged to be illegal, notwithstanding the fact that such taxpayer is authorized to act for and on behalf of a citizens' league composed of many persons, resident taxpayers of said city.—*Moore v. Hupp*, 17 Idaho, 232, 105 Pac. 209.

XIV. CLAIMS AGAINST CORPORATION.

Presentation of claim for personal injuries. See ante, XII, (A).

XV. ACTIONS.

Villages need not give undertaking on appeal. See *Appeal and Error*, VII, (O), 2.

A municipal corporation cannot be held for the malicious suing out of a writ of injunction without probable cause, for the reason that such an act would be ultra vires and beyond and without the scope of authority of the municipal officers, and would become the personal and individual act of the officers so acting.—*Doyle v. City of Sandpoint*, 18 Idaho, 654, Ann. Cas. 1912A, 210, 112 Pac. 204.

Under R. C. 4291, a municipal corporation is not required to give an undertaking on the issuance of an injunction, and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the issuance of an injunction sued out by such municipal corporation.—*Doyle v. City of Sandpoint*, 18 Idaho, 654, Ann. Cas. 1912A, 210, 112 Pac. 204.

NAMES.

See Signatures.

Of deceased in indictment for murder, effect of variance. See *Homicide*, VI.

Of mining claim, evidence to show common use of name. See *Mines and Minerals*, III, (C).

Of owner in mechanic's lien claim. See *Mechanic's Lien*, III.

Of political party. See *Elections*, VI, VII.

Mistake in name in summons. See *Process*, III.

NAVIGABLE WATERS.

I. RIGHTS OF PUBLIC.

(A) Navigability in General.

(B) Improvements.

(C) Obstruction of Navigation.

II. LANDS UNDER WATER.

III. RIPARIAN AND LITTORAL RIGHTS.

Artificial watercourses and streams made navigable by improvement by individuals. See *Canals; Waters and Watercourses*.

Control, use and regulation by railway company of its dock or wharf on navigable waters. See *Carriers*, I.

Dedication of beach. See *Dedication*.

Floatage of logs in streams not navigable. See *Logs and Logging*.

Ferries. See *Ferries*.

Wharves. See *Wharves*.

Navigable waters as boundaries. See *Boundaries*.

Liability for collision of boats. See *Collision*.

I. RIGHTS OF PUBLIC.

(A) NAVIGABILITY IN GENERAL.

Navigable streams are public highways, over which every citizen has a natural right to carry commerce, whether it be by boats or the simple floating of logs, but in doing so the citizen must have due consideration and exercise reasonable care not to infringe upon the equal right of his fellow-citizen to likewise use such waters.—*Powell v. Springston Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

Under R. S. 5210, subdivision 3, as amended by Laws 1903, page 204, providing that the right of eminent domain may be exercised in behalf of the following uses, *inter alia*, "for storing and floating logs and lumber on streams not navigable," the phrase "streams not navigable" means streams not navigable in fact and does not include a stream which is not so navigable but which has been declared to be navigable by an act of the legislature.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

The legislature cannot by legislative act impress the character of navigability on a stream that is not navigable in fact.—*Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

Snake river, being a navigable river, is a public highway, and subject to the use of the public, not only to low-water mark, but to high-water mark, and the riparian owner can in no way interfere with this use.—*Johnson*

v. Johnson, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499.

All streams which are capable of being used for the purpose of carrying boats, passengers, freight or floating logs, timber, wood or any other product to market, are navigable streams.—*Johnson v. Johnson*, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499.

A stream not capable of carrying logs without the construction of dams for flooding purposes is not navigable for the floating of logs.—*La Veine v. Stack-Gibbs Lbr. Co.*, 17 Idaho, 51, 134 Am. St. Rep. 253, 104 Pac. 666.

In the new and undeveloped condition of this state, and in view of the circumstance that large areas of the state's forest and mineral wealth have not been opened or developed, proof that a stream flowing through such territory has never before been utilized for the floating of logs or other materials should have but little or no weight in determining the fact of the navigability or floatability of such stream.—*Idaho Northern R. Co. v. Post Falls etc. Co.*, 20 Idaho, 695, 38 L. R. A., N. S., 114, 119 Pac. 1098.

If a stream is in fact navigable or floatable, the question as to whether or not logs, lumber, or other floatable materials may be profitably transported by means of such watercourse is a question that should be left in a large measure to the person who undertakes the enterprise, and the chief question to be determined by a court in such a case is the question of navigability in fact, while the question as to whether it can be done profitably is one that will depend largely upon the condition and circumstances of the person who undertakes the enterprise, and to him it may be both practicable and profitable, while to another differently situated it might be unprofitable.—*Idaho Northern R. Co. v. Post Falls etc. Co.*, 20 Idaho, 695, 38 L. R. A., N. S., 114, 119 Pac. 1098.

Any stream in this state is navigable on which logs or timber can be floated to market or the place of use, and to that extent and for that purpose is a public highway; and it is not necessary that such stream be navigable the whole year for such or any purpose. It is sufficient if during the high-water season such stream can be used for the floating of logs and timber, and the question of navigability for such or any useful purpose is a question of fact, to be determined in the same manner as any other question of fact is determined.—*Idaho Northern R. Co. v. Post Falls etc. Co.*, 20 Idaho, 695, 38 L. R. A., N. S., 114, 119 Pac. 1098.

Editorial Notes.

Floatage of logs as a test of navigability: 5 Am. Rep. 108.

What waters are navigable: 126 Am. St. Rep. 710; 42 L. R. A. 305.

Power of legislature to declare water to be navigable: Ann. Cas. 1912D, 1091.

Navigable stream as highway: 70 L. R. A. 272.

(B) IMPROVEMENTS.

Laws 1899, page 332, authorizing the state board of land commissioners to grant a license and franchise to a company or corporation to clear, deepen, straighten and improve the channel of a stream and collect tolls for the floating of logs and lumber thereon, if not constitutional, affords no protection to the grantee of the license and franchise; and, if constitutional, it cannot be construed to authorize the grantee of the franchise and license to enter upon the lands of the riparian proprietor, or to interfere with the banks of the stream or the growing timber along the stream, or to commit any injury against or trespass upon the lands of such proprietor.—*Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 35 L. R. A., N. S., 824, 113 Pac. 92.

All navigable streams within this state are "highways" to the extent and for the purpose of their navigability, and the state has a right to enter upon and improve the beds of such streams or highways.—*Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 35 L. R. A., N. S., 824, 113 Pac. 92.

Every stream of water within this state, which in its natural state is capable of floating logs or other commercial and floatable commodities for any practical period of time, is to such extent and for such time a "navigable stream," and the bed thereof is for such purposes subject to the regulation and control of the state.—*Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 35 L. R. A., N. S., 824, 113 Pac. 92.

Laws 1899, page 332, entitled "An act for the improvement of the navigation of rivers, and their tributaries, in the state of Idaho, by deepening, straightening and clearing the channels thereof, by the erection of dams, booms and canals, and otherwise, and for collecting tolls and charges thereon, for the floating, driving and handling of sawlogs, and other timber products, and the navigation of barges and rafts," and repealed by Laws 1905, page 30, was not void for the reason that it imposed certain duties on the board of state land commissioners, which duties were additional to those imposed by Const., article 9, section 7.—*St. Joe Improvement Co. v. Laumierster*, 19 Idaho, 66, 112 Pac. 683.

Laws 1899, page 332, relating to the improvement and navigating of rivers (repealed by Laws 1905, p. 30), is not void as authorizing the deepening, clearing and straightening of channels without providing compensation to riparian proprietors, since such act is supplemented by the eminent domain statutes.—*St. Joe Improvement Co. v. Laumierster*, 19 Idaho, 66, 112 Pac. 683.

One who undertakes to utilize a stream for the floating of logs, lumber, or other material must do so having due and proper regard for the interests and property rights of others along such stream, and must exercise care proportionate to the natural conditions of the stream, the dangers and difficulties of the undertaking, and the liability of inflicting in-

jury upon others.—*Idaho Northern R. Co. v. Post Falls etc. Co.*, 20 Idaho, 695, 38 L. R. A., N. S., 114, 119 Pac. 1098.

Editorial Notes.

Right to improve navigability: 67 L. R. A. 820.

(C) OBSTRUCTION OF NAVIGATION.

Obstruction and detention of natural watercourses.

See, also, *Waters and Watercourses*, II, (F).

Obstruction of waters by dams, breakwaters, etc.

See *Waters and Watercourses*, VIII.

The trial and acquittal of a person charged with the construction of a nuisance in a navigable stream of the state by a jury in a justice's court on a criminal complaint therefor is not a bar to a civil action to restrain the construction of the alleged nuisance.—*Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461.

Under R. S. 3633, providing that "a private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise," an action may be maintained by a private citizen to restrain the construction of a nuisance in a navigable stream of the state on showing special damage to such citizen by reason of such nuisance.—*Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461.

R. S. 835 provides that no dam or boom must be hereafter constructed or permitted on any creek or river unless said dam or boom has connected therewith a sluiceway, lock or fixture sufficient and so arranged as to permit timber to pass around, through or over said dam without unreasonable delay or hindrance. Held, that an individual cannot complain of an obstruction built for logging purposes, which merely impairs or renders the navigation of a stream more difficult without destroying it.—*Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461.

Under R. S. 835, one who constructs a boom or obstruction "across" a navigable stream so as to "prevent" others driving logs past such boom or obstruction is liable in an action to abate the same as a nuisance and for damages caused by its maintenance.—*Powell v. Springston Lbr. Co.*, 12 Idaho, 723, 88 Pac. 97.

R. S. 835 provides that no dam or boom may be constructed or erected across a navigable stream after the passage of this act, without being first provided with sluiceways, locks or fixtures as provided by the act. R. S. 836 allows the owners of all such booms or dams or weirs as had been previously constructed a period of thirty days after receiving notice from any person interested in which to make the necessary alterations and construct a sluiceway, lock or fixture in conformity with the statute. Held, that the thirty days' notice prior to beginning an action to enjoin an obstruction of a stream is required only where it appears that the obstruction was erected prior to the enactment of Laws 1885, page 178 (R. S. 836).—

Powell v. Springston Lbr. Co., 12 Idaho, 723, 88 Pac. 97.

Lake Coeur d'Alene is a public highway over which the public have a right to travel and to carry on commerce, and every person is entitled to exercise and enjoy that right in common with every other person, but no one has a right to convert that easement into a private use for a storehouse or warehouse or boom for holding or retaining its property or articles of trade and commerce, as to do so would amount to an obstruction to the right of navigation and to the right to carry on commerce over such navigable waters.—Shepherd v. Coeur d'Alene Lumber Co., 16 Idaho, 293, 101 Pac. 591.

Where a railroad company builds its grade and track along the course of a stream, crossing it from time to time and utilizing a bank of the stream for its grade, it is chargeable with notice of the navigability of such stream for the floating of logs and other articles of commerce and of the natural conditions of the country and the fact that the stream is subject to periods of high water, freshets and floods, and must so build its grade and road as not to unreasonably impede or obstruct the navigation of such stream, and in so doing it must take notice of the fact that floatable commodities are liable at times to strike the banks of the stream, and cause abrasions of the bank, and must accordingly guard and protect its roadbed built along such banks.—Idaho Northern R. Co. v. Post Falls etc. Co., 20 Idaho, 695, 38 L. R. A., N. S., 114, 119 Pac. 1098.

Editorial Notes.

Obstruction of navigable waters, remedies for: 57 Am. St. Rep. 693.

Purprestures in navigable waters and remedies for their abatement: 69 Am. St. Rep. 271.

Obstruction of navigation: 59 L. R. A. 33.

II. LANDS UNDER WATER.

In this state the riparian owner takes title to the thread of the stream, both in navigable and non-navigable rivers, subject to an easement of the use of the public.—Johnson v. Johnson, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47, reversed by 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242; Ulbright v. Baslington, 20 Idaho, 539, 119 Pac. 292; Fischer v. Davis, 19 Idaho, 493, 116 Pac. 412.

The meander line run in surveying public lands bordering on a navigable river is not a line of boundary, but one designed merely to point out the sinuosity of the bank of the stream, and as a means only of ascertaining the quantity of land in the fraction that is to be paid for by the purchaser, and the watercourse, not the meander line as actually run on the land, becomes the true boundary line.—Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784.

Where the field-notes and official plats of a United States survey show that all the lands within the legal subdivisions as directed to be surveyed by U. S. Rev. Stats. 2395, have been returned as surveyed and the remainder of those subdivisions is shown to be the waters of a navigable stream, the grantee to lots or fractional subdivisions abutting on the meander line takes title to the stream.—Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784.

Where public lands front on a navigable stream, and a line meandering the margin of such stream is run under U. S. Rev. Stats. 2395, 2396, for the purpose of ascertaining the quantity of land to be paid for, such meander line is not regarded as a boundary line, but only points out the sinuosities of the bank for the purpose of ascertaining the area. Johnson v. Johnson, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513.

The fact that navigable rivers are reserved as public highways in no way interferes with the legal doctrine that the riparian owner takes to the thread of the stream.—Johnson v. Johnson, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499.

U. S. Rev. Stats. 2476, reserving all navigable rivers as public highways, recognizes the rule that the bed of the stream belongs to the riparian proprietor to the center of the stream, subject to the public easement of navigation therein.—Johnson v. Johnson, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513.

Where the government grants land bordering on a navigable stream and there is nothing in the grant or in the acts of the government indicating an intention on the part of the government to make any reservation or limit the grant to the water's edge, the grantee takes to the middle of the main channel of such stream.—Johnson v. Johnson, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513.

All grants of the government lands bounded by a navigable stream entitle the grantee to all islands lying between the main land and the thread of the stream, unless it appears from the grant itself or from surrounding circumstances, that the government intended to reserve such island from the grant.—Johnson v. Johnson, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513.

The government granted a patent to lots 6 and 7 of section 1, which were bounded on the south by Snake river. The government plat to which the patent referred showed the area thereof to be forty-four and forty-hundredths acres, and the government charged only for that amount. Between the shore line and the main channel of the river was an unsurveyed island, which if included within the grant together with the land between high and low water mark would bring the total acreage to ninety-two acres. Held,

that the grantee took title to the thread of the stream.—*Johnson v. Johnson*, 14 Idaho, 561, 24 L. R. A., N. S., 1240, 95 Pac. 499.

The government meander line of public lands on a navigable stream is not a line of boundary, but is intended only to designate the sinuosity of the bank of the stream and as a means of ascertaining the quantity of land in the fractional subdivisions to be paid for by the purchaser, and the real and true monument in such case is the watercourse; hence the purchaser takes title to the thread of the stream.—*Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47, reversed 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.

Editorial Notes.

Navigable waters as boundaries: 27 Am. St. Rep. 56.

Title to lands covered by navigable waters: 53 Am. St. Rep. 289; 42 L. R. A. 161.

III. RIPARIAN AND LITTORAL RIGHTS.

See, also, *Waters and Watercourses*, II; VIII, (C).

Where a lumber company constructs and maintains a log boom along the waterfront of the lands of a riparian owner, preventing ingress and egress to and from the lands of such owner, injunction will lie to restrain the party maintaining the same from a continuance thereof.—*Shephard v. Coeur d'Alene Lumber Co.*, 16 Idaho, 293, 101 Pac. 591.

The right of ingress and egress to and from the lands of a riparian owner is a property right, and must be respected, and for the protection of which the courts will afford a remedy.—*Shephard v. Coeur d'Alene Lumber Co.*, 16 Idaho, 293, 101 Pac. 591.

Where P. and G. purchased fractional subdivisions of the public domain meandering the Snake river, and took title by patents issued in 1894 and 1895, respectively, for such tracts of land, and the description contained in such conveyances referred to an official survey made in 1868 and the plat thereof on file in the land office, the patentees took title to the respective portions of an island extending along the course of the stream and between the meander line and the thread of the stream.—*Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47, reversed, 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.

As a general rule, the omission on the part of the government to take notice of an existing island or tract of land between the meander line along a stream of fresh water and the stream itself which it purports to meander and the subsequent approval of a survey thereof and the plats of such survey is to be taken as evidence that the island or strip of land beyond such meander line was intended to pass as a part of and incident to the surveyed abutting upland.—*Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47, reversed by 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.

The plat and field-notes made from a survey of public lands, which has been approved

and adopted by the government, showing fractional subdivisions along a meandered stream of fresh water, showing all the dry land as having been surveyed and the balance of the legal subdivisions as covered by the waters of the stream, constitute prima facie evidence that no island of which the government takes notice existed opposite such fractional subdivisions at the time the survey was made.—*Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47, reversed by 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.

A riparian owner of lands abutting upon a stream has no right to place obstructions out into the stream for the purpose of changing the natural course of the river, or for any other purpose that would do damage to a riparian owner on the opposite side, or to owners of land abutting upon said stream, either above or below.—*Fischer v. Davis*, 19 Idaho, 493, 116 Pac. 412.

Riparian owner of lands abutting upon a stream, whether navigable or non-navigable, have the right to place and maintain upon their lands such barriers as will prevent their lands from being overflowed and damaged by the stream, and for the purpose of keeping the same within its natural channel.—*Fischer v. Davis*, 19 Idaho, 493, 116 Pac. 412.

Where a railroad company acquired twenty acres of station grounds under act of Congress, March 3, 1875 (18 Stat. 482, c. 152), for occupation and use as a common carrier, such grounds abutting on a navigable lake, one who in no way connects himself with any property rights in the lands on which a dock of the company is erected or in any riparian rights is not in position to claim that the dock is not on the land of the company or that the grant confers no riparian rights.—*Coeur d'Alene etc. Transp. Co. v. Ferrell*, 22 Idaho, 752, 128 Pac. 565.

In an action for damages sustained to a ditch, flume and sawmill by diversion of water due to a log jam, evidence held sufficient to go to the jury to establish the charge of negligence.—*McGuire v. Post Falls Mfg. Co.*, 23 Idaho, 608, 131 Pac. 654.

Evidence in an action for injuries from flowage due to a log jam, held insufficient to support a verdict and judgment in the amount rendered.—*McGuire v. Post Falls Lumber Mfg. Co.*, 23 Idaho, 608, 131 Pac. 654.

One who engages in floating logs and lumber down a stream must exercise reasonable care in order to avoid injury to the property of others. The fact that the stream is navigable does not give one the right to dump logs and timber into the stream and allow the same to go unattended and without being cared for, and form jams and dams in the stream and divert the current of the stream onto the property of other persons, and thereby injure and damage the same.—*McGuire v. Post Falls Mfg. Co.*, 23 Idaho, 608, 131 Pac. 654.

Where a dam has been erected across a stream, which is the outlet to a large lake and body of water, and such dam is lawfully

erected upon the premises of the owner of such dam, and a contrivance is erected upon the top of the dam so as to be raised and thereby raise the elevation of the water in the lake several feet above its usual and ordinary height, and this contrivance is raised each season for the purpose of holding the water back and maintaining it at a high-water stage during the latter part of the summer and autumn, and the same results in flooding and overflowing a sand beach used as a bathing beach during the summer season, and the owner of the beach sues for damages, and alleges the flooding and injuries as occurring periodically and the damages as accruing during a particular season of the year from year to year, a recovery may be had for each recurring flooding and injury.—*Deffenbaugh v. Washington Water P. Co.*, 24 Idaho, 514, 135 Pac. 247.

Editorial Notes.

Riparian owners, rights of in navigable waters, and in the lands thereunder: 19 Am. St. Rep. 226.

Right of access of riparian owners: 1 Ann. Cas. 184.

Right of access of riparian owner as including right to construct wharf or pier: 11 Ann. Cas. 11.

Right of riparian owner to use water to generate electric power: 17 Ann. Cas. 1226.

Liability of one using stream to float timber for resulting injuries to riparian owner: 10 Ann. Cas. 235.

Separation of riparian rights from upland: 40 L. R. A. 393.

Correlative rights of upper and lower properties: 41 L. R. A. 737.

NEGLIGENCE.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

II. PROXIMATE CAUSE OF INJURY.

III. CONTRIBUTORY NEGLIGENCE.

IV. ACTIONS.

Damages, exemplary, measure in general, mental suffering as element, nominal or substantial. See *Damages*.

Negligence of particular classes of persons or incident to particular personal relations. See *Attorney and Client*; *Master and Servant*; *Carriers*; and other specific heads.

Employer. See *Master and Servant*.

Master for injuries to servant. See *Master and Servant*.

Municipality. See *Municipal Corporations*.

Railroad company, injuries to animals, injuries to persons, injury to property by fire, injury to property from construction, injury to property from operation. See *Railroads*.

Telegraph and telephone companies. See *Telegraphs and Telephones*.

Actions for damages for death caused by negligence. See *Death*.

Collision of boats. See *Collision*.

Instruction as to negligence in action for causing death. See *Death*.

Negligence causing death. See *Death*.

In operating electric light plant. See *Electricity*.
Of county in construction or maintenance of bridge. See *Bridges*.

Assumptions of risk by servant. See *Master and Servant*, III, (F).

Fellow-servant doctrine. See *Master and Servant*, III, (E).

Contributory negligence of servants. See *Master and Servant*, III, (G).

Negligence of physician. See *Physicians and Surgeons*.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

Negligence of street railroad, causing death of pedestrian. See *Street Railroads*.

A person guilty of negligence cannot avoid responsibility therefor on the ground that others are also guilty of negligence contributing to the same injury.—*McCarty v. Boise City Canal Co.*, 2 Idaho, 245, 10 Pac. 623.

Defendant irrigation company maintained a footbridge over its canal, one side of which was nine and one-half inches from a headgate. The bridge was not intended for public use, but for the use of the irrigation company. The bridge was three feet eight inches in width, and had a hand-rail on the side opposite the headgate. At one end of the bridge a cleat two inches thick was nailed to the floor of the bridge. Plaintiff's son, nine years of age, while playing in the vicinity, ran toward the bridge in a diagonal course therefrom, and, stumbling over the cleat, fell between the bridge and headgate, and was drowned. The parents of the boy did not consider the bridge dangerous, and did not warn him not to play near it, and the bridge was not in fact dangerous for ordinary use. Held, that defendant was not guilty of negligence, and a verdict for plaintiff would be set aside.—*Thomas v. Pocatello Power & Irrigation Co.*, 7 Idaho, 435, 63 Pac. 595.

Where a railroad turntable is constructed in a much frequented place in a thickly populated community it is the duty of the railroad company to so construct the turntable as to protect even trespassers.—*York v. Pacific etc. Ry. Co.*, 8 Idaho, 574, 69 Pac. 1042.

Where a turntable is in a public and much frequented place and there are no obstructions to prevent persons from going upon it nor any signs warning of the danger, and people were in the habit of going on the turntable and using it as a merry-go-round, the defense that a child, killed while playing on the turntable, was a trespasser is untenable.—*York v. Pacific etc. Ry. Co.*, 8 Idaho, 574, 69 Pac. 1042.

When two or more persons unite in the commission of a wrong, or where separate and independent acts of negligence by different persons all concur as a proximate cause in producing an injury, such wrongdoers are jointly and severally liable for the damage resulting therefrom.—*Brose v. Twin Falls Land & Water Co.*, 24 Idaho, 266, 133 Pac.

673; *Partridge v. Twin Falls Land & Water Co.*, 24 Idaho, 275, 133 Pac. 677.

In order to hold two or more defendants jointly liable as tort-feasors, there must be some joint or concurrent act or community of action, or a neglect of some common duty, or it must appear that the several wrongful acts of the defendants done at different times all concurred in their effects as a single act to produce the injury complained of.—*Brose v. Twin Falls Land & Water Co.*, 24 Idaho, 266, 133 Pac. 673; *Partridge v. Twin Falls Land & Water Co.*, 24 Idaho, 275, 133 Pac. 677.

Editorial Notes.

Consequences for which person guilty of negligence is liable: 96 Am. Dec. 649.

Turntables and other dangerous appliances, liability for injuries suffered by trespassers from: 31 Am. Rep. 206; 40 Am. Rep. 667.

Privity necessary to sustain a recovery for negligence: 42 Am. Rep. 315; 100 Am. St. Rep. 192, 1 Ann. Cas. 755.

Concurrent of two or more persons resulting in injury to a third: 16 Am. St. Rep. 250.

Negligence in dealing with children: 49 Am. St. Rep. 406.

Imputed negligence: 110 Am. St. Rep. 278.

Application of last clear chance rule to injury sustained by person standing or walking close to railroad tracks: Ann. Cas. 1912B, 1242.

Liability of owner of premises containing dangerous machinery for injury to infant licensee or invitee: Ann. Cas. 1913A, 115.

Liability of land owner for injury to trespassing child on account of unguarded pond, pool, well, etc.: Ann. Cas. 1913A, 1032; 7 Ann. Cas. 200; 11 Ann. Cas. 990.

Attractive nuisance: 19 L. R. A., N. S., 1094.

Duty of property owner to trespassing child: 32 L. R. A., N. S., 559.

II. PROXIMATE CAUSE OF INJURY.

Aggravation of previous injury, disease or disability. See Damages, III.

In an action against the members of a lodge for the careless and negligent maintenance of a flagpole, by the breaking of which plaintiff's intestate was killed, the evidence showed that the lodge had had nothing to do with the erection of the pole, that it was a public flagpole, that the pole was blown down by an extraordinary windstorm. Held, that the defendants were not liable.—*Lamb v. Licey*, 16 Idaho, 664, 102 Pac. 378.

No liability attaches for damages sustained by reason of an act of God or forces of nature.—*Lamb v. Licey*, 16 Idaho, 664, 102 Pac. 378.

Where two independent causes—one of responsible, the other of irresponsible, origin—unite or concur in producing an injury so as to contribute to the plaintiff's damage, in so much that it can be said with reasonable certainty that the act of the defendant caused the injury, and that the other and concurring cause set in motion by an irresponsible or unknown agency would not alone have sufficed to produce the injury, the defendant will be held liable. But, if the other cause or superior force would have, at the same time and place, produced the same damage, whether defendant had been negligent or not, his negligence is not deemed the cause of the injury.—*Miller v. Northern Pac. R. Co.*, 24 Idaho, 567, 135 Pac. 845; *Studebaker v. Northern Pac. R. Co.*, 24 Idaho, 600, 135 Pac. 850.

No one is liable for damages sustained by reason of the act of God or the forces of nature; but whoever by his wrongful act augments, diverts or accelerates those forces in such manner as to injure another is liable in damages therefor.—*Miller v. Northern Pac. R. Co.*, 24 Idaho, 567, 135 Pac. 845; *Studebaker v. Northern Pac. R. Co.*, 24 Idaho, 600, 135 Pac. 850.

Editorial Notes.

Liability of remote wrongdoer for damage caused by negligence: 57 Am. Dec. 461.

Proximate cause, of what subsequent injuries deemed to be: 47 Am. Rep. 381.

Proximate and remote causes of injury from negligence: 50 Am. Rep. 569; 36 Am. St. Rep. 807; 1 Ann. Cas. 230.

III. CONTRIBUTORY NEGLIGENCE.

As question for jury. See post, IV.

Contributory negligence of pedestrian killed at crossing. See Street Railroads.

Contributory negligence of person injured at railroad crossing. See Railroads, X, (F).

The rule in an action for personal injuries is that, where the person injured or the plaintiff or any person whose negligence is attributable to plaintiff, has so far contributed to the injury by his want of ordinary care that, but for the want of such ordinary care on his part, the injury would not have been done, defendant is not liable.—*Rumple v. Oregon Short Line Ry. Co.*, 4 Idaho, 13, 22 L. R. A. 725, 35 Pac. 700.

One who has the last clear chance or opportunity of avoiding an accident, notwithstanding the negligence of the other party, is considered in law to be solely responsible for such accident.—*Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432.

Although the actions of the person injured may have been the primary cause of the injury, yet an action for such injury may be maintained where it appears that, by the exercise of reasonable care and diligence, defendant might have avoided the consequences

of the injured party's negligence.—*Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432.

In an action for damages for the death of a minor child, where contributory negligence is charged by the defendant, if the negligence of the plaintiff preceded the negligence of the defendant, and the accident might have been prevented by the exercise of ordinary care on the part of the defendant, notwithstanding plaintiff's negligence, then and in that case, the defendant is bound to exercise such care, and a failure to do so is actionable.—*Anderson v. Great Northern R. Co.*, 15 Idaho, 513, 99 Pac. 91.

The fact that the plaintiff was riding in a race upon which money had been wagered, even if in violation of law, would not justify the defendants in injuring him when such injury was not the result of an effort to suppress such wrong or enforce the law; neither would it deny him the right to recover damages sustained by him, in a race, caused by the negligent acts of the defendants in interfering with such race.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 25 L. R. A., N. S., 691, 104 Pac. 1015.

To prevent a recovery by reason of contributory negligence, the person injured must be guilty of a want of ordinary care, and it must appear that such want of care was a proximate cause of the injury. The negligence or want of care, however, of the injured person need not be the sole proximate cause of the injury, for that would exclude all negligence on the part of the defendant, and there would be no reason for the application of the rule of contributory negligence on the part of both parties.—*Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465.

In an action to recover for personal injuries, where contributory negligence is pleaded as a defense, the plaintiff cannot recover when it is proven by the evidence that the negligence of the plaintiff was a proximate cause of the injury, notwithstanding the fact that the evidence may also show negligence on the part of the defendant.—*Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465.

Editorial Notes.

Contributory negligence and the general principles of law applicable to: 55 Am. Dec. 666.

Contributory negligence, when does not bar a recovery: 30 Am. Rep. 190; 38 Am. Rep. 637.

Contributory negligence, what is and what is not: 32 Am. Rep. 98; 8 Am. St. Rep. 849.

Care to be exercised by person injured by negligence: 23 Am. Rep. 25.

Last clear chance: 55 L. R. A. 418.

IV. ACTIONS.

A complaint, alleging ownership and possession of a certain town lot by defendant

upon which a well was situated, and that through the negligence and carelessness of defendant said well was left open, and that plaintiff's infant son, without carelessness, negligence or fault on his part, fell therein and was instantly killed, states a cause of action.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

Precautionary measures for the future, such as making machinery more safe where an accident has happened, or placing safeguards about a place where a person has been injured, cannot be considered as showing negligence in the past, and it is error to admit evidence showing such facts.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

In an action for negligence, admissions and declarations made by an agent after an accident has occurred cannot be admitted to show the negligence of the principal.—*Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

Under R. S. 4168, subdivision 2, which requires the complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language, a general allegation of negligence, setting forth no specific acts of commission or omission, is demurrable for uncertainty.—*King v. Oregon Short Line Ry.*, 6 Idaho, 306, 59 L. R. A. 209, 55 Pac. 665.

One seeking to recover for an injury due to defendant's negligence, must show not only that defendant was negligent but that there was no contributory negligence on his own part.—*Haner v. Northern Pac. Ry. Co.*, 7 Idaho, 305, 62 Pac. 1028.

A complaint alleging that plaintiff received such great bodily injuries as to render her an invalid and a cripple, in connection with other allegations showing permanent injury, is sufficient to warrant the admission of evidence that plaintiff was permanently injured.—*McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478.

In an action for the death of a child on account of a turntable negligently left unguarded, evidence to show that a short time before the accident the turntable had been used as a merry-go-round by young people, that there were no inclosures or signs about the table at that time and that the turntable was in a public and much frequented place, was admissible to show that the turntable was frequented by people for amusement, and by reason of that fact was enticing to children.—*York v. Pacific etc. Ry. Co.*, 8 Idaho, 574, 69 Pac. 1042.

Where the evidence showed that defendant's turntable was near a village and close to a public highway; that people lived close by; that there were no danger signs; that people were in the habit of using the turntable for amusement; that it was dangerous and insecurely fastened; that the plaintiff left his wife and child in a wagon close by; that the child got out of the wagon and was killed while on the turntable, the question of the contributory negligence of the parents

was a question of fact for the jury.—York v. Pacific etc. Ry. Co., 8 Idaho, 574, 69 Pac. 1042.

As a rule, negligence may be pleaded generally, it being an ultimate fact and not a conclusion of law.—Younie v. Blackfoot Light & W. Co., 15 Idaho, 56, 96 Pac. 193.

The burden of proving contributory negligence rests on defendant.—Carscallen v. Coeur d'Alene etc. Co., 15 Idaho, 444, 98 Pac. 622.

Where the facts are disputed and from them reasonable and prudent men might disagree as to negligence, the question of negligence becomes a question of fact for the jury. Wheeler v. Oregon R. R. etc. Co., 16 Idaho, 375, 102 Pac. 347.

Where the facts are undisputed and but one deduction can be drawn therefrom, the question of negligence is purely one of law.—Wheeler v. Oregon R. R. etc. Co., 16 Idaho, 375, 102 Pac. 347.

Where the plaintiff in an action for damages against a railroad company alleges several separate and independent acts of negligence as all concurring in the accident and consequent damages, and the acts charged are of such a nature that the accident might have occurred and the injury resulted from any one of such acts independently of any or all of the others, it will be sufficient to entitle the plaintiff to recover if he prove any act or acts alleged from which the jury may reasonably believe the accident occurred and the injury resulted.—Fleenor v. Oregon Short Line R. R. Co., 16 Idaho, 781, 102 Pac. 897.

Where the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair-minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence is one of fact to be submitted to the jury.—Fleenor v. Oregon Short Line R. R. Co., 16 Idaho, 781, 102 Pac. 897.

Contributory negligence may be a question of both law and fact or a question of law or of fact alone. Where it is a question of fact, it must be submitted to a jury and proven as a defense; but, where it appears on the face of the complaint, it becomes one of law and may be taken advantage of by demurrer.—Goure v. Storey, 17 Idaho, 352, 105 Pac. 794.

The rule in this state that contributory negligence is a defense to be pleaded and proven by the defendant does not change the rule that plaintiff cannot recover where the allegations of the complaint show that his own negligence was the proximate cause of the injury.—Goure v. Storey, 17 Idaho, 352, 105 Pac. 794.

Where negligence is the issue for the jury to determine, it is sufficient if the evidence, whether direct or circumstantial, creates a preponderance of the proof.—Calkins v.

Blackwell Lbr. Co., 23 Idaho, 128, 129 Pac. 435.

Circumstantial evidence is legal evidence, and if the facts are shown by circumstantial evidence, and are such that reasonable men may fairly differ upon the question whether there was negligence or not, and the jury concludes that there was negligence, the verdict of the jury should not be set aside or reversed.—Calkins v. Blackwell Lbr. Co., 23 Idaho, 128, 129 Pac. 435.

Evidence in an action against a lumber company for damages resulting from a fire which destroyed plaintiff's growing timber, held, sufficient to support the special findings of the jury that the fire was a result of negligence on the part of defendant.—Calkins v. Blackwell Lbr. Co., 23 Idaho, 128, 129 Pac. 435.

Contributory negligence is a matter for the jury.—Staab v. Rocky Mountain Bell Tel. Co., 23 Idaho, 314, 129 Pac. 1078.

In an action for damages based upon negligence, it is irrelevant to prove that the plaintiff or defendant has, on similar occasions, been careful or negligent, or that either party has the reputation of being careful or negligent.—Denbeigh v. Oregon-Washington R. & Nav. Co., 23 Idaho, 663, 132 Pac. 112.

A complaint which does not specifically allege the things concerning which negligence is imputed is open to demurrer for uncertainty.—Osborn v. Carey, 24 Idaho, 158, 132 Pac. 967.

Editorial Notes.

Contributory negligence, burden of proof as to: 28 Am. Rep. 563; 10 Ann. Cas. 4.

Contributory negligence, burden of disproving, when must be assumed by plaintiff: 39 Am. Rep. 511; 58 Am. Rep. 229.

Presumption of negligence from an accident or injury: 43 Am. Rep. 73; 6 Am. St. Rep. 792; 113 Am. St. Rep. 986.

Evidence of other accidents, when admissible: 44 Am. Rep. 694; 57 Am. Rep. 812.

Evidence of subsequent repairs: 50 Am. Rep. 53; 57 Am. Rep. 183; 18 Am. St. Rep. 307.

Negligence, accident as evidence of: 20 Am. St. Rep. 490; 30 Am. St. Rep. 736; 6 Am. St. Rep. 792.

Rule that complaint in negligence must allege negligence to have been proximate cause of injury as applicable to injury from excavation in street: Ann. Cas. 1913E, 82.

Right of recovery upon proof of negligent act not pleaded: Ann. Cas. 1912A, 641.

Availability as defense of contributory negligence not pleaded: Ann. Cas. 1913B, 845; 15 Ann. Cas. 433.

Right to charge two or more acts of negligence in one count in complaint or declaration in action for damages for personal injuries: Ann. Cas. 1913C, 101.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWSPAPERS.

Contempt of court in publications. See Contempt.

Service of process by publication. See Process.

Publication of libels. See Libel and Slander.

Notice of tax sale or tax proceedings. See Taxation.

Specific performance of contract for sale of newspaper business. See Specific Performance, II.

Law as to state and county printing not violation of commerce clause. See Commerce.

Public policy as affecting sale of. See Contracts, I, (F).

Law requiring printing, etc., within county and state. See Constitutional Law, V, X.

Mortgage of. See Chattel Mortgages, I.

Where a statute requires the giving of "twenty days," notice by publication in some newspaper, such notice need not be published in every issue of the paper for twenty days, the statute being complied with by publication in one issue of the paper twenty days prior to the date of the meeting or other action of which the publication purports to give notice.—*McGilveray v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348.

Editorial Notes.

Statement published in newspaper as notice in absence of statute: *Ann. Cas.* 1913D, 224.

What constitutes a newspaper: *Ann. Cas.* 1913D, 879; 16 *Ann. Cas.* 417.

NEW TRIAL.**I. NATURE AND SCOPE OF REMEDY.****II. GROUNDS.**

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Necessity and effect of motion for new trial for purposes of review, review of decisions granting or refusing new trials, and decisions on appeal, etc., remanding causes for new trials. See Appeal and Error.

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I. NATURE AND SCOPE OF REMEDY.

On motion for a new trial, every intentment is in favor of the judgment of the court and the party alleging error must affirmatively show it.—*Hazard v. Cole*, 1 Idaho, 276.

R. S. 1776-1779, as amended by Laws 1899, p. 248, prescribe the manner of taking appeals from the county board of commissioners and that the matter shall be heard anew on the appeal. Held, that there could be no appeal from an order of the district court denying a new trial after judgment affirming the action of the board of county commissioners in authorizing the sheriff to appoint additional deputies, the remedy being to appeal from the judgment and not to move for a new trial.—*Mahoney v. Board of County Commrs.*, 8 Idaho, 375, 69 Pac. 108.

The granting or denying of a new trial is in the sound discretion of the court.—*Hall v. Jensen*, 14 Idaho, 165, 93 Pac. 962.

A new trial is a re-examination of an issue of fact in the same court after a trial and decision by the court or jury, or referees.—*Caldwell v. Wells*, 16 Idaho, 459, 101 Pac. 812.

The granting of a new trial is in the sound discretion of the trial court.—*Cox v. Cox*, 22 Idaho, 692, 127 Pac. 679.

In determining the question of abuse of discretion in granting or refusing a motion for a new trial, the circumstances in each case, as shown by the evidence, should be the practical and proper guide in determining the same, and it should be a legal, and not an arbitrary, discretion, and should be exercised in conformity with the spirit of the law and in such a manner as will subserve rather than impede and defeat the ends of justice, and technicalities should be avoided. *Baillie v. City of Wallace*, 22 Idaho, 702, 127 Pac. 908.

Editorial Notes.

New trial on court's own motion: 40 L. R. A., N. S., 291.

II. GROUNDS.

In criminal prosecutions. See Criminal Law.

Slight variance between proof and verdict as to amount of damages not ground for new trial. See Damages, VIII.

(A) ERRORS AND IRREGULARITIES IN GENERAL.

It is not ground for new trial that the findings were not filed until after the adjournment of the term of court at which the case was tried.—*Hazard v. Cole*, 1 Idaho, 276.

Insufficiency of the evidence to justify the judgment, and objections to the judgment as

being contrary to law, are not grounds upon which a motion for a new trial will be granted. *Curtis v. Walling*, 2 Idaho, 416, 18 Pac. 54.

The rule that where there is a substantial conflict in the evidence the verdict of a jury or the findings of the court will not be set aside on appeal, does not apply to a trial court on an application for a new trial.—*Jones v. Campbell*, 11 Idaho, 752, 84 Pac. 510.

A motion for a new trial should be directed to the verdict of the jury or the decision of the court, and not to the judgment.—*Caldwell v. Wells*, 16 Idaho, 459, 101 Pac. 812.

Insufficiency of the evidence to justify the judgment is not a ground of motion for a new trial.—*Caldwell v. Wells*, 16 Idaho, 459, 101 Pac. 812.

That a judgment is against the evidence and the law is not a ground of motion for a new trial.—*Caldwell v. Wells*, 16 Idaho, 459, 101 Pac. 812.

(B) MISCONDUCT OF PARTIES, COUNSEL, OR WITNESSES.

Refusal of the court to require counsel to desist from referring to opposing counsel in a joking way in his argument to the jury will not warrant the granting of a new trial. *McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478.

Editorial Notes.

New trials, attorneys, misconduct of in argument as a ground for: 9 Am. St. Rep. 599; 100 Am. St. Rep. 689.

(C) RULINGS AND INSTRUCTIONS AT TRIAL.

Where the allegations of the complaint are supported by the proofs, and the verdict and judgment are in accordance with both, a new trial will not be granted because an instruction was given which, though correct as an abstract principle of law, was not applicable to the case.—*Stinson v. Bourke*, 4 Idaho, 765, 46 Pac. 445.

Editorial Notes.

Evidence, admission of irrelevant or immaterial as a ground for new trials: 66 Am. Dec. 717.

(D) DISQUALIFICATION OR MISCONDUCT OF OR AFFECTING JURY.

Affidavit of juror to impeach verdict. See post, III, (F).

A judgment in favor of a party guilty of improper conduct calculated to influence the jury, or any juror, in his favor in rendering a verdict, should be reversed and a new trial granted on the ground of public policy. *Palmer v. Utah etc. Ry. Co.*, 2 Idaho, 315, 13 Pac. 425.

Where the record shows that while the jury were viewing the premises in controversy, defendants supplied the jury with liquors, lunch and cigars, such conduct is sufficient to influence the jury and is improper, and a verdict for defendants should

be set aside and a new trial granted on the ground of public policy.—*Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98.

Where a jury agree that each member thereof shall mark the sum which he thinks plaintiff is entitled to recover on a slip of paper, and then ascertain by addition the amount of the sums so marked, and to then divide said amount by the number of jurors, the quotient to be the amount of the verdict, such verdict is obtained by "resort to a determination of chance" within the meaning of R. S. 4439, subdivision 2, and such verdict should be set aside.—*Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254.

Where a jury agrees that each juror shall name the amount which he considers the plaintiffs entitled to recover and that the amount so named by each juror shall be put down and that the several sums so named shall be added together and the total amount thereof divided by twelve, the number of jurors trying the case, and the quotient arising from such division shall be the verdict, such verdict is a chance verdict and ground for a new trial under R. S. 4439.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

It is error to permit a juror to use intoxicating liquors during the trial of a case or during the deliberations of the jury, unless it is done with the permission of the court, upon the prescription of a practicing physician.—*Bernier v. Anderson*, 8 Idaho, 675, 70 Pac. 1027.

It is not error for the trial court to deny a motion for a new trial on account of the intoxication of a juror, where it clearly appears that such intoxication is brought on by the indulgence of the juror during a recess of the court and when the jury is permitted to separate, and no motion is made at the time that the panel be discharged and a new jury selected, or that the particular juror be discharged and another juror selected in his stead, or any objection made to resuming the trial on account of the intoxication of such juror; and it further clearly appears as a fact that the trial was not resumed until the juror had fully recovered his normal condition and faculties, although such conduct of the juror calls for severe censure and punishment from the trial court.—*Walsh v. Winston Bros. Co.*, 18 Idaho, 768, 111 Pac. 1090.

Editorial Notes.

Verdict, determination of by chance: 2 Am. Dec. 38.

Misconduct of juror as a ground for a new trial: 35 Am. Dec. 254.

Misconduct of jurors, other than their separation, for which a verdict may be set aside: 134 Am. St. Rep. 1033.

Use of intoxicating liquors by jury as ground for new trial: Ann. Cas. 1912A, 1322.

Furnishing refreshment to juror by successful party as ground for new trial: Ann. Cas. 1912B, 747.

New trial for misconduct of jury as resting in discretion of trial court: Ann. Cas. 1912D, 1018.

Disqualification of juror as ground for new trial: Ann. Cas. 1913A, 892; 18 L. R. A. 473.

Treating jurors: 19 L. R. A., N. S., 733.

(E) IRREGULARITIES OR DEFECTS IN VERDICT OR FINDINGS.

Where the special finding of facts made by a jury is contradictory and inconsistent on a material issue, a judgment rendered thereon cannot be sustained and a new trial should be granted.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

(F) VERDICT OR FINDINGS CONTRARY TO LAW OR EVIDENCE.

After two concurring verdicts, the court will not grant a new trial if the question to be tried wholly depends on matters of fact, and no rule of law has been violated; even though in the opinion of the court the verdict is against the weight of evidence.—Monarch etc. M. Co. v. McLaughlin, 1 Idaho, 650.

R. S. 4439, in authorizing a new trial on the ground that the "verdict is against the law," does not intend to include in that ground all or any of the several distinct and separate grounds of the motion which are numbered and specified in said section.—Young v. Tiner, 4 Idaho, 269, 38 Pac. 697.

The rule that where there is a substantial conflict in the evidence, the judgment will not be disturbed, has no application on motion for a new trial.—Bernier v. Anderson, 8 Idaho, 675, 70 Pac. 1027.

R. C. 4439, subdivision 6, provides that a new trial may be granted for "insufficiency of the evidence to justify the verdict or other decision or that it is against the law." Held, that "decision," as used in this statute and as used in the statute providing for giving notice of intention to move for a new trial, means the findings of fact and conclusions of law made by the court, and not the judgment.—Caldwell v. Wells, 16 Idaho, 459, 101 Pac. 812.

The granting of a new trial on the ground of insufficiency of the evidence is addressed to the sound legal discretion of the trial court.—Wolfe v. Ridley, 17 Idaho, 173, 104 Pac. 1014.

Editorial Notes.

Necessity for new trial where verdict is found contrary to erroneous instruction: 14 Ann. Cas. 973.

(G) SURPRISE, ACCIDENT, INADVERTENCE OR MISTAKE.

On a motion for a new trial, on the ground that the party was taken by surprise by reason of one of his own witnesses failing to testify to a material fact which the witness had previously stated in the presence of others he could testify to, the affidavits of the persons in whose hearing such statements were made, are the best evidence of the surprise and should be produced.—Lillienthal v. Anderson, 1 Idaho, 673.

Where application is made upon affidavit for a new trial under R. S. 4439, paragraph 3, on the ground of accident or surprise, the facts constituting such accident or surprise must be set forth in the affidavit.—Hall v. Jensen, 14 Idaho, 165, 93 Pac. 962.

Editorial Notes.

Surprise, when may be granted on account of new trial: 78 Am. Dec. 518.

(H) NEWLY DISCOVERED EVIDENCE.

Where newly discovered evidence brings to light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted.—Flannagan v. Newberg, 1 Idaho, 78.

Where newly discovered evidence relates to a substantial point or particular fact which was inquired into on the trial, it is cumulative.—Flannagan v. Newberg, 1 Idaho, 78.

An objection to the insufficiency of the jurat to an affidavit on motion for new trial on the ground of newly discovered evidence is waived if not made in the trial court.—Heilner v. Brown, 2 Idaho, 263, 12 Pac. 903.

While the application for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court, such application should generally be looked upon with suspicion and disfavor.—Black v. City of Lewiston, 2 Idaho, 276, 13 Pac. 80.

Where newly discovered evidence tends to establish the same general result sought to be established at the trial, and such evidence is of a different character and deals with a new and distinct fact, it is not cumulative within the meaning of the rule prohibiting the granting of a new trial upon newly discovered evidence which is merely cumulative. Twin Springs Placer Co. v. Upper Boise etc. Min. Co., 6 Idaho, 687, 59 Pac. 535.

A motion for a new trial on the ground of newly discovered evidence is properly denied, where such evidence is mainly cumulative and with proper diligence could have been produced at the trial.—Knollin v. Jones, 7 Idaho, 466, 63 Pac. 638.

Where affidavits of newly discovered evidence on motion for new trial are mostly cumulative and corroborative, there is no abuse of discretion in denying the new trial. Heckman v. Espey, 12 Idaho, 755, 88 Pac. 80.

Newly discovered evidence, which is merely cumulative or designed to contradict witnesses, is not sufficient to warrant the granting of a new trial.—Hall v. Jensen, 14 Idaho, 165, 93 Pac. 962.

Where application for a new trial is made under R. S. 4439, paragraph 4, the newly discovered evidence must be set forth, and it must also appear from the affidavit that such evidence could not, with reasonable diligence, have been discovered and produced at the trial.—Hall v. Jensen, 14 Idaho, 165, 93 Pac. 962.

Under the showing made, held, that the court did not err in denying a new trial on

the ground of newly discovered evidence.—*Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 109 Pac. 851.

Editorial Notes.

Newly discovered evidence of contradictory statements made by witness as ground for new trial: *Ann. Cas.* 1912D, 856.

What is cumulative evidence within rule excluding it when offered as newly discovered evidence in support of motion for new trial: *Ann. Cas.* 1913D, 157; 14 L. R. A. 609.

Right to new trial for newly discovered evidence which was not in existence when trial was had: *Ann. Cas.* 1913E, 147.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

Defects in proceedings as grounds for dismissal of appeal. See *Appeal and Error*.

In criminal prosecutions. See *Criminal Law*.

Review of discretion of court. See *Appeal and Error*.

(A) IN GENERAL.

In moving for a new trial, three steps are necessary: giving notice of intention to move for the new trial, filing the statement or affidavits upon which the motion is to be made and the application or motion.—*Stevens v. Northwestern Stage Co.*, 1 Idaho, 604.

Under R. S. 4889, providing the manner of service of notice and other papers on the attorney for a litigant, proof of service on an attorney's clerk must show that the attorney was absent from his office at the time of service.—*Peter v. Kalez*, 11 Idaho, 553, 83 Pac. 526.

(B) TIME.

Time for hearing and decision. See *post*, III, (E).

Time for settlement of statement. See *post*, III, (E).

By appearing at the settlement of a statement on motion for a new trial or at the hearing of the motion, without objection to defects in the service of notice of intention to move for a new trial or to the failure to file a statement within the required time, a party waives such defects.—*Stevens v. Northwestern Stage Co.*, 1 Idaho, 604.

An order "that there be a stay of execution on the judgment in this case for a period of twenty days for the purpose of allowing the defendants to move for a new trial" is not an order extending the time for giving notice of intention to move for a new trial, or for filing a statement.—*Stevens v. Northwestern Stage Co.*, 1 Idaho, 604.

Where the notice of intention to move for a new trial was not served and filed within ten days after verdict as required by R. S. 4441 an appeal from an order denying a new trial will be dismissed.—*Fox v. Rogers*, 6 Idaho, 710, 59 Pac. 538.

(C) NOTICE OF MOTION OR INTENTION TO MOVE.

A failure to give notice of intention to move for a new trial or to file the statement

within the time required by law, or such further time as the court or judge may grant by order, is a waiver of the right to move for a new trial.—*Stevens v. Northwestern Stage Co.*, 1 Idaho, 604.

A notice of intention to move for a new trial, on the ground that the evidence was insufficient to justify the verdict and judgment, should specify wherein the evidence is insufficient.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

R. C. 4441, as amended by Laws 1911, page 377, provides that a person intending to move for a new trial must within ten days after the verdict of the jury, or after notice of the decision of the court or referee, file with the clerk and serve upon the adverse party "notice of his motion designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the records and files in the action, or the minutes of the court." Held, the notice provided for under the statute is a notice of the motion for a new trial, and such notice must designate the grounds upon which the motion will be made, and the motion for a new trial follows after the notice, and may be oral or in writing, and is not required to be in any particular form, or to state the grounds upon which the same is made.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

A notice of intention to move for a new trial, which states, "Said motion will be made upon affidavits hereafter to be filed and served upon you, the records and files in the action, and the minutes of the court, or said motion will be made upon affidavits hereafter to be filed and served upon you, or the records and files in the action, or the minutes of the court, or either or all of them," is sufficient under R. C. 4441, and states the grounds upon which said motion will be made; and the statement in the notice of the grounds in the disjunctive does not render the notice insufficient, where the notice does state that such motion is to be heard upon "either or all of them."—*Andregg v. Oregon Short Line R. Co.*, 22 Idaho, 437, 126 Pac. 528.

(D) SPECIFICATION OF ERRORS.

Under R. S. 4441 providing the method of procedure on application for a new trial, a specification of particulars wherein the evidence is insufficient to justify the verdict is sufficient if it designates some particular fact and avers that it is not justified by, or not sustained by, or contrary to the evidence.—*Bernier v. Anderson*, 8 Idaho, 675, 70 Pac. 1027.

Motion will be sustained to disregard a statement on motion for new trial, when such statement does not specify wherein the evidence is insufficient to support the judgment.—*Robson v. Colson*, 9 Idaho, 215, 72 Pac. 951.

(E) STATEMENT AND SETTLEMENT THEREOF.

Where affidavits, depositions or minutes of the court are incorporated into a statement, either in *haec verba* or by appropriate ref-

erence, it is unnecessary to have any further identification of them.—*Moore v. Taylor*, 1 Idaho, 583.

An intelligible and definite reference, in a statement, to papers and exhibits, by letters and numbers, as attached to and constituting a part of the statement, is sufficient, without incorporating the same at length into the statement.—*Moore v. Taylor*, 1 Idaho, 583.

The statement on a motion for a new trial must be settled, before a decision on the motion, in order that the court below or judge thereof may have something definite to act upon.—*Stevens v. Northwestern Stage Co.*, 1 Idaho, 604.

A statement of the case once made may be used on appeal from a judgment, and such statement can be so used on an appeal from a judgment only when first used on a motion for a new trial.—*Bradbury v. Idaho etc. L. Imp. Co.*, 2 Idaho, 239, 10 Pac. 620.

Failure of the appellant to serve a statement on motion for a new trial or transcript on appeal on one of the defendants cannot be taken advantage of by his codefendants, such defendant having waived the lack of service by not raising the question.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

Under R. S. 4441, a statement on motion for a new trial should contain a history of the proceedings at the trial, and all the exceptions taken by the moving party, and a specification of all errors relied on.—*Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540.

R. S. 4441 provides, *inter alia*, that the party intending to move for a new trial must, within ten days after the verdict of the jury or after notice of the decision of the court, etc., file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds and whether the same will be made upon affidavits, etc., on the statement of the case. Subdivision 3 thereof provides that, if the motion is to be made on a statement of the case, the moving party must within ten days after service of the notice, or such further time as the court or judge may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. Held, that where a proposed statement on motion for a new trial is served on the adverse party within the statutory time and no amendments are proposed thereto, the statement as proposed may be presented to the judge or delivered to the clerk for settlement within any reasonable time thereafter.—*Miller v. Hunt*, 7 Idaho, 486, 63 Pac. 803.

Where amendments are proposed to a statement on motion for a new trial and not adopted by the moving party, the moving party must, within ten days after service of the proposed amendments, deliver the proposed statement and amendments to the clerk of the court for the judge as required by R. S. 4441, subdivision 3.—*Hoehnan v. New York Dry Goods Co.*, 8 Idaho, 66, 67 Pac. 796.

Where there is an objection or protest to the settlement of the statement on motion for new trial, the court has no jurisdiction to

extend the time or settle the statement, if the statutory time has elapsed.—*Hoehnan v. New York Dry Goods Co.*, 8 Idaho, 66, 67 Pac. 796.

It seems that R. S. 4229 permits a statement or motion for new trial to be settled after the statutory time has expired, where there is no laches or where the neglect is excusable.—*Hoehnan v. New York Dry Goods Co.*, 8 Idaho, 66, 67 Pac. 796.

Under R. S. 4441 requiring the statement on motion for a new trial to be settled and signed by the judge or referee a statement certified by the attorneys for the parties, but not signed by the judge, is insufficient.—*Van Meter v. Squibb*, 9 Idaho, 160, 72 Pac. 884.

It is the duty of a trial judge to see that the statement of the case signed by him conforms to the facts and to eliminate therefrom all matter that is not true and to correct it so as to conform to the truth whether amendments are offered or not; and on proper notice such correction may be made even after settlement; but the practice of making and filing an independent certificate by the trial judge disputing statements contained in the original bill or statement is not commendable.—*Humbird Lumber Co. v. Kootenai County*, 10 Idaho, 490, 79 Pac. 396.

The provision of R. S. 4442, requiring the settlement and filing of the statement on motion for new trial before the court or judge can decide such motion is mandatory.—*Buckle v. McConaghy*, 11 Idaho, 533, 83 Pac. 525.

R. S. 4892, providing that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given, does not require notice of application for extension of time in which to prepare and serve a statement on motion for new trial, since neither statutes nor rules of court require such notice.—*White v. Whitcomb*, 13 Idaho, 490, 90 Pac. 1080.

Where the trial court made an order extending the time for preparing a statement on motion for new trial and thereafter made a second order but not until the time allowed by the first order had expired, the court lost jurisdiction to settle it and it was properly stricken from the files.—*Bank of Commerce v. Baldwin*, 14 Idaho, 75, 17 L. R. A., N. S., 676, 93 Pac. 504.

Where the trial judge neglects or refuses to fix a time to settle a statement on motion for a new trial, the party desiring the statement settled may apply to the supreme court and have the bill settled under R. S. 4432.—*Smith v. American Falls etc. Co.*, 15 Idaho, 89, 95 Pac. 1059.

A judge or court has no jurisdiction to extend the time for preparing and serving a proposed statement on motion for a new trial after the time allowed by law or given by the court or judge has expired.—*Simpson v. Pioneer Irr. Dist.*, 17 Idaho, 435, 106 Pac. 1.

Where the time for preparing and serving a proposed statement on motion for new trial has expired, it will not be presumed that a

stipulation thereafter entered into between the attorneys extending the time for preparing a proposed statement or bill of exceptions was intended to confer jurisdiction already lost.—*Simpson v. Pioneer Irr. Dist.*, 17 Idaho, 435, 106 Pac. 1.

Where proposed amendments and the proposed statement are not delivered to the clerk of the court for the judge within ten days after the service of such amendments upon the moving party, the presumption is that such amendments have been adopted and will be so treated, and the amendments and statement may be presented to the judge for settlement within a reasonable time after the expiration of said ten days.—*Coast Lumber Co. v. Wood*, 18 Idaho, 28, 108 Pac. 338.

(F) AFFIDAVITS.

Affidavits of newly discovered evidence. See ante, II, (H).

On motion for a new trial the court properly disregarded the affidavit of a juror to impeach the verdict.—*Jacobs v. Dooley*, 1 Idaho, 41.

On a motion for a new trial on the ground that the court denied a continuance, the moving party should procure the affidavits of the absent witness showing that they can testify to the facts sought to be proven, or show sufficient reason for not obtaining such affidavits.—*Lillienthal v. Anderson*, 1 Idaho, 673.

Under R. S. 4439, subdivision 2, misconduct of the jurors by resorting to a determination of chance may be proven by affidavit of any of the jurors.—*Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254.

Under R. S. 4439, subdivision 2, affidavits of jurors cannot be received for the purpose of impeaching their verdict, unless it is a verdict obtained by a resort to the determination of chance.—*Griffiths v. Montandon*, 4 Idaho, 377, 39 Pac. 548; *Bernier v. Anderson*, 8 Idaho, 675, 70 Pac. 1027.

Under R. S. 4439, subdivision 2, the affidavit of a juror is competent to show that a verdict was reached by resorting to chance.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Where the notice of intention to move for a new trial does not state that the motion will be based upon affidavits, it is improper to file affidavits, and, if filed, the same will be stricken from the records.—*Storer v. Heitfield*, 17 Idaho, 113, 105 Pac. 55.

Affidavits charging misconduct of jury, examined, and held insufficient to show any injustice sustained by the moving party, or substantial reason for granting a new trial.—*McDonald v. Challis*, 22 Idaho, 749, 128 Pac. 570.

Where a notice of intention to move for a new trial states that the motion will be based upon affidavits, such affidavits must be filed within ten days after the service of such notice, unless the court or judge allow further time to file the same.—*Storer v. Heitfield*, 17 Idaho, 113, 105 Pac. 55.

Editorial Notes.

Impeaching verdict by affidavits of jurors: 12 Am. Dec. 143; 24 Am. Dec. 475; 48 Am. Dec. 376; 31 L. E. A., N. S., 930.

Affidavits of jurors as evidence that verdict returned or entered differed from verdict actually found: Ann. Cas. 1912A, 1205.

Right of adverse party, on motion for new trial, to introduce counter-affidavits: Ann. Cas. 1912D, 1303.

Admissibility of affidavits of jurors in support of verdict: Ann. Cas. 1913B, 761.

(G) STENOGRAPHER'S REPORT.

At the hearing of a motion for a new trial, reference may be had in all cases to the pleadings and orders of the court on file, and, when the motion is made on the minutes, reference may be had to any depositions, documentary evidence and phonographic reports of the testimony on file.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

Under R. C. 4442, the phonographic report of the testimony on file means the stenographic report of the stenographer or the stenographer's notes, and not the transcription of the testimony by such stenographer, and, upon a hearing upon motion for a new trial when made upon the minutes of the court, the sufficiency of the evidence and the questions arising during the trial and the matters contained in the reporter's notes may all be referred to, and the court may determine such questions from his recollection of what took place and from his own minutes kept of the proceedings, and by reference to the stenographer's notes, without waiting for a transcript of the proceedings and evidence as transcribed by the stenographer.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

R. C. 4442 as amended by Laws 1911, chapter 118, does not require the reporter's notes to be transcribed and certified to before the motion for new trial is made, but does provide that upon hearing the phonographic report or stenographer's notes on file may be used, if the motion is heard upon the minutes of the court.—*Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95.

(H) TIME FOR HEARING AND DECISION.

An order granting a new trial, made before settling and filing the statement on motion for new trial, is premature and must be set aside.—*Buckle v. McConaghy*, 11 Idaho, 533, 83 Pac. 525.

A stipulation that defendant's motion for a new trial be submitted without argument and without further notice to either party, and that plaintiff's proposed amendment to defendant's statement of the case, to be used on his motion for a new trial herein, may be adopted and allowed by the court, and incorporated in said statement of the case, does

not amount to a submission of the motion for new trial which would waive any error by the court in passing prematurely on the motion. *Buckle v. McConaghy*, 11 Idaho, 533, 83 Pac. 525.

Where a motion for new trial is based on affidavits, a notice of intention to present such motion for hearing on a day prior to the time limited by R. S. 4441 within which the adverse parties may file counter-affidavits, is a nullity.—*Peter v. Kalez*, 11 Idaho, 553, 83 Pac. 526.

Under R. S. 4441, 4442, the court cannot hear a motion for new trial based on affidavits until after the ten days allowed the adverse party in which to file counter-affidavits.—*Peters v. Kalez*, 11 Idaho, 553, 83 Pac. 526.

The adverse party is entitled to notice of the time and place of the hearing on a motion for new trial and to be present at the hearing and present his side of the case.—*Peter v. Kalez*, 11 Idaho, 553, 83 Pac. 526.

Where the attorneys for the respective parties have signed a stipulation waiving notice of the time and place of hearing and passing on a motion for new trial, the trial judge may hear and pass on the same without notice to the adverse party.—*Buckle v. McConaghy*, 12 Idaho, 733, 88 Pac. 100.

(I) DETERMINATION IN GENERAL.

On motion for a new trial, the district court may modify the judgment by striking out the name of one of the parties defendant where several defendants are severally joined. *Gaffney v. Hoyt*, 2 Idaho, 199, 10 Pac. 34.

(J) ORDER GRANTING OR REFUSING.

Where the trial court in passing on a motion for a new trial says "that the said verdict and judgment are not sustained by the evidence, and are contrary to the law and the evidence, and that errors of law occurred at the trial of said cause," there is a sufficient statement of the grounds or reasons for granting a new trial to support such order for a new trial.—*Gray v. Pierson*, 7 Idaho, 540, 64 Pac. 233.

It would be in the interest of good practice and the dispatch of business if trial courts, when making orders granting new trials, would specify the particular grounds on which such orders are made.—*Wolfe v. Ridley*, 17 Idaho, 173, 20 Ann. Cas. 39, 104 Pac. 1014.

The trial court in its order granting a new trial ought to specify the grounds upon which the new trial is granted.—*Cox v. Cox*, 22 Idaho, 692, 127 Pac. 679.

Editorial Notes.

Right of trial court to grant new trial on part of issues only: *Ann. Cas.* 1913B, 365.

NOTARIES.

Taking and certifying acknowledgment, and competency to testify thereto. See Acknowledgment.

Protest of bills and notes by notary. See Bills and Notes.

NOTICE.

Notice of particular facts, acts, and proceedings. See specific titles thereof, or of subjects to which they relate.

Effect of notice to attorneys, agents, partners, corporate officers, etc. See Attorney and Client; Principal and Agent; Corporations; Partnership; and other specific heads.

Recording instruments in writing to constitute constructive notice. See Records.

Judicial notice of facts. See Evidence.

Notice as affecting good faith of purchaser, priority of mortgages, etc. See Vendor and Purchaser; Sales; Bills and Notes; Mortgages; Chattel Mortgages.

Notice and demand before suit. See Claim and Delivery, and titles of other particular forms and causes of action.

To pay rent. See Landlord and Tenant.

Sufficiency of publication of notice calling for election for organization of road district. See Highways, II.

To corporation. See Corporations, VII, (B).

Of mining location. See Mines and Minerals, I, (B), 3, (e).

NOVATION.

Agreements for benefit of third persons. See Contracts.

Assumption by new firm of liabilities of old on retirement of member. See Partnership.

Requirements of statute of frauds. See Frauds, Statute of.

New mortgage not release of old mortgage in absence of agreement. See Chattel Mortgages, VIII.

Where defendant at the request of his creditor agreed to pay the plaintiff money that he owed to such creditor and did pay part thereof, defendant thereby accepts plaintiff as his creditor in place of his former creditor, and such transaction in law amounts to a novation.—*Casey v. Miller*, 3 Idaho, 567, 32 Pac. 195.

Where D. worked for defendant and on settlement therefor defendant agreed to pay plaintiff to whom D. was indebted, evidence thereof was sufficient to establish a novation. *Sherer v. Rubedew*, 11 Idaho, 536, 83 Pac. 512.

Editorial Notes.

Novation, action by a third person on a promise made for his benefit: 39 Am. St. Rep. 531.

Whether release of original debtor by novation of contract may be established by implication: *Ann. Cas.* 1912D, 508.

NUISANCE.

Obstruction of highways, streets, etc. See Highways, V; Municipal Corporations.

Obstruction of navigation. See Navigable Waters, I, (C).

Obstruction, diversion, pollution, etc., of watercourses. See Waters and Watercourses.

Powers of municipal bodies. See Municipal Corporations.

Criminal prosecution for maintaining a common nuisance by keeping intoxicating liquors. See Intoxicating Liquors, VIII, IX.

Gambling devices as nuisances. See Gaming, II.

To maintain an action for special damages, caused by an obstruction of a public street, constituting a public nuisance, plaintiff must allege and prove that he has sustained special damages of a different kind and character from the damages sustained by the public.—*Stufflebeam v. Montgomery*, 3 Idaho, 20, 26 Pac. 125.

A complaint to enjoin a public nuisance at the suit of a private party should set forth by positive averment facts sufficient to show that plaintiff has sustained special injury, different in kind from that sustained by the general public.—*Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104.

R. S. 4529 provides that anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered. Held, not to change the general rule as declared by R. S. 3633, that a private party, to maintain an action to abate a public nuisance, must show special injury to himself.—*Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104.

Under R. S. 3631, providing that the remedies against a public nuisance are indictment, a civil action, or abatement, a private party may maintain an action to abate a house of prostitution as a public nuisance, by showing that such nuisance is specially injurious to him, whether the nuisance could be abated by the judgment of the criminal court or not.—*Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104.

Under R. S. 3633, a private person may maintain an action for a public nuisance if it is specially injurious to himself but not otherwise.—*Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104.

Under R. S. 3630, no lapse of time can give a prescriptive right to maintain a nuisance. *City of Lewiston v. Booth*, 3 Idaho, 692, 34 Pac. 809.

A private party or corporation constructing a ditch or canal across a public highway or street in such a manner as to render such highway or street unsafe or inconvenient for public travel, and maintaining such a ditch without a bridge or other safe and convenient way of crossing would be guilty of maintaining a nuisance.—*City of Lewiston v. Booth*, 3 Idaho, 692, 34 Pac. 809.

The fact that in an action to abate a nuisance statutory damages are demanded does not change the action from a suit in equity to one at law.—*Peters v. Leflang*, 6 Idaho, 364, 55 Pac. 857.

A complaint alleged that defendants deposited over five hundred and fifty thousand tons of waste material from their mines into a certain stream thereby filling the banks and polluting the stream, that by the natural flow thereof, said waste material was carried

downstream, causing the waters to overflow and to carry and deposit portions of said waste material on plaintiff's lands, thereby poisoning the lands for agricultural, grazing, residence and other purposes and doing other specified injuries, and rendering the use and occupation of said premises as a home dangerous to the health of plaintiff. Held, not demurrable.—*Hill v. Standard Min. Co.*, 12 Idaho, 223, 85 Pac. 907.

Where plaintiff's complaint and affidavits show that defendant village is maintaining a nuisance specially injurious to plaintiff, to wit, a dumping ground near plaintiff's dwelling, and defendant does not deny the existence of the nuisance, but alleges that it has taken steps to abate the same and that it means and intends to prevent any repetition or recurrence of the matters charged as constituting the nuisance, and affidavits are produced showing that conditions have not been changed materially and that the nuisance still exists, an injunction pendente lite should be granted.—*Schreck v. Village of Coeur d'Alene*, 12 Idaho, 708, 87 Pac. 1001.

The rule of law applicable to obstructions placed in streets which are nuisances per se is not applicable to a case where cellarways and doors are maintained in a sidewalk by authority of law.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

Where a cellarway and doors in the sidewalk were maintained by authority of law, and said doors were a part of the sidewalk, they cannot be deemed a nuisance, since R. C. 3659 provides that nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.—*City of Lewiston v. Isaman*, 19 Idaho, 653, 115 Pac. 494.

The smoking of meats, rendering lard, and manufacturing of sausages and other meat products is not, per se, a nuisance, and where the city authorities have not prescribed any limits within which such business shall be carried on, or prohibited the carrying on of such business within any part or portion of the city, it is not, per se, a nuisance to carry on such business at any place within the city, and it only becomes a nuisance to do so by reason of the particular facts of any specific case, and the manner and method of conducting the business at such place.—*Lorenzi v. Star Market Co.*, 19 Idaho, 674, 35 L. R. A., N. S., 1142, 115 Pac. 490.

Where the facts of any given case show that a lawful business is being conducted in such a manner and under such circumstances as to become a private nuisance to an adjoining property owner and an injury and damage to such property owner, and it is determined by the court that an injunction ought to be issued, such injunction should not be absolute, but ought, rather, to be a qualified injunction, unless it clearly appears that the business could not be conducted in any manner, or under any circumstances, at the specific place, without being a nuisance to such adjoining property owner.—*Lorenzi v. Star Market Co.*, 19 Idaho, 674, 35 L. R. A., N. S., 1142, 115 Pac. 490.

The court did not abuse its discretion in granting a temporary restraining order preventing defendant from keeping, storing or drawing off gasoline from its oil tanks.—*Angell v. Continental Oil Co.*, 19 Idaho, 746, 115 Pac. 692.

Where defendant was restrained *pendente lite* from keeping, storing or drawing off gasoline from its oil tanks, it had the right to remove the gasoline it had in said tanks at the date of granting said order without making it liable for contempt.—*Angell v. Continental Oil Co.*, 19 Idaho, 746, 115 Pac. 692.

R. C. 3660, providing that every successive owner of property, who neglects to abate a continuing nuisance upon or in the use of such property created by a former owner, is liable therefor in the same manner as the one who first created it, does not mean that such subsequent owner is liable for damages caused prior to his acquiring the ownership, possession, or control of the property.—*Brose v. Twin Falls Land & Water Co.*, 24 Idaho, 266, 133 Pac. 673; *Partridge v. Twin Falls Land & Water Co.*, 24 Idaho, 275, 133 Pac. 677.

Editorial Notes.

Liabilities of erectors and continuers of nuisances: 14 Am. Dec. 336.

Public nuisances, private action for: 31 Am. Dec. 132; 25 Am. Rep. 533; 52 Am. Rep. 574; 1 Ann. Cas. 38; 17 Ann. Cas. 1128.

Public nuisances, injunction against, who may obtain: 67 Am. Dec. 203.

Injunction against threatened nuisances: 73 Am. Dec. 113; 2 Ann. Cas. 250; 20 Ann. Cas. 933.

Private nuisances, what will be enjoined as interfering with the comfortable enjoyment of real property: 10 Am. Rep. 674.

Percolating of filthy water: 39 Am. Rep. 16.

Offensive trades and manufactures as: 42 Am. Rep. 540.

Abatement of private nuisances, when justifiable: 43 Am. Rep. 24.

Businesses and machinery which may be enjoined as nuisances: 51 Am. Rep. 467.

Debris in streams, when constitute nuisances: 30 Am. St. Rep. 551.

Prescriptive right to maintain nuisances: 30 Am. St. Rep. 556; 17 Ann. Cas. 789.

Public nuisances, what are: 107 Am. St. Rep. 195.

Burning of soft coal as nuisance: Ann. Cas. 1912B, 1036; 13 L. R. A., N. S., 465.

Right of private citizen to maintain action to abate nuisance caused by obstruction of navigable stream: Ann. Cas. 1913E, 51.

Gas plant as nuisance: 20 L. R. A., N. S., 466.

NUNC PRO TUNC.

Entry of judgment after appeal. See *Justices of the Peace*, IV.

OATH.

Affidavits. See *Affidavits*.

Oath or affirmation of witnesses. See *Witnesses*.

— Of jurors. See *Jury*.

False swearing. See *Perjury*.

Verification of pleadings. See *Pleading*, VII.

Constitutionality of test oath law. See *Constitutional Law*, V, VIII.

Test oath as qualification of voter. See *Elections*, IV.

Right of registrar to administer. See *Elections*, V.

OBSTRUCTING JUSTICE.

Arrest without a warrant. See *Arrest*.

Assaults and homicides committed upon or by officers making arrests. See *Assault and Battery*; *Homicide*.

Misconduct and neglect of officers. See *Officers*; *Sheriff and Constable*.

Though the statute requires an officer to inform a party upon whom he is about to serve criminal process of his office and purpose, this need not be done when the officer is well known to such person.—*People v. Nash*, 1 Idaho, 206.

The word "process" as used in the statute relating to the offense of resisting an officer is equivalent in meaning to the official authority of the sheriff or other officer.—*People v. Nash*, 1 Idaho, 206.

In a prosecution, under R. C. 6515, for resisting an officer in the discharge of his duty, it is not necessary that the resistance should have been made with any particular intent of violating the law or injuring the officer or anyone else, but it is essential that the person making the resistance should have had knowledge that the person resisted was an officer, and that he was engaged in the discharge of, or the attempt to discharge, an official duty.—*State v. Winter*, 24 Idaho, 749, 135 Pac. 739.

Evidence in a prosecution for willfully resisting an officer engaged in the discharge of his duty, held sufficient to support the verdict.—*State v. Winter*, 24 Idaho, 749, 135 Pac. 739.

In a prosecution for unlawfully resisting an officer, facts and circumstances examined, and held that the judgment is excessive, and it is modified accordingly.—*State v. Winter*, 24 Idaho, 749, 135 Pac. 739.

In a prosecution for unlawfully resisting or obstructing an officer in the discharge of his official duty, it is no defense for the defendant to show that threats had been made against him by other parties, or that at the time he was in fear of bodily injury being inflicted upon him, or his property being injured or destroyed.—*State v. Winter*, 24 Idaho, 749, 135 Pac. 739.

OFFICERS.**I. APPOINTMENT, QUALIFICATION, AND TENURE.**

- (A) Offices, and Power to Appoint to and Remove from Office.
- (B) Appointment.
- (C) Eligibility and Qualification.
- (D) De Facto Officers.
- (E) Deputies and Assistants.
- (F) Term of Office, Vacancies, and Holding Over.
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II. TITLE TO AND POSSESSION OF OFFICE.**III. RIGHTS, POWERS, DUTIES AND LIABILITIES.****IV. LIABILITIES ON OFFICIAL BONDS.**

See Attorney General; Clerks of Courts; Coroners; District and Prosecuting Attorneys; Judges; Justices of the Peace; Receivers; Referees; Sheriffs and Constables.

Assessors and collectors of taxes. See Taxation.

Court officers. See Courts.

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Tax collectors. See Taxation, VIII, (A).

I. APPOINTMENT, QUALIFICATION, AND TENURE.

See District and Prosecuting Attorneys.

(A) OFFICES, AND POWER TO APPOINT TO AND REMOVE FROM OFFICE.

Power of board of regents to remove president or professors of state university. See Colleges and Universities.

The abolishment of an appointive office by an act of the legislature and imposing the duties of such office on another officer without enumerating in detail such duties, as specified in the act creating the office so abolished, does not conflict with Const., article 3, section 18.—*Noble v. Bragaw*, 12 Idaho, 265, 85 Pac. 903.

In the absence of legislation on the subject of removal and grounds therefor, the power to remove is incident to the power to appoint, and the authority to appoint an officer carries with it the resultant power and authority to remove him.—*Conwell v. Village of Culdesac*, 13 Idaho, 575, 92 Pac. 535.

Const., article 4, section 6, providing that the governor "shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law and whose appointment or election is not otherwise provided for," leaves it to the discretion of the legislature, when creating any office by legislative act, to prescribe the method of filling the office, and to designate the officer, board, or body that shall make the appointment, and in case of failure on the part of the legislature to do so the governor is vested by the constitution with the appointive power.—*Elliott v. McCrea*, 23 Idaho, 524, 130 Pac. 785.

Under the provisions of House Bill No. 92, approved February 21, 1913, the legislature has "otherwise provided" for the appointment of drainage commissioners, and has directed that such appointment shall be made by the district judge. This was a legitimate exercise of the constitutional authority conferred upon the legislature.—*Elliott v. McCrea*, 23 Idaho, 524, 130 Pac. 785.

Editorial Notes.

Power to appoint officers, whether essentially an executive function: 13 Am. St. Rep. 125.

(B) APPOINTMENT.

Power to appoint. See ante, I, (A).

Appointment to fill vacancy. See post, I, (F).

(C) ELIGIBILITY AND QUALIFICATION.

U. S. Rev. Stats. 1854 prohibits members of the territorial legislature from holding any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected or for one year thereafter. Held, that a member of the legislature was ineligible to hold the office of probate judge for three years from the beginning of such legislature, where the legislature increased the fees of probate judges during the term of such member, he having been elected for two years.—*People v. Curtis*, 1 Idaho, 753.

There are two remedies for reaching the ineligibility of a person to hold office: one, by contest under Laws 1899, page 60; the other, by information in the nature of quo warranto under R. S. 4612-4619.—*Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Where the word "eligibility" is used in connection with an office, and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold the office, rather than the qualification to be elected to the office.—*Bradfield v. Avery*, 16 Idaho, 769, 23 L. R. A., N. S., 1228, 102 Pac. 687.

R. C. 585, providing "that no person shall be eligible to the office of county superintendent of public instruction except a first grade practical teacher of not less than two years' experience in Idaho, one of which must have been while holding a valid first grade certificate issued by a county superintendent," relates to the time the person so elected is inducted into office, and although the person so elected does not possess such qualification at the time of election, still if the disqualification is removed and the person elected becomes qualified at the time he is inducted into office, such person is eligible to the office of county superintendent of public instruction.—*Bradfield v. Avery*, 16 Idaho, 769, 23 L. R. A., N. S., 1228, 102 Pac. 687.

R. C. 251 makes it unlawful for any member of the legislature to be appointed to any office created by any laws passed by the legislature of which he is a member. A mem-

ber of the legislature which passed Laws 1911, page 121, authorizing the creation of highway districts was appointed by the governor to the office of highway commissioner of a district created under said act. Held, that he was not ineligible.—*State v. Gooding*, 22 Idaho, 128, 124 Pac. 791.

Editorial Notes.

Eligibility of women: 39 Am. Rep. 36; Ann. Cas. 1913C, 1162; 38 L. R. A. 208; 27 L. R. A., N. S., 532.

(D) DE FACTO OFFICERS.

Right to compensation. See post, III.

Member of board of highways, as de facto officer. See Highways, II.

There can be no officer de facto where the office claimed to be filled does not exist.—*Van Buren v. McKinley*, 8 Idaho, 93, 66 Pac. 936.

Editorial Notes.

De facto officers, who are: 19 Am. Dec. 63; 140 Am. St. Rep. 164.

Right of de facto officer to compensation of office where there is no other claimant: Ann. Cas. 1913B, 643; 16 Ann. Cas. 484.

(E) DEPUTIES AND ASSISTANTS.

Cf clerk of court. See Clerk of Court, Auditor and Recorder.

Of sheriff. See Sheriff and Constable.

Of prosecuting attorney. See District and Prosecuting Attorneys.

(F) TERM OF OFFICE, VACANCIES, AND HOLDING OVER.

Vacancy in the office of district judge. See Judges, I.

The right of an officer to hold office until his successor is elected and qualified is as much a part of his estate in the office as the original term for which he was elected.—*People v. Green*, 1 Idaho, 235.

A member of the territorial legislature cannot hold the office of probate judge, where the salary of the office has been increased during the term for which he was elected; and, if he is not qualified to enter into and hold the office at the time fixed by law therefor, it becomes vacant, and may be filled by appointment.—*People v. Curtis*, 1 Idaho, 753.

A newly created office which is not filled by the legislative act creating the same, and for which no provision is made by the act for filling the same, becomes vacant on the instant of its creation.—*Knight v. Trigg*, 16 Idaho, 256, 100 Pac. 1060.

Editorial Notes.

Vacancy in office, what constitutes: 33 Am. Rep. 777.

Public office, abandonment, of: 113 Am. St. Rep. 516.

Right of incumbent of public office to retain office where successor elected or appointed is ineligible: Ann. Cas. 1918B, 677.

Vacancy in office by failure to file bond within time prescribed: 16 L. R. A. 140.

(G) RESIGNATION, SUSPENSION, OR REMOVAL.

Power to remove. See ante, I, (A).

Removal of county commissioners. See, also, Counties.

Right of appeal in action to remove. See Appeal and Error, III, (D), (E).

Where defendant challenges an information filed under R. S. 7459, providing for the removal of public officers by summary proceedings, and the grounds of such insufficiency are intelligibly presented in writing, the court should hear and determine them, whether the objection be termed a demurrer or a motion to dismiss, the name given being immaterial.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

There is no constitutional prohibition against the right of the legislature to provide a proceeding and tribunal for the summary removal of all civil officers whose removal is not provided for by the constitution for misdemeanor, incompetence or corruption in office.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

R. S. 7459, providing for the summary removal of public officers and that a judgment for \$500 and costs may be entered in favor of the informer if the charges made are sustained, is not in conflict with U. S. Const., amendment 7, which provides that in suits at common law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, since such constitutional provision has no application to state courts.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

R. S. 7459, providing for the summary removal of certain public officers, does not violate the constitutional provision which requires an information or indictment and trial by jury in criminal cases.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

The proceeding under R. S. 7459 for the summary removal of a public officer is not a criminal proceeding, but is rather a proceeding designed to protect the people from the misconduct of unfaithful officials.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

R. S. 7459, providing for the summary removal of certain officers for misconduct, neglect or misfeasance, does not violate the "due process of law" clause of the constitution.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

A proceeding for the removal of a public officer under R. S. 7459 need not be prosecuted by indictment or information filed by the public prosecutor.—*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 503; *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111; *Hays v. Simmons*, 6 Idaho, 651, 59 Pac. 182; *Hays v. Young*, 6 Idaho, 654, 59 Pac. 1113.

Where a constable charged and collected mileage from a county for conveying prisoners to the county jail and the proof in proceedings for his removal shows that such

prisoners were taken to the county jail by the sheriff, whom the constable claimed as his private agent in the transaction, a judgment of removal and for the statutory penalty is proper.—*Smith v. Ellis*, 7 Idaho, 196, 61 Pac. 695.

In a proceeding under R. S. 7459 to remove by summary proceedings a public officer who has charged and collected illegal fees, general allegations that defendant constable had at different times knowingly, willfully and corruptly charged illegal fees, are insufficient, it being necessary to charge with certainty the specific acts of omission or commission for which the removal is sought.—*Smith v. Ellis*, 7 Idaho, 196, 61 Pac. 695.

In a proceeding under R. S. 7459 to remove a public officer for collecting illegal fees the fact that the action was brought in the name of the state of Idaho and that the court on its own motion erroneously changed the title to the name of the informant as plaintiff, is not prejudicial to defendant, and hence not reversible error.—*Smith v. Ellis*, 7 Idaho, 196, 61 Pac. 695.

An action to remove a public officer under R. S. 7459 may be commenced either in the name of the state or of the informant.—*Smith v. Ellis*, 7 Idaho, 196, 61 Pac. 695.

Under R. S. 7459 providing for the removal of public officers for collecting illegal fees or neglecting duties, the informer need not show that the acts of the officers sought to be removed were willful, fraudulent or corrupt, proof of frequent violations of the statute being sufficient to show the willful, fraudulent or corrupt intent.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

In an action to remove a member of the board of county commissioners for willfully and knowingly approving insufficient sureties on official bonds, the fact that the board had the county attorney's advice in the matter is no defense, since the sufficiency of the sureties is for the board's determination.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

In a proceeding to remove a county officer, he cannot shield his unlawful acts under the plea of ignorance of the law.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

In an action to remove defendant from the office of county commissioner on the ground that he approved insufficient sureties on official bonds, the complaint should clearly and specifically allege that defendant acted with the board of county commissioners when in session, in the approval of such bonds.—*Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824.

An information under R. S. 7459 for the removal of a public officer, showing that such officer collected illegal fees, is not vitiated by the fact that it shows the allowance of illegal fees to others.—*Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680; *Tannahill v. Black*, 7 Idaho, 290, 62 Pac. 1116; *Tannahill v. Johnson*, 7 Idaho, 291, 62 Pac. 1116.

A proceeding under R. S. 7459 to summarily remove a public officer is not a crim-

inal action.—*Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680; *Tannahill v. Black*, 7 Idaho, 290, 62 Pac. 1116; *Tannahill v. Johnson*, 7 Idaho, 291, 62 Pac. 1116.

Where an action is brought under R. S. 7459 to remove a public officer for collecting illegal fees, and it is shown that such officer acted in good faith and under an honest conviction that he was entitled to the compensation claimed and collected, and was acting under the legal advice of the county attorney, it is error to remove him from office and enter judgment against him for the statutory penalty.—*Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680; *Tannahill v. Black*, 7 Idaho, 290, 62 Pac. 1116.

R. S. 7459 provides for the removal of public officers guilty of charging or collecting illegal fees or refusal or neglect to perform official duties. R. S. 7445 et seq. provide for the removal of civil officers for willful or corrupt misconduct in office. Held, that no proceedings can be maintained against an officer under the former section for any other kind of misconduct in office than the two kinds mentioned therein and that the latter section governs in all other removal proceedings for willful or corrupt misconduct.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

R. S. 7459 provides for the removal of public officers guilty of charging or collecting illegal fees or refusal or neglect to perform official duties. R. S. 7445 et seq. provide for the removal of civil officers for willful or corrupt misconduct in office. Held, that members of a board of equalization accused of acting corruptly or of failure to perform their duty as members of the board of equalization could not be removed under the former section, the provisions of the latter section being intended to meet such cases.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

R. S. 7459 provides for the removal of public officers guilty of charging or collecting illegal fees or refusal or neglect to perform official duties. R. S. 7445 et seq. provide for the removal of civil officers for willful or corrupt misconduct in office. Held, that proceedings under the former section may be initiated by a private person, while under the latter section the accusation must be by the prosecuting attorney or presented by the grand jury.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

Under R. S. 7459, providing for the removal of public officers guilty of charging or collecting illegal fees or refusal or neglect to perform official duties, the allegations of an information to remove a public officer under said section must be made positively and not on information and belief where the facts are matters of record and accessible or within

the personal knowledge of the informer; otherwise, they may be made on information and belief.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Pac. 165, 85 Pac. 392.

Under R. S. 7459, providing for the removal of public officers guilty of charging or collecting illegal fees or refusal or neglect to perform official duties, an information charging that defendant "willfully, knowingly and intentionally failed, neglected and refused to perform the official duties pertaining to his office in the following particulars," specifying the particulars, and "that the defendant knowingly, willfully and intentionally collected illegal fees," specifying them, sufficiently states a cause of action.—*Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *Corker v. Ward*, 12 Idaho, 165, 85 Pac. 392; *Corker v. Elliott*, 12 Idaho, 165, 85 Pac. 392.

Where a statute provides that an officer may be removed for certain specified causes, the order of removal must be based on one or more of such causes, and cannot be made for other causes.—*Village of Kendrick v. Nelson*, 13 Idaho, 244, 12 Ann. Cas. 993, 89 Pac. 755.

Where an appointment or election is made for a definite term or during good behavior, and the removal of an officer so elected or appointed is to be for cause, the power of removal, except by clear statutory authority, cannot be exercised without notice and hearing, and the existence of the cause must be determined after notice to the officer of the charges, and an opportunity given to defend against them.—*Village of Kendrick v. Nelson*, 13 Idaho, 244, 12 Ann. Cas. 993, 89 Pac. 755.

The statutory proceedings for the removal from office (R. C. 4612) is in the nature of quo warranto and quasi criminal.—*State v. Gooding*, 22 Idaho, 128, 124 Pac. 791.

Editorial Notes.

Removal of officers for cause: 135 Am. St. Rep. 250.

Failure to enforce laws as ground for removal of public officer: Ann. Cas. 1913D, 32.

Exacting illegal fees or compensation as misconduct for which public officer may be removed: Ann. Cas. 1912C, 147.

What constitutes "willful misconduct" in office: Ann. Cas. 1912C, 1083.

Removal of public officer for acts of deputy or subordinate: Ann. Cas. 1912D, 1082.

Good faith or intent of public officer in committing wrongful act as affecting right of removal therefor: Ann. Cas. 1913B, 400.

Right of public officer holding for fixed term to notice and hearing before removal for cause: Ann. Cas. 1913D, 1209.

Right of appointing power to remove officer summarily when term of office is not fixed: Ann. Cas. 1912C, 374.

Right to remove officers summarily: 15 L. R. A. 95.

II. TITLE TO AND POSSESSION OF OFFICE.

In proving the fact that a man is a public officer, his own testimony that he is such officer is competent evidence.—*Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

III. RIGHTS, POWERS, DUTIES AND LIABILITIES.

Compensation of state officers. See States, II, (C). Successor cannot have proceedings dismissed in action against predecessor for neglect of duty. See Dismissal and Nonsuit.

Necessity of verification of complaint by public officer. See Pleadings, VII.

Validity of contract made by Secretary of State, in which he is interested. See Contracts, I, (F).

Contract of school trustees with school board. See Schools and School Districts, II, (C), (G).

The incumbent of an office, though only an officer de facto under color of right, is alone entitled to compensation for the services performed by him.—*Gorman v. Commrs. Boise County*, 1 Idaho, 655.

As against the person who has kept one out of office by intrusion, an action will lie for the injury, and the lawful perquisites which he would have received if in office, are proper subjects of inquiry.—*Gorman v. Commrs. Boise County*, 1 Idaho, 655.

The right of an officer to his fees does not grow out of any contract between him and the government, but rather from the rendition of services.—*Gorman v. Commrs. Boise County*, 1 Idaho, 655.

Where an officer is in possession of a certificate declaring him duly elected and has qualified as provided by law, he will be presumed to be entitled to all the fees and emoluments received by him during the time he was in office. Even then, however, the de facto officer would be entitled to receive the necessary expenses incurred by him in earning the fees and emoluments received.—*Havird v. Commrs. Boise Co.*, 2 Idaho, 687, 24 Pac. 542.

R. S. 2137 provides that the officers mentioned in the title are not to perform official services unless their fees are prepaid. R. S. 2140 provides that any clerk, sheriff, justice of the peace or constable may have execution for his fees for services rendered in any action or proceeding. Held, that an officer is not prohibited from performing services unless his fees therefor are prepaid but may waive such prepayment.—*Naylor v. Vermont Loan etc. Co.*, 6 Idaho, 251, 55 Pac. 297.

Const., article 5, section 17, fixes the salary of district judges "until otherwise provided by the legislature" at \$3,000. Const., article 5, section 27, permits the legislature to increase or diminish the compensation of various officers, including district judges, "but no diminution or increase shall affect the compensation of the officer then in office during his term." Laws 1907, page 465, fixed the salary of district judges at \$4,000 per

annum. Held, that the increase of salary did not inure to judges in office at the time the act was passed during their respective terms.—*Woods v. Bragaw*, 13 Idaho, 607, 92 Pac. 576.

Where an officer accepts an office with compensation fixed by law, he is bound to perform the duties for the compensation, and such officer has no legal claim for extra compensation, and a promise by the board to pay him an extra fee or sum beyond that fixed by law is not binding, although he renders services and exercises a degree of diligence greater than could legally have been expected of him.—*Crowley v. Empey*, 23 Idaho, 190, 129 Pac. 340; *Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334.

A public or official duty devolved by law on an officer, a discharge of which may be enforced by legal process, may be discharged without compulsion of such process, and although not done at the time prescribed may be voluntarily done or peremptorily enforced at any time thereafter and before it is too late for the doing thereof to accomplish the results intended to be accomplished by such act.—*Stanrod v. Case*, 24 Idaho, 365, 133 Pac. 651.

Editorial Notes.

Salaries of officers, subjecting to the payment of their debts: 96 Am. St. Rep. 443.

IV. LIABILITIES ON OFFICIAL BONDS.

Where an official bond ran to "the people of the United States in the territory of Idaho," the fact that the complaint in an action thereon alleged that the action was brought for the use of Boise county, the injured party, would not render the complaint demurrable, since such allegation might be rejected as surplusage.—*People v. Slocum*, 1 Idaho, 62.

Where a person obtains possession of an office by usurpation, and gives a statutory or legal bond, and a breach of its conditions takes place, he and his sureties are as much liable on such bond as though he had been duly elected or appointed.—*People v. Slocum*, 1 Idaho, 62.

Where an official bond did not conform to the statutory requisites, but was less onerous than that required by statute, the sureties could not complain of such variance in a suit for a breach of the conditions in the bond signed by them.—*People v. Slocum*, 1 Idaho, 62.

An official bond not filling the statutory requisites, yet which is lawful in itself and intended to protect the public, is a good bond. *People v. Slocum*, 1 Idaho, 62.

An official bond in the sum of \$30,000 stated that the principal and sureties were jointly and severally bound, the principal in the full amount and the sureties in sums ranging from \$1,000 to \$5,000. Held, a joint and several bond for \$30,000, and that each

and all the defendants were liable for that sum, and that the sum set opposite their respective names was intended to show their liability toward each other in the event of the collection of the penalty and the necessity of contribution and settlement.—*People v. Slocum*, 1 Idaho, 62.

Where an official bond sued on recites that the principal was "elected" and the contention is made that the bond was given in pursuance of the "appointment" of the governor, such variance is not sufficient to avoid the bond or release the sureties.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

Editorial Notes.

Bonds of officers, informalities which do not invalidate: 15 Am. Dec. 170.

Bonds of officers, irregularities in which do not release sureties: 90 Am. St. Rep. 188.

Official bonds of officers, when valid and when void: 82 Am. Dec. 760.

Bonds of officers, failure of some of the named parties to execute: 40 Am. St. Rep. 51.

Liability on official bonds, receipts of officers as evidence against their sureties: 3 Am. St. Rep. 749.

Bonds of officers, successive, liability of sureties upon: 10 Am. St. Rep. 843.

Bonds of officers, trespasses of principal, liability of sureties on for: 78 Am. St. Rep. 420.

Bonds of officers, sureties on, acts for which liable: 91 Am. St. Rep. 497.

OPTION.

Distinction between option and contract of sale. See *Vendor and Purchaser*, I.

ORDERS.

See *Motions*.

Announcement of order from bench. See *Courts*, II, (C).

PARDON.

An act of the legislative assembly of the territory remitting the penalty imposed in a criminal action, duly approved by the governor, is equivalent to a pardon.—*People v. Stewart*, 1 Idaho, 546.

A prisoner, who has been paroled by the board of pardons, and thereafter rearrested and returned to the penitentiary for violation of the terms of his parole, is entitled to his discharge at the expiration of the period of time for which he was sentenced by the court, and he cannot be lawfully detained for the purpose of serving an additional time thereafter equaling the time he was out on parole. In re *Prout*, 12 Idaho, 494, 5 L. R. A., N. S., 1064, 10 Ann. Cas. 119, 86 Pac. 275.

The board of pardons is a branch of the executive department of the state government and its powers and prerogatives, as such, are those of granting clemency to convicted

prisoners, and it has no power to increase or extend penalties or punishments, imposed by judgment of the courts.—*In re Prout*, 12 Idaho, 494, 5 L. R. A., N. S., 1064, 10 Ann. Cas. 119, 86 Pac. 275.

Under Const., article 4, section 7, and Laws 1899, page 11, the board of pardons, upon the granting of a pardon, commutation or parole, may attach such conditions as they see fit, so long as they are not immoral, illegal or impossible of performance, provided they are to be kept and performed or complied with during the term for which the prisoner was sentenced by the court.—*In re Prout*, 12 Idaho, 494, 5 L. R. A., N. S., 1064, 10 Ann. Cas. 119, 86 Pac. 275.

Editorial Notes.

Definition and effect of pardons: 59 Am. Dec. 572.

Pardons, conditional: 111 Am. St. Rep. 108; 7 Ann. Cas. 92; 13 Ann. Cas. 1103.

PARENT AND CHILD.

Act for care of delinquent children does not deprive parent of custody without due process of law. See Constitutional Law, XI.

Action by parent or child for death of the other. See Death.

Application of father for guardianship of children. See Guardian and Ward.

Assisting mother in taking child from state as kidnapping. See Kidnaping.

Domicile of child follows that of parent. See Domicile.

Evidence to show earning capacity of a minor. See Damages, VII.

Temporary order for care and custody of infant pending application for writ of habeas corpus. See Habeas Corpus, II.

Enticing child as criminal offense. See Kidnaping.

Where a debtor agrees with his creditor that the services and earnings of his infant son may be retained by the creditor in part payment of the indebtedness, he cannot, by emancipating his son or donating to him his earnings, avoid payment of such indebtedness and thereby give the son the right to recover for such services.—*Tuckey v. Lovell*, 8 Idaho, 731, 71 Pac. 122.

A minor, who with his father's teams cultivates crops, has no lien thereon for the service of the teams.—*Tuckey v. Lovell*, 8 Idaho, 731, 71 Pac. 122.

Where the custody of a twelve year old girl is in dispute, the court may consult the wishes of the child to aid in determining what will be for the best interest of the child. *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

Where shortly prior to his death a father placed his two and a half year old child in the custody of its aunt, with whom it resided for nearly twelve years without having seen its mother, and the mother made no inquiries about the child except at rare intervals and then only to keep track of its whereabouts, and did not contribute to the child's support or show any interest in its welfare or happiness, and it appears that the care and custody

of the child cannot be changed without endangering its welfare and happiness, the parent has become "unsuitable" for the possession of the child under R. S. 5774.—*Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

Where the legal right of the parent to the custody of a child is not clear, the best interest of the child will govern the court.—*Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

The legal right to the custody of a minor may be abandoned or forfeited by the acts or conduct of the parent, and in such case the parent may be equitably estopped from asserting such legal right.—*Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

Under R. S. 5774, as amended by Laws 1899, page 302, the mother or father of a minor child, being competent and not unsuitable, is absolutely entitled to the guardianship of the minor.—*Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

Editorial Notes.

Custody of child, on habeas corpus, how to be determined: 20 Am. Dec. 330.

Custody of child, father's right to: 34 Am. Rep. 698; 40 Am. Rep. 327.

Emancipation of child, what constitutes, and effects of: 35 Am. Rep. 117.

Custody of child, parent's right to and proceedings to vindicate: 2 Am. St. Rep. 183.

Contracts to transfer parental custody and responsibility: 88 Am. St. Rep. 866; Ann. Cas. 1913B, 886; 6 Ann. Cas. 939; 11 Ann. Cas. 217.

Habeas corpus as remedy by one parent to recover child from custody of other parent: Ann. Cas. 1912C, 868.

Religious belief as defense to criminal prosecution for failure to furnish medical attendance to another: Ann. Cas. 1913B, 1221.

Parents' liability for torts of child: 10 L. R. A., N. S., 933.

Authority of child to bind parent by contracts other than those for necessities: 39 L. R. A., N. S., 881.

PARTICEPS CRIMINIS.

By membership in association or organization. See Associations.

PARTIES.

I. PLAINTIFFS.

II. DEFENDANTS.

III. NEW PARTIES AND CHANGE OF PARTIES.

IV. DESIGNATION AND DESCRIPTION.

V. DEFECTS, OBJECTIONS AND AMENDMENT.

Parties to particular classes of actions. See Contracts; Torts; and other specific heads.

Effect of death or defect of parties as ground of abatement of actions. See Abatement and Revival.

Effect of assignment of cause of action before suit. See Assignments.

Interpleading. See Interpleader.

Dismissal as to one or more coparties. See Dismissal and Nonsuit.

Competency of parties as witnesses. See Witnesses.

Parties to proceedings for review in civil actions.

See Appeal and Error, and other specific heads.

Parties to civil proceedings other than actions. See Mandamus, and other specific heads.

Parties to suits in equity. See Equity.

Parties to criminal prosecutions. See Criminal Law; Indictment and Information.

Intervention by claimant of attached property. See Attachment and Garnishment, VIII.

In action to compel irrigation company to deliver water. See Waters and Watercourses, IX, (B), 8, (d).

In action for breach of contract. See Contracts, VI, (B).

Rights of contracting parties to recover where another has a beneficial and resulting interest. See Contracts, II, (B).

Right of purchaser of chattel to sue on warranty after assigning chattel. See Sales, VI.

In action to set aside fraudulent conveyances. See Fraudulent Conveyances, III.

In action on joint recognisance. See Bail and Recognisance.

I. PLAINTIFFS.

In actions by or against husband or wife. See Husband and Wife, VI.

Where the record shows that a mother and son joined in a lease of land and livestock, that each owned one hundred and sixty acres of the land leased separate and distinct from each other, that each owned separately a part of the personal property leased and that the son sold his interest in the property to plaintiff, the mother was not a necessary party to an action to restrain the lessee from disposing of the personal property and for an accounting, since no partnership was shown to exist between the mother and son.—Price v. Grice, 10 Idaho, 443, 79 Pac. 387.

Unlawful assessments were claimed to have been made against certain lands by an irrigation company and the land was subsequently sold to plaintiff, who reserved the amount of such assessments from the purchase price. Plaintiff thereafter paid such assessments under protest. Held, in an action to recover such assessments, that plaintiff could not recover, as the right of action therefor, if any, would belong to his grantor.—Knowles v. New Sweden Irr. Dist., 16 Idaho, 217, 101 Pac. 81.

Editorial Notes.

Who is real party in interest within meaning of statutes defining parties by whom action must be brought: 64 L. R. A. 581.

II. DEFENDANTS.

Any person who has or claims an interest in the subject matter of an action adverse to the plaintiff may be joined as defendant with other persons who are proper parties defendant to the action.—Brady v. Linehan, 5 Idaho, 732, 51 Pac. 761.

In an action for tort, a complaint, alleging that the defendants wrongfully, recklessly, carelessly, negligently, wantonly, and with utter disregard of the safety of the various riders engaged in a speed contest, permitted a dog to trespass upon, run upon, over, and about such track, alleges the liability of the defendants as joint tort-feasors, and the complaint is not subject to a demurrer for misjoinder of defendants.—McClain v. Lewiston etc. Assn., 17 Idaho, 63, 25 L. R. A., N. S., 691, 20 Ann. Cas. 60, 104 Pac. 1015.

In an action for trespass against the rights of the plaintiff, where the allegations show that the defendants acted in concert or by unity of action in permitting such wrong, there is no misjoinder of parties defendant.—McClain v. Lewiston etc. Assn., 17 Idaho, 63, 25 L. R. A., N. S., 691, 20 Ann. Cas. 60, 104 Pac. 1015.

Editorial Notes.

Joinder of defendants in equity: 15 Am. Dec. 427.

III. NEW PARTIES AND CHANGE OF PARTIES.

The statutory right of intervention exists only in actions which are purely civil in their character.—People v. Green, 1 Idaho, 235.

The district court has the right at any time to call in other parties, or to cause the proceedings to be amended in that particular by striking out or adding the names of any parties which may be necessary to accomplish the ends of justice and secure the interests of all.—Oro Fino etc. Min. Co. v. Cullen, 1 Idaho, 113.

Where the parties to a suit stipulate that the money for the purchase price of a part interest in the property in controversy shall be paid into court subject to the determination thereof as to which of the parties are entitled thereto, one who alleges a purchase from the defendants of a one-half interest in and to the fund deposited in court is entitled to file a complaint in intervention under R. S. 4111.—Pence v. Sweeney, 3 Idaho, 181, 28 Pac. 413.

Where it appears either from the pleadings or proof that a complete determination of the rights of all the parties cannot be made without making other persons parties, it is the duty of the court to order such persons brought in, and should permit the defendant to file a cross-bill for that purpose.—First Nat. Bk. v. Bews, 3 Idaho, 486, 31 Pac. 816.

Where two persons are seeking to recover from a general debtor, the one upon express contract and the other upon garnishment, there is no such identity of claims as is contemplated by, or essential to, the requirements of R. S. 4109, authorizing the substitution of defendants.—McCauley v. Sears, 3 Idaho, 676, 34 Pac. 814.

Where a stranger to an action, who has not intervened or become a party by order of court or in any other manner, files a petition and obtains an ex parte order without notice

to any of the parties to the action, the order is void.—*Kerns v. Morgan*, 11 Idaho, 572, 83 Pac. 954.

A wife, who is plaintiff in a proceeding for divorce, may intervene in an action brought by a third party against her husband for debt, upon showing that such latter suit is collusive and fraudulent and brought for the purpose of defeating the wife's right to her interest in the community property and subjecting to sale property in said suit, which otherwise will be distributed as community property in the divorce proceeding, provided said application is made within the time fixed by R. S. 4111, and it is error for the trial court to deny the application to intervene.—*Pittock v. Buck*, 15 Idaho, 47, 96 Pac. 212.

The district court has power and jurisdiction to set aside and vacate an order inadvertently made, bringing in new parties as defendants, and to strike from the files the answer and cross-complaint of such defendant, where no right has been acquired by such defendant except the right to file such answer.—*Frost v. Idaho Irr. Co.*, 19 Idaho, 372, 114 Pac. 38.

Where a motion is made by the plaintiff for a judgment on the pleadings, and an intervenor who has filed his complaint in intervention stands upon his complaint, and argues the same, and submits the matter to the judgment of the court, and it does not appear that he was taken by surprise, or in any way taken unawares, after the motion was granted, and judgment was entered in favor of the plaintiff as prayed for by the complaint, it was too late for the intervenor to move to vacate and set aside the judgment, and for leave to file an amended complaint in intervention, and the trial court properly denied such a motion.—*Union Trust & Savings Bank v. Idaho, Smelting & Refining Co.*, 24 Idaho, 735, 135 Pac. 822.

Editorial Notes.

New parties, jurisdiction over, how acquired: 50 Am. St. Rep. 737.

Right to amend petition or complaint by adding or substituting new plaintiff suing for use of original plaintiff: Ann. Cas. 1913B, 110.

IV. DESIGNATION AND DESCRIPTION.

Courts will look beyond the mere title of an action or proceeding for the purpose of determining who are interested and affected as parties.—*Van Camp v. Board of Commrs. Custer County*, 2 Idaho, 29, 2 Pac. 721.

V. DEFECTS, OBJECTIONS AND AMENDMENT.

Where a contract pleaded in *hac verba* shows on its face a joint and several liability against the defendants, and another party who is not made a party defendant, the defect in naming parties defendant, if any exists, cannot be raised by general demurrer going to the sufficiency of the complaint, but must be raised by special demurrer on the grounds

of defect or misjoinder of parties defendant. *Bonham Nat. Bank v. Grimes Pass etc. Min. Co.*, 18 Idaho, 629, 111 Pac. 1078.

PARTITION.

Rights and liabilities of co-owners in general. See Tenancy in Common.

Where referees do not comply with the court's order in making a partition, their report will be set aside.—*Richardson v. Ruddy*, 11 Idaho, 561, 83 Pac. 606.

Where it is shown that the report of the referees appointed to partition real estate is unjust and inequitable, it should be set aside. *Richardson v. Ruddy*, 11 Idaho, 561, 83 Pac. 606.

Under R. S. 4568 providing for partial partition, there is no error in ordering a partial partition as between plaintiff and one of the defendants, who admits the allegations of the complaint and joins with plaintiff in praying for a partition of the premises.—*Richardson v. Ruddy*, 10 Idaho, 151, 77 Pac. 972.

The interlocutory decree, entered in an action for the partition of real property, determines the right to partition and fixes the respective rights of the parties, as ascertained by the court.—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

The report of the referees appointed to partition real property presents merely the question whether said referees made the partition in accordance with the decree of the court.—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

The hearing of the report of referees appointed to partition real property should be merely for the purpose of ascertaining whether such referees carried out the directions of the court, and evidence should be received at such hearing directed to this question only, except when such report involves the question whether the referees acted fairly and equitably.—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

An interlocutory decree in a partition suit and the report of the referees thereunder, will not be set aside on the ground that the particular facts upon which the court based such interlocutory decree did not authorize or justify the entry of such decree, where the evidence is not contained in the record.—*Richardson v. Ruddy*, 15 Idaho, 488, 98 Pac. 842.

Editorial Notes.

Judgment in partition, effect of: 40 Am. Dec. 640.

Partition, compulsory, effect of: 101 Am. St. Rep. 864.

Whether must include all the lands of the cotenancy: 114 Am. St. Rep. 80.

Power of court to partition land in another jurisdiction: Ann. Cas. 1912B, 991.

Effect of deed in partition as distinguished from ordinary deeds: 57 L. R. A. 332.

PARTNERSHIP.

- I. THE RELATION.
- II. THE FIRM, ITS NAME, POWERS AND PROPERTY.
- III. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF PARTNERS.
- IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.
- V. RETIREMENT AND ADMISSION OF PARTNERS.
- VI. DEATH OF PARTNER AND SURVIVING PARTNERS.
- VII. DISSOLUTION, SETTLEMENT AND ACCOUNTING.

See Associations.

Mining partnership. See Mines and Minerals, III, (B).

Joint or common ownership of property. See Joint Tenancy; Tenancy in Common.

I. THE RELATION.

Evidence which is capable of affording an inference of the fact of the existence of a partnership, or which constitutes a link in the chain of proof, although alone it might not justify a verdict based on the existence of such partnership, should be admitted.—*Lillienthal v. Anderson*, 1 Idaho, 673.

Common report can only be admitted to prove the partnership of different members of a firm when it is accompanied with evidence that such report was known to the party sought to be charged.—*Gaffney v. Hoyt*, 2 Idaho, 199, 10 Pac. 34.

Where an attempt is made to show a partnership, and there is no evidence whatever showing the same, it is not error for the court to hold that no partnership existed.—*Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

Evidence examined and held not to show the existence of a partnership.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

Where the evidence as to the existence of a partnership is conflicting the finding of the trial court thereon will not be disturbed on appeal.—*Miller v. Mitcham*, 21 Idaho, 741, 123 Pac. 941.

Editorial Notes.

Proof of partnership by general reputation: 38 Am. Dec. 481; 4 Ann. Cas. 817.

Participation in profits, when does and when does not create partnership: 49 Am. Rep. 255; 58 Am. Rep. 99; 30 Am. St. Rep. 828; 18 L. R. A., N. S., 963.

Existence of partnership, what agreements establish: 43 Am. St. Rep. 229.

What constitutes partnership: 115 Am. St. Rep. 400.

Agreement to share losses as essential to existence of partnership relation: Ann. Cas. 1913B, 1335.

II. THE FIRM, ITS NAME, POWERS AND PROPERTY.

(No paragraphs.)

III. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF PARTNERS.

In the absence of an agreement to pay interest, and of any accounting between the parties, interest does not run on a share of the profits drawn out by one of the partners for his private use.—*Taylor v. Peterson*, 1 Idaho, 513.

Where one partner expressly agrees to repay to the other partner his share of advances made by the latter on account of partnership business, the amount so agreed to be paid is the debt of the partner and may be recovered in an action at law without dissolution of the partnership or an accounting between the partners.—*Haskins v. Curran*, 4 Idaho, 573, 43 Pac. 559.

Editorial Notes.

Interest, when partner may be charged with: 45 Am. Dec. 518.

Right of partner to interest on capital of other funds due to him from firm: Ann. Cas. 1913A, 173; 35 L. R. A., N. S., 220.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Judgment on partnership notes in another state, effect as bar to action in this state. See Judgments, XVI.

Where a complaint charges that goods were sold and delivered to a partnership, and the answer denies the existence of the partnership, such denial is not sufficient as to the sale and delivery and the partnership being established, the sale and delivery is admitted.—*Lillienthal v. Anderson*, 1 Idaho, 673.

Where a partnership deposits money in a bank, which thereafter pays the money to one of the firm, who had authority to draw the money, but no receipt, order, check or authority was given therefor by the firm or any of its members in the usual course of business, such payment, if actually shown to have been made, absolves the bank from further liability.—*Rice v. Bank of Camas Prairie*, 5 Idaho, 39, 47 Pac. 856.

In an action by a partnership against a bank for the amount of a deposit, claimed by the bank to have been paid to one of the partners on a certain date, it was not prejudicial error to permit evidence to show that such partner was not at the bank at such time even though the cashier admitted that he might be mistaken as to the date and had made statements to others that the money was paid at different dates from the date claimed.—*Rice v. Bank of Camas Prairie*, 5 Idaho, 39, 47 Pac. 856.

A partner who has charge of the partnership business has authority to execute and deliver firm notes in carrying on the partnership business.—*First Nat. Bk. v. Grignon*, 7 Idaho, 646, 65 Pac. 365.

In an action on partnership notes, one of the partners contended that the notes sued on were executed without his knowledge or consent. The evidence showed that the partner executing the notes had complete charge of the

partnership business, that the notes were renewal notes and given in the ordinary course of business, that a credit had been authorized thereon by the partner defending the present action and that he had at one time offered to give security for the indebtedness evidenced by the notes. Held, that the notes were shown to be supported by a valuable consideration.—*First Nat. Bk. v. Grignon*, 7 Idaho, 646, 65 Pac. 365.

Defendants contracted to sell farm implements for plaintiff on commission. The contract was signed individually and permitted defendants to sell on credit, taking notes therefor, payment of which they must guarantee. Defendants thereafter sold implements from time to time for cash and on credit and made remittances. Defendant H. did all the work in the office and salesroom. Defendant S. assisted in unloading the freight and solicited orders. Plaintiff had a settlement with defendant H., who gave in settlement the notes sued on, signed S. & H. per H. Numerous letters were written by S. to plaintiff during the course of the business, discussing such implement business, hurrying shipments and complaining of nonpayment of commissions. No service was had on H. and S. denied his authority to sign the notes sued on. Held, that a finding that S. was not liable either as a partner or as an individual is unsupported by the evidence, since the evidence was sufficient to show that both were liable individually.—*Sidney Stevens Implement Co. v. Stuart*, 9 Idaho, 221, 73 Pac. 21.

Where a member of a partnership draws a check in payment of his personal obligations, or for a debt without and beyond the scope of the partnership, and the payee named in such check cashes the same without knowledge, either actual or constructive, that the check was drawn without authority, in an action by the payee to recover the debt evidenced by such check, the partnership cannot defend upon the ground that the member drawing such check had no authority to draw the same.—*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 128 Am. St. Rep. 81, 21 L. R. A., N. S., 703, 99 Pac. 833.

Editorial Notes.

Power of one partner to authorize an appearance for the firm: 13 Am. Dec. 726.

Partnership, accommodation paper, power of one partner to bind the firm by: 31 Am. St. Rep. 754.

Power of one member to obtain loan on credit of the firm: 48 Am. St. Rep. 438.

Judgment against partnership on service of process on one member only: 44 Am. Dec. 570.

Power of one partner to limit the authority of another: 88 Am. St. Rep. 322.

Liability of partnership on note executed in name of single partner: Ann. Cas. 1912A, 618.

Assumption by partnership of individual debts of partners: 29 L. R. A. 681.

Liability of partnership for torts: 51 L. R. A. 463.

V. RETIREMENT AND ADMISSION OF PARTNERS.

The incoming members of a partnership are not liable for the debts of the old firm, unless they have assumed or agreed to pay such indebtedness.—*Bank of Commerce v. Ada County Abstract Co.*, 11 Idaho, 756, 85 Pac. 919.

Where one loans money to a partnership, which money is thereafter invested in office furniture and other property by the partnership, and the partners thereafter sell and transfer said property to other persons, the person loaning such money cannot pursue the property for the price thereof unless he has retained some lien thereon recognized by law. *Bank of Commerce v. Ada County Abstract Co.*, 11 Idaho, 756, 85 Pac. 919.

Where a sale is made of an interest in a partnership to a stranger, and it is provided in the contract of sale that the new partner who purchases an interest in the partnership makes such purchase upon the books and inventory of the assets and liabilities of said business, and such books and inventory are furnished to the purchaser by the partnership in which the purchaser is buying an interest, and such books and inventory show the debts and liabilities of the copartnership and the interest the purchaser is buying, such contract completes the things in respect to which the contract is made, and does not include other debts.—*McGilvery v. McGilvery & Seeley*, 23 Idaho, 116, 128 Pac. 978.

Where a partner conceals what he knows about the liabilities of the copartnership in which the incoming purchaser is purchasing, and an agreement is entered into with the purchaser by one of the copartners selling his interest to the purchaser, which is known to the partner at the time, and the purchaser agrees to purchase said interest upon the books and inventory of the assets and liabilities of said business, and such books and inventory are furnished to the purchaser by the partnership in which the purchaser is buying an interest, such purchaser is not liable for other liabilities or obligations not embraced in the contract, which were known and not divulged to the purchaser.—*McGilvery v. McGilvery & Seeley*, 23 Idaho, 116, 128 Pac. 978.

VI. DEATH OF PARTNER AND SURVIVING PARTNERS.

The general rule, that the surviving partner is not entitled to a salary or compensation for managing or settling up the partnership business, is subject to an exception when a partnership has been carried on for some years after dissolution by death, and such continuance has proved to be beneficial.—*McElroy v. Whitney*, 12 Idaho, 512, 88 Pac. 349.

On the death of one partner, the surviving partner may continue the partnership business by and with the consent of the executor or administrator of the estate of the deceased and the approval of the probate court.—*McElroy v. Whitney*, 12 Idaho, 512, 88 Pac. 349.

Under R. S. 5554, the surviving partner must settle the partnership affairs without de-

lay, unless the executor or administrator of the deceased partner consents to a continuance of the partnership business and the probate court approves such course.—*McElroy v. Whitney*, 12 Idaho, 512, 88 Pac. 349.

The general rule of law that the surviving partner is not entitled to a salary or compensation for managing and settling up the partnership business is subject to some exception in a case where the partnership consisted of persons engaged in professional employment, such as attorneys at law, and where the firm had contracted to perform certain services and had collected the compensation therefor, or where litigation is necessary for the protection of fees earned or of property belonging to the partnership.—*Jones v. Marshall*, 24 Idaho, 678, 135 Pac. 841.

Editorial Notes.

Partnership after death of one of the partners: 56 Am. Dec. 517; 79 Am. St. Rep. 709.

Continuance of partnership for benefit of heirs of deceased partner: 56 Am. Dec. 517; 79 Am. St. Rep. 709.

Surviving partner's right to compensation: 112 Am. St. Rep. 843; 5 Ann. Cas. 664; 17 L. R. A., N. S., 399.

Business of partnership carried on after death of partner according to provisions in partnership articles or deceased partner's will or by arrangement with heirs or representatives as creation of new partnership or continuance of old one: Ann. Cas. 1913B, 933.

Powers of surviving partner in firm realty: 28 L. R. A. 129.

VII. DISSOLUTION, SETTLEMENT AND ACCOUNTING.

Rights and liabilities of surviving partner. See ante, VI.

Actions between partners without dissolution. See ante, III.

Where it appears that all the parties interested in the assets of a partnership, dissolved by the death of some of its members, have acquiesced in a settlement and distribution of such assets, and that such settlement has been agreed to by the guardian ad litem, general guardian, and attorney for the guardian ad litem of minor heirs, the district court has jurisdiction to confirm such settlement so as to avoid the necessity of resorting to the probate court.—*Aram v. Edwards*, 9 Idaho, 333, 74 Pac. 961.

The dissolution of a partnership does not preclude the maintenance of an action for the collection of debts and liabilities due, nor from recovering property that belonged to the firm.—*Later v. Haywood*, 12 Idaho, 78, 85 Pac. 494.

Evidence in an action for an accounting between partners held sufficient to support the findings and judgment.—*Turmes v. Kisner*, 12 Idaho, 147, 85 Pac. 212.

Where the complaint and answer pray for the appointment of a referee to take an accounting of the affairs of a copartnership and

report his findings to the court as to the indebtedness of one to the other, and such report shows such indebtedness and that all of the partnership affairs have been considered by the referee, the court may adopt the findings of the referee as the findings of the court.—*McElroy v. Whitney*, 12 Idaho, 512, 88 Pac. 349.

Where the court appoints a referee in an action for accounting in the settlement of a partnership business, and directs him to take an accounting of the business and transactions of the partnership, the parties are entitled to a statement from the referee of all the items of account between them, and to have the same reported to the court showing the items allowed and rejected in favor of and against each party.—*McElroy v. Whitney* (on rehearing), 12 Idaho, 527, 88 Pac. 354.

Editorial Notes.

Dissolution of partnership by a decree: 98 Am. Dec. 260.

Dissolution, powers, rights, remedies, and liabilities of partners after: 40 Am. St. Rep. 561.

Dissolution of partnership, causes sufficient for: 69 Am. St. Rep. 410.

Respective rights of partners to capital on dissolution of partnership: Ann. Cas. 1913B, 1161.

PARTY-WALLS.

Where one purchases property that is connected with and supported by a party-wall, and such wall is constructed and maintained on the land of the adjoining owner, and the purchaser continues to use such party-wall as it had been used by his grantor, he is chargeable with notice of the terms and conditions of the agreement under which the wall was constructed, and his grantor used the same.—*Lorenzi v. Star Market Co.*, 19 Idaho, 674, 35 L. R. A., N. S., 1142, 115 Pac. 490.

Editorial Notes.

The law of party-walls: 92 Am. Dec. 289.

Party-walls, covenants concerning, whether run with the land: 82 Am. St. Rep. 679.

What constitute party-walls: 89 Am. St. Rep. 924.

Use of wall as inclosure of user's building as rendering user liable for contribution: Ann. Cas. 1913A, 769.

Right of grantee of builder of party-wall to recover for use thereof: 8 Ann. Cas. 292; 15 Ann. Cas. 176; 66 L. R. A. 675.

PASS.

Employee riding on pass, effect on right to recover for personal injury. See *Master and Servant*, III, (A).

PATENTS.

Allegations of a complaint for breach of a contract for the sale of an interest in a patent right held sufficient.—*West v. Johnson*, 15 Idaho, 681, 99 Pac. 709.

PAUPERS.

One who contracts to care for and maintain all of the county poor under R. S., chapter 6, title 9, by the year for a gross sum, cannot hold the county liable for the support of a person who does not come within his contract, though such person was committed to his care under proper certificate of a justice of the peace.—Board Commrs. Logan Co. v. McFall, 4 Idaho, 71, 35 Pac. 691.

A justice of the peace cannot bind the county for the keeping and care of a person who is not an indigent sick person within the meaning of R. S., chapter 6, title 9.—Board Commrs. Logan Co. v. McFall, 4 Idaho, 71, 35 Pac. 691.

One who has a contract for keeping all of the indigent sick of a county for a gross sum by the year is not required to keep persons who do not come within the terms of his contract, even though such persons have been committed to his care by a justice of the peace.—Board Commrs. Logan Co. v. McFall, 4 Idaho, 71, 35 Pac. 691.

R. S., chapter 6, title 9, providing for the care of indigent sick persons, does not require that such persons reside within the county any certain length of time, or that they possess any particular qualification other than that of being indigent sick or otherwise dependent poor; and the fact that such person is a citizen of another state does not bar him from the benefits of such statute.—Board Commrs. Logan Co. v. McFall, 4 Idaho, 71, 35 Pac. 691.

PAYMENT.

Canceled check admissible to prove. See Bills and Notes, VIII.

Of bills and notes. See Bills and Notes.

Questioning accuracy of receipt for first time on appeal. See Appeal and Error, V, (B).

Receipt of money for application on principal's debts, right to sue surety. See Principal and Surety.

Check in partial payment, when not considered release in full. See Accord and Satisfaction.

In full to contractor, no defense in mechanic's lien suit. See Mechanics' Liens, II.

Where the answer admits the making of the note sued on, and alleges that a mortgage was given to secure said note, and to further secure the same, defendants agreed to give the plaintiff and the mortgagees possession of a valuable property, with authority to collect the rents, to keep said property insured, and in case of loss by fire to collect the insurance and pay, first, all taxes, premiums on insurance and then the note and interest thereon; that they took possession thereof and collected the rents; that the property was destroyed by fire, and that plaintiffs and mortgagees collected said insurance; that the amount so collected far exceeded all demands, and that said note was fully paid from said funds, such answer sets up a complete plea of payment and setoff, and proof thereof should be permitted.—First Nat. Bk. v. Bews, 3 Idaho, 486, 31 Pac. 816.

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Payments made by the county commissioners to public officers, which are positively forbidden by law, may be recovered and the doctrine that money paid through mistake of law is a voluntary payment and cannot be recovered does not apply.—Ada County v. Gess, 4 Idaho, 611, 43 Pac. 71.

Where a married woman makes payments on an indebtedness, for a part of which she could not be held liable in an action, but makes no direction as to the application thereof, the creditor may apply the payments as he chooses.—Edminston v. Smith, 13 Idaho, 645, 121 Am. St. Rep. 294, 14 L. R. A., N. S., 871, 92 Pac. 842.

Where money is voluntarily paid in satisfaction of an unjust or illegal claim, with full knowledge of the facts and without any fraud, mistake, duress or extortion, it cannot be recovered by the payor.—Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126, 94 Pac. 1039.

Editorial Notes.

Application of payment: 13 Am. Dec. 505; 14 Am. Dec. 694; 96 Am. St. Rep. 44.

Payment, compulsory or under duress, what constitutes so as to enable the payor to recover money paid: 45 Am. Dec. 153; 22 Am. Rep. 519; 50 Am. Rep. 820.

Recovery of money paid by mistake: 50 Am. Rep. 139.

Recovery of voluntary payment: 94 Am. St. Rep. 408; 23 L. R. A. 120.

Payment made under duress of person as compulsory payment: Ann. Cas. 1913A, 1354.

Rule that payment voluntarily made under no mistake of fact cannot be recovered as applicable to unauthorized payment by public officer: Ann. Cas. 1913B, 651.

Payment of tax to avoid imposition of penalty (including forfeiture of right to do business) as involuntary payment: Ann. Cas. 1913C, 1052.

Time when creditor may make application of payment: Ann. Cas. 1913E, 895.

Application by creditor of undirected payment to debt barred by limitation as reviving unpaid portion: 13 Ann. Cas. 1203.

Payment by commercial paper: 35 L. R. A., N. S., 1.

PEDDLERS.

See Hawkers and Peddlers.

PENALTIES.

See Fines, Penalties and Forfeitures.

PERJURY.

An indictment for perjury which states that the defendant on his oath "falsely, wickedly and feloniously did say, swear, etc.," is suffi-

cient without the word "knowingly."—*Territory v. Anderson*, 2 Idaho, 573, 21 Pac. 417.

Editorial Notes.

Perjury, what constitutes: 85 Am. Dec. 485.

Indictments for perjury: 124 Am. St. Rep. 654.

Perjury in statements involving matters of opinion or belief: 25 L. E. A., N. S., 654.

PHYSICIANS AND SURGEONS.

Confidential relations and privileged communications.

See *Witnesses*, II, (D).

Fees for making post-mortem examination and acting as witness at coroner's inquest. See *Coroners*.

Act March 12, 1897, regulating the practice of medicine and surgery, is void for the reason that it was not passed in accordance with Const., article 3, section 15, requiring that on final passage of a bill it must be read "section by section."—*Brown v. Collister*, 5 Idaho, 589, 51 Pac. 417.

Since act March 12, 1897, regulating the practice of medicine and surgery, is void for the reason that it was not passed in accordance with the requirements of Const., article 3, section 15, the state board of medical examiners has no authority to grant a license for the practice of medicine and mandamus will not lie therefor.—*Brown v. Collister*, 5 Idaho, 589, 51 Pac. 417.

Where return was made to a writ of certiorari to review the action of the state medical board in refusing plaintiff a license to practice medicine and afterward the board filed a demurrer to plaintiff's application and plaintiff's petition was sufficient to entitle him to the writ, an order sustaining the demurrer was erroneous.—*Ah Fong v. McCalla*, 7 Idaho, 20, 59 Pac. 930.

Laws 1899, page 345, regulating the practice of medicine and surgery, provides that no one can take the examination and acquire a license who is not a graduate of a reputable college of medicine in good standing. Held, that the act is a proper exercise of the police power of the state and does not vest the medical examining board with judicial power to determine the standing of medical schools, and hence does not contravene Const., article 5, section 2.—*In re Inman*, 8 Idaho, 398, 69 Pac. 120.

The objection that Laws 1899, page 345, regulating the practice of medicine and surgery, by its terms excludes Chinese from taking the examination necessary to obtain a license, and violates the terms of existing treaties and is therefore unconstitutional, if tenable, would avoid only that part of the act relating to Chinese and will not be considered where there is no allegation that petitioner is a Chinaman.—*In re Inman*, 8 Idaho, 398, 69 Pac. 120.

Sess. Laws 1899, sections 5 and 6, providing that persons engaged in the practice of medicine at the time of the passage of the

act shall be licensed to continue such practice without examination on proper application to the state medical board and on payment of a fee of \$5, while persons desiring to commence practice after the passage of the act must pass an examination and pay a license fee of \$25, is not in conflict with the constitutional provision against "class legislation" or "special immunities."—*In re Inman*, 8 Idaho, 398, 69 Pac. 120.

Where an applicant for a license to practice medicine was a resident of the state engaged in the practice of his profession under the medical act of 1887 and he has complied with the provisions of Laws 1899, page 346, but the board of medical examiners refused him a license for failure to present a diploma which they would recognize, he cannot be convicted for practicing without a license.—*State v. Cooper*, 11 Idaho, 219, 81 Pac. 374.

Under Laws 1899, page 346, section 5, the state board of medical examiners cannot demand the presentation of a diploma from the applicant for a license who was legally engaged in the practice of medicine in this state under the medical act of 1887.—*State v. Cooper*, 11 Idaho, 219, 81 Pac. 374.

Under Laws 1899, page 345, section 9, providing that the action of the state medical board in refusing to grant a license to practice medicine under the provisions thereof may be reviewed by the district court on certiorari provided proceedings therefor be instituted within ten days after notice of such refusal, courts are limited in considering the action of the board to a determination of the question whether the board has acted within its jurisdiction.—*Raaf v. State Board of Medical Examiners*, 11 Idaho, 707, 84 Pac. 33.

Under Laws 1899, page 345, known as the state medical law, the state board of medical examiners, in the examination of applicants for a license to practice medicine and surgery, exercises judgment and discretion in granting or refusing a license to applicants and does not thereunder exercise purely ministerial functions.—*Raaf v. State Board of Medical Examiners*, 11 Idaho, 707, 84 Pac. 33.

Under Laws 1899, page 345, known as the state medical law, the courts have no jurisdiction to examine applicants or review their answers and mark and grade them on such answers, such action being the duty of the medical board.—*Raaf v. State Board of Medical Examiners*, 11 Idaho, 707, 84 Pac. 33.

The filing of the affidavit required by Laws 1899, page 387, section 4, is not sufficient to entitle the applicant to registration if he was not in fact engaged in the practice of dentistry within the state at the time the law went into effect and the board of examiners has the power and authority to determine that fact before registry of the applicant.—*Sherburne v. Board of Dental Examiners*, 13 Idaho, 105, 88 Pac. 762.

Under Laws 1899, page 348, section 9, there is no provision for an appeal from an order

of the state board of medical examiners refusing to grant a license to an applicant; but said section contains a provision whereby the proper court may review by certiorari certain proceedings of said board.—*Vadney v. State Board of Med. Examiners*, 19 Idaho, 203, 112 Pac. 1046.

Under R. S. 1298, no person was permitted to practice medicine or surgery in this territory (now state) who had not received a medical education and a diploma from some regularly chartered medical school having a bona fide existence at the time the diploma was granted, and when it appears from the complaint that the applicant for a license to practice medicine and surgery in the state was engaged in the practice of his profession under such statute, and had complied with all of the provisions of Laws 1899, page 346, section 5, it was the duty of the state board of medical examiners to issue to him a license to practice medicine and surgery in this state. *Vadney v. State Board of Med. Examiners*, 19 Idaho, 203, 112 Pac. 1046.

The state board of medical examiners, under Laws 1890, page 345, has no authority to refuse a license to an applicant who was engaged in the practice of medicine and surgery under R. S. 1298, on the ground that the college issuing the medical diploma under which he was practicing was not a "reputable college of medicine in good standing," as R. S. 1298 provides that the diploma referred to must be from some "regularly chartered medical school" having a bona fide existence at the time when said diploma was granted.—*Vadney v. State Board of Med. Examiners*, 19 Idaho, 203, 112 Pac. 1046.

A diploma from a regularly chartered medical school which had a bona fide existence at the time the diploma was granted, and a compliance with the provisions of R. S. 1298a, 1298b, was all of the proof that the statute required at that time of the applicant's having a medical education, and under Laws 1899, page 345, the medical board had no authority to require any other or further evidence of that fact.—*Vadney v. State Board of Med. Examiners*, 19 Idaho, 203, 112 Pac. 1046.

The legislature of this state has the power to regulate the practice of medicine and surgery within the state, and in doing so the legislature may require applicants to practice medicine and surgery to pass an examination under the supervision of an examining board, and such board may be given power to determine the qualifications of the applicant to receive a license, and the action of such board may be reviewed only in the manner and for the purpose provided by the statute.—*Barton v. Schmershall*, 21 Idaho, 562, 122 Pac. 385.

In R. C. 1342, as amended by Laws 1909, page 192, providing that the board of medical examiners may, either with or without examination, grant a license to any physician licensed to practice by a similar board of any other state, who holds a certificate of registration showing that an examination has been made by the proper board of any state in

which an average grade of not less than eighty per cent was awarded, and who is the holder of a diploma from a medical college in good standing, the word "may" is not to be construed as equivalent to "must."—*Barton v. Schmershall*, 21 Idaho, 562, 122 Pac. 385.

Under Laws 1899, page 345, entitled "An act to regulate the practice of medicine and surgery within the state of Idaho . . ." discretionary power is conferred upon the board of examiners to determine the questions of fact presented by an application for license, and the board may either grant or refuse a license according to the judgment of the board. *Barton v. Schmershall*, 21 Idaho, 562, 122 Pac. 385.

In determining the qualification of an applicant for license to practice medicine, without examination, as provided by R. C. 1342, as amended by Laws 1909, page 192, the state board of examiners is required to determine the following questions of fact: First, that the applicant has been licensed to practice medicine by a similar board of another state; that is, whether the applicant has been licensed and whether it was by a board similar to the examining board of this state. Second, that the applicant holds a certificate of registration showing that an examination has been made by a proper board of any state in which an average grade of not less than eighty per cent was awarded to the holder thereof. Third, that the appellant was the legal possessor of a diploma from a medical college in good standing in any such state, which said diploma may be accepted in lieu of an examination as evidence of qualification. Fourth, that the scope of the examination was not less than prescribed in this state.—*Barton v. Schmershall*, 21 Idaho, 562, 122 Pac. 385.

The statute regulating the practice of medicine and surgery within the state of Idaho is intended for the common good of the people of the state and is clearly within the police power of the state. The determination of the questions of fact required to be established by the applicant for license may be reviewed in the manner prescribed by the statute, and, if the applicant has been deprived of any legal right, it may be corrected by the courts of the state; but the court will not interfere with or disturb the discretionary power conferred upon the state board.—*Barton v. Schmershall*, 21 Idaho, 562, 122 Pac. 385.

In determining the questions of fact presented to the state board upon application for a license to practice medicine and surgery within the state without examination, the board is not in any way limited to any particular character or kind of proof, but are possessed with power to determine such questions by such evidence as will satisfy the minds of the members of the board as to whether the applicant for license is qualified as required by law and the rules of the board. *Barton v. Schmershall*, 21 Idaho, 562, 122 Pac. 385.

In an action against a physician for malpractice, held, that the evidence was insuffi-

cient to support a verdict for plaintiff.—Osborn v. Carey, 24 Idaho, 158, 132 Pac. 967.

In an action against a physician for malpractice, held, that the giving of a certain instruction was not error.—Osborn v. Carey, 24 Idaho, 158, 132 Pac. 967.

In an action to recover damages for negligence and carelessness in the diagnosis and treatment of what is alleged to be a "well-known disease," without naming the disease, or without alleging wherein the treatment was wrong, the complaint is uncertain and not specific and subject to demurrer on the ground of uncertainty.—Osborn v. Carey, 24 Idaho, 158, 132 Pac. 967.

Editorial Notes.

Liability of physicians and surgeons for negligence and malpractice: 48 Am. Dec. 481; 93 Am. St. Rep. 657.

Skill and diligence which physicians and surgeons must exercise: 59 Am. Dec. 397; 59 Am. Rep. 392; 1 Ann. Cas. 21, 306; 14 Ann. Cas. 605; 37 L. R. A. 830.

Medicine and dentistry, power of the states to prohibit practicing of without a license: 23 Am. St. Rep. 25.

Statutes regulating the practice of physicians and surgeons, to whom applicable: 98 Am. St. Rep. 742.

Christian Science and clairvoyance, statutes regulating the practice of: 98 Am. St. Rep. 742; 2 Ann. Cas. 904; 3 L. R. A., N. S., 763; 24 L. R. A., N. S., 103; 25 L. R. A., N. S., 1297.

Validity and effect of statute authorizing revocation of license granted to physician or surgeon: Ann. Cas. 1912A, 634.

Liability of physician for injuries caused by use of X-rays: Ann. Cas. 1912C, 1124.

Liability of physician or surgeon for leaving foreign substance in wound or opening for surgical operation: Ann. Cas. 1913E, 1010; 19 Ann. Cas. 190.

Massage treatment of disease as practice of medicine: Ann. Cas. 1913C, 480.

PLATS.

Dedication of streets. See Dedication.

Dedication of beach along lake shore. See Dedication.

PLEADING.

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In criminal prosecutions. See Criminal Law; Indictment and Information.

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Parties to actions. See Parties.

Review of questions relating to pleadings. See Appeal and Error.

In actions by or against particular classes of parties. See Carriers; Corporations; Executors and Administrators; Husband and Wife; Infants; and other specific heads.

In particular forms of actions or proceedings. See titles of particular actions.

Appealability of orders relating to pleadings. See Appeal and Error, III, (D).

Questions of libel in pleading. See Libel and Slander.

In actions for breach of contracts. See Contracts, VI, (C).

Failure to state cause of action as ground for dissolving attachment. See Attachment and Garnishment, VII.

I. FORM AND ALLEGATIONS IN GENERAL.

Damages in general. See Damages, VIII.

R. S. 4207 provides that in the construction of a pleading for the purpose of determining its effect its allegations must be liberally construed with a view to substantial justice between the parties.—Cantwell v. McPherson, 3 Idaho, 721, 34 Pac. 1095; Stuart v. Noble Ditch Co., 9 Idaho, 765, 76 Pac. 255.

Where a plaintiff desires to avail himself of a statutory privilege or right to be granted on particular facts set forth in a statute or ordinances, such facts must be alleged.—Sherwood v. Stephens, 13 Idaho, 399, 90 Pac. 345; Perkins v. Loux, 14 Idaho, 607, 95 Pac. 694.

A mere averment of undue influence is insufficient, unless the facts are pleaded.—Kelly v. Perrault, 5 Idaho, 221, 48 Pac. 45.

A complaint which attacks a judgment as void on the ground that the affidavit for order of publication "was insufficient" does not state a cause of action, since such allega-

tion is merely a conclusion of law.—*Ollis v. Orr*, 6 Idaho, 474, 56 Pac. 162.

Matters of record in the courts of general jurisdiction in this state must be pleaded specifically and with certainty, and not on information and belief.—*First Nat. Bk. v. Watt*, 7 Idaho, 510, 64 Pac. 223.

The allegations of a complaint must be sufficiently specific to enable defendant to make a defense to the action.—*McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478.

Where defendant's pleading designates a portion thereof as a further and separate defense and it contains allegations which, if found true, would entitle defendant to affirmative relief and the prayer claims such relief, and the opposing party is not misled, the fact that such separate defense is really matter for a cross-complaint will not prevent the court from granting the relief warranted.—*Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

An allegation in a complaint that "defendant is informed and believes" that certain facts exist, without further alleging on information and belief that those facts do exist, is not a sufficient allegation of any issuable fact.—*Swank v. Sweetwater Irrigation etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

Where a complaint in an action for negligence states the ultimate facts necessary to be pleaded and is sufficiently specific to enable defendant to intelligently answer and make a complete defense to the action, a demurrer thereto is properly overruled.—*Carscallen v. Coeur d'Alene etc. Co.*, 15 Idaho, 444, 98 Pac. 622.

The subject matter of a plea is not sham, irrelevant or redundant because it states the facts more in detail than required under the statute to constitute a cause of action or defense.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

Implications of law arising from facts alleged in the complaint and presumptions of law arising therefrom need not be pleaded.—*Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277.

Where one of several defendants has filed an answer, and a codefendant desires to adopt the same answer, he may do so by filing an answer in which he states that he joins in the answer of his codefendant and desires to make the same a part of his answer as fully as if set out in full and in detail in his own pleading.—*Collins v. Brown*, 19 Idaho, 360, 114 Pac. 671.

A pleading should be so construed as to allege all of the facts that can be implied by fair and reasonable intentment from the facts expressly alleged.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

R. C. 4207 provides for a liberal construction of the pleadings, with a view to substantial justice between the parties.—*McCormick v. Smith*, 23 Idaho, 487, 130 Pac. 999.

Editorial Notes.

Common counts, how far allowable under code system of pleading: 57 Am. Dec. 544.

II. COMPLAINT.

Allegation that bond sued on is "for the use" of plaintiff. See Bonds.

Uncertainty in complaint in action for causing death. See Death.

Sufficiency of complaint in action by assignee of claim for conversion. See Assignments.

Sufficiency of complaint in action on account. See Account, Action on.

Complaint by tenant for damages to property and for breach of lease contains no misjoinder. See Landlord and Tenant.

Joinder of causes of action. See Action, III.

Waiver of objections. See post, XIII.

The rule under the code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same cause under different forms.—*People v. Slocum*, 1 Idaho, 62; overruled by *Spotswood v. Morris*, 10 Idaho, 129, 77 Pac. 216.

Under R. S. 4169, requiring each cause of action to be separately stated, it is not necessary to rewrite in each subsequent count the preliminary averments of the first count, but it is sufficient if such allegations be referred to by apt and express words making such allegations a part of each subsequent count.—*Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322.

Under R. S. 4168, subdivision 2, which provides that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, plaintiff need only state his cause of action in ordinary and concise language without regard to the ancient forms of pleading and plaintiff can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity.—*Rauh v. Oliver*, 10 Idaho, 3, 77 Pac. 20.

Where a complaint containing only one count demands damages (1) for an assault on plaintiff; (2) for injury to growing crops; (3) for trespass in cutting timber; (4) for injury to plaintiff's land; (5) for obstructing a boat landing; (6) for loss of dead timber, and for loss of time—a demurrer thereto is properly sustained under R. S. 4169, providing what causes of action may be united in the same complaint.—*Kruger v. St. Joe Lbr. Co.*, 11 Idaho, 504, 83 Pac. 695.

Where several persons are named as defendants, the complaint must contain allegations sufficient to charge them jointly.—*Kruger v. St. Joe Lbr. Co.*, 11 Idaho, 504, 83 Pac. 695.

Where a number of persons, at different times and without concerted action or collusion, go upon a tract of land and each takes severally a part thereof and erects improvements thereon, an action of ejectment may be maintained against all the defendants so far as the restitution of the premises is concerned but plaintiff cannot unite in such action a claim for damages against each defendant for his trespass.—*White v. Whitcomb*, 13 Idaho, 490, 90 Pac. 1080.

Editorial Notes.

Complaint stating same causes of action in different counts under the codes: 72 Am. Dec. 588.

III. PLEA OR ANSWER AND CROSS-COMPLAINT.

(A) DEFENSES IN GENERAL.

Motion to compel separate statement or election. See post, XIII.

Though defendant is in default, it is within the discretion of the trial court to extend and enlarge his time for answering.—*Later v. Haywood*, 12 Idaho, 78, 85 Pac. 494.

Where an answer in a suit to quiet title alleges adverse possession and pleads the statute of limitations, a general demurrer thereto is properly overruled.—*Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

R. C. 4140 fixes the time within which a defendant shall appear and answer, and the fact that in the meanwhile and prior to the expiration of that time the defendant has the cause removed to the federal court, and it is thereafter held by the federal court that the removal was not proper and did not confer jurisdiction on the latter court, such action on the part of the defendant to change the forum will not serve to extend the time for answering in the state court, and will not relieve him from a default which he thus allows to be entered against him.—*Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89.

Where in an action based on a fall on a defective sidewalk, the allegations of the complaint are denied and as a further defense it is alleged that if plaintiff sustained any injury, the same was caused by her own negligence and carelessness, each of such defenses should be pleaded in separate counts.—*Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 110.

(B) DILATORY PLEAS AND MATTER IN ABATEMENT.

See Abatement and Revival.

(C) DENIALS AND ADMISSIONS.

Admissions as dispensing with proof. See post, XII. Admissibility in evidence of pleadings containing admissions. See Evidence, VII.

Allegations of the petition not denied by the answer stand admitted.—*Bloomingtondale v. Du Rell*, 1 Idaho, 33.

Admissions in an original answer remain effective against defendants though stricken out by them.—*Bloomingtondale v. Du Rell*, 1 Idaho, 33.

Where the complaint is verified, the answer must specifically deny every material allegation of the complaint, but need not traverse mere matters of surplusage.—*Pence v. Durbin*, 1 Idaho, 550.

A failure to deny specifically each and every material allegation of a verified complaint, admits the allegations not so denied.—*Norris v. Glenn*, 1 Idaho, 590.

A denial of the literal truth of the allegations of a complaint, and not a denial of every specific averment in it, is evasive.—*Norris v. Glenn*, 1 Idaho, 590.

Where a complaint charges that goods were sold and delivered to a partnership, and the

answer denies the existence of the partnership, such denial is not sufficient as to the sale and delivery and the partnership being established, the sale and delivery is admitted.—*Lillienthal v. Anderson*, 1 Idaho, 673.

A denial in an answer of the material averments of the complaint, upon information and belief, is sufficient to raise an issue to be tried, if the facts are not within the personal knowledge of the answering defendant.—*People v. Curtis*, 1 Idaho, 753.

Under the Code of Procedure a defendant is not only permitted, but is required to set up all matters of defense by answer, whether such matters are legal or equitable in their character.—*Utah and N. Ry. Co. v. Crawford*, 1 Idaho, 770.

An allegation in the complaint not denied in the answer is sufficient to sustain a finding that the facts stated therein are true.—*Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555.

Where an action is brought on a written instrument, a copy of which is set out in or annexed to the complaint, the genuineness and due execution of the instrument are deemed admitted under R. S. 4200, unless the answer specifically denies the same and is verified.—*United States v. Alexander*, 2 Idaho, 386, 17 Pac. 746.

The denial of an indebtedness, without a denial of the facts alleged in the complaint out of which such indebtedness arose, is a denial of a conclusion of law and raises no issue of fact.—*Swanholm v. Reeser*, 3 Idaho, 476, 31 Pac. 804.

A denial "that the account referred to in the complaint for goods sold and delivered, and money advanced, by plaintiff to defendant, is not correct," is insufficient.—*Swanholm v. Reeser*, 3 Idaho, 476, 31 Pac. 804.

The allegation of the issuance of an execution and its return nulla bona, being matters of public record, cannot be denied on information and belief.—*Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360.

A complaint alleged that defendant became indebted to plaintiffs in a specified sum for goods, wares and merchandise, which had been "sold and delivered" to defendant. The answer denied that defendant was indebted to plaintiff for "goods, wares and merchandise sold and delivered to him by plaintiffs" at any time. Held, that the words "sold and delivered" as used in the complaint constituted but one act and that the denial of "sale and delivery" in the conjunctive was sufficient.—*Feldman v. Shea*, 6 Idaho, 717, 59 Pac. 537.

A denial stating "the plaintiff says that he has not sufficient knowledge or information to enable him to answer the fourth paragraph of the said complaint, and, basing his denial on that ground, denies all statements and allegations in said paragraph," is not such a specific denial as is required to a verified pleading, but must be considered as a general conjunctive denial and for that reason insufficient.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189.

Denials of matters of record, based on want of knowledge, are insufficient.—*Work Bros. v. Kinney*, 7 Idaho, 460, 63 Pac. 596.

An answer averring that a certain obligation "has since been fully discharged and liquidated" is insufficient for uncertainty and as being too much in the nature of the statement of a conclusion.—*First Nat. Bk. v. Watt*, 7 Idaho, 510, 64 Pac. 223.

A denial of an allegation in the complaint, concluding with the words "other than as hereinafter specifically set forth," is sufficient, even though the pleader does not thereafter refer to the particular allegation of the complaint thus denied.—*Anderson v. War Eagle Con. Min. Co.*, 8 Idaho, 789, 72 Pac. 671.

In an action to recover the purchase price of property sold, failure of title or illegality of the contract are affirmative defenses which must be specially pleaded.—*Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608.

Where a plaintiff alleges in general terms that he is "the duly appointed, qualified and acting trustee" of the estate of a bankrupt, and in like general terms alleges the filing of the petition in bankruptcy, and the adjudication in bankruptcy, denials by one in no way a party to that proceeding of such allegations for want of information on the subject are sufficient, and should not be stricken out.—*Dittemore v. Cable Milling Co.*, 16 Idaho, 298, 133 Am. St. Rep. 98, 101 Pac. 593.

The rule prohibiting denials on information of matters of record should not be extended to the length of requiring a defendant to inform himself as to the files and records of referees in bankruptcy in the federal courts and bankruptcy courts generally, wherein the proceedings are chiefly had before a referee, to which proceeding the defendant was not a party, nor should it be extended to the records and files of boards and departments of government in matters to which the pleader has not been a party in any respect.—*Dittemore v. Cable Milling Co.*, 16 Idaho, 298, 133 Am. St. Rep. 98, 101 Pac. 593.

A denial of matters which are of record and accessible to the defendant is insufficient and is no denial, and does not raise an issue.—*Vadney v. State Board of Med. Examiners*, 19 Idaho, 203, 112 Pac. 1046.

Under R. C. 4183, subdivision 2, the following denial on information and belief is sufficient: "and defendant denies that it has any knowledge or information sufficient to form a belief whether or not the said G. was strong, bright or healthy, etc., and this defendant therefore denies that said G. had been strong, bright or healthy," etc., and here follows a disjunctive denial of each of the allegations of said paragraph of the complaint.—*Golden v. Spokane etc. R. R. Co.*, 20 Idaho, 531, 118 Pac. 1077.

Where plaintiff alleged that it was necessary to put dams in a certain creek in order to get water on his land and the answer does not deny this allegation, special findings of the court and jury that such dams are neces-

sary, are unauthorized, since R. S. 4217 declares that every material allegation of the complaint not controverted by the answer must, for the purpose of the action, be taken as true.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

An answer recited "as to the allegations contained in paragraphs 2, 3, 4 of said cross-complaint, these answering defendants have no knowledge, information or belief on the subject sufficient to enable them to answer the allegations contained in said paragraphs or any of them, and placing their denials on that ground these answering defendants deny each and every allegation contained in said paragraphs 2, 3, 4." Held, a sufficient denial under R. C. 4183.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

Immaterial allegations or averments in a pleading are not admitted by failure to deny them.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

Where the plaintiff sues for \$1,000 damages, and the answer denies "that the plaintiff has been damaged in the sum of \$1,000 by reason of the acts of this defendant," such denial is an admission that the plaintiff has sustained damages in a sum less than \$1,000.—*Welch v. Bigger*, 24 Idaho, 169, 133 Pac. 381.

Editorial Notes.

Answer, denial in on information and belief, when permissible: 70 Am. Dec. 625; 133 Am. St. Rep. 105.

Effect of denial on information and belief of matter necessarily within knowledge of defendant: Ann. Cas. 1912C, 149; 30 L. R. A., N. S., 771.

Right to plead inconsistent defenses: 48 L. R. A. 177.

(D) MATTER IN AVOIDANCE.

(No paragraphs.)

(E) SETOFF, COUNTERCLAIM AND CROSS-COMPLAINT.

Subject matter of setoff or counterclaim. See *Setoff and Counterclaim*.

When cross-complaint necessary or proper. See *Quieting Title, II*.

Setting up assigned claims against assignor of plaintiff. See *Assignments*.

Sufficiency of service. See *post, X*.

Cross-complaint for damages for wrongful attachment in action in which attachment issued. See *Attachment and Garnishment, XI*.

A counterclaim alleging a debt due defendant and a former partner, or a stranger to the suit, is demurrable.—*McGuire v. Lamb*, 2 Idaho, 378, 17 Pac. 749.

A demurrer will lie to a counterclaim which fails to allege that the debt existed at the commencement of the action, but alleges that it is now due.—*McGuire v. Lamb*, 2 Idaho, 378, 17 Pac. 749.

A defense set up by way of counterclaim, alleging that plaintiff is indebted to defendant in the sum of \$156 for use of a certain building, and \$1,262 for certain gold bullion,

without alleging that said sums are due, or that defendant is entitled to credit therefor on the demand sued on is no defense and a demurrer thereto should be sustained.—*Swanholm v. Reeser*, 3 Idaho, 476, 31 Pac. 804.

Where the cross-complaint in an action is not answered, and defendant proceeds to trial as though answer had been filed and introduces proof of the allegations of his cross-complaint, he thereby waives such answer and is estopped to claim that he was entitled to judgment on the pleadings.—*Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250.

Under R. S. 4183-4185, requiring a cause of action arising out of the transaction set forth in the complaint as a basis of plaintiff's claim, or connected therewith, to be set forth in the answer as a counterclaim, or in a cross-complaint, if the defendant desires to avail himself of such counterclaim, in an action to contest the foreclosure of a chattel mortgage to secure the purchase price of a machine, defendant may file a cross-complaint to foreclose a realty mortgage executed as additional security for the payment of notes given for such machine.—*Murphy v. Russell*, 8 Idaho, 151, 67 Pac. 427.

Where no cross-complaint was filed, or affirmative relief sought, until after the case had been tried, and it appeared that the case had been pending three or four years, there was no abate of discretion in refusing to allow the filing of a cross-complaint.—*Kindall v. Lincoln Hdw. etc. Co.*, 10 Idaho, 13, 76 Pac. 992.

A cross-complaint under R. S. 4188 must relate to or depend upon the contract on which the main case is found, or affect the property to which the action relates, but does not necessarily seek relief against all or any of the original plaintiffs or defendants.—*Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434.

A counterclaim, under R. S. 4184, while it may exist in favor of the defendant and against the plaintiff, may in other respects go further than a cross-complaint, and, if the cause of action arose on contract, may set forth any other cause of action arising on contracts.—*Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434.

An answer and cross-complaint may be embodied in the same instrument.—*Western Loan etc. Co. v. Smith*, 12 Idaho, 94, 85 Pac. 1084.

Where a counterclaim is set forth and no proof is offered in support thereof, it should be dismissed.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

In an action at law where a suit in equity is interposed as a defense, and such equitable relief alleged constitutes an independent cause of action, and is properly pleaded and such defense is of such a character as may result in a decree in his favor, the party making such plea becomes the actor and plaintiff as to all matters alleged in such affirmative defense.—*Penninger Lateral Co. v. Clark*, 22 Idaho, 397, 126 Pac. 524.

Pleadings examined and held that the demurrer to the counterclaim on the grounds of ambiguity and uncertainty should have been sustained.—*Moore v. Evans*, 24 Idaho, 153, 132 Pac. 971.

Editorial Notes.

Necessity that defendant designate counterclaim as such in pleading: *Ann. Cas.* 1913A, 1079.

IV. SUBSEQUENT PLEADINGS.

Under R. C. 4217, the plaintiff is deemed to have denied any and all allegations of new matter contained in the answer.—*Wheeler v. Gilmore etc. R. Co.*, 23 Idaho, 479, 130 Pac. 801.

Where new matter is contained in an answer in avoidance or constituting a defense or counterclaim, and no denial is pleaded, such defense is deemed denied; and it is not error to give an instruction upon the law with reference to such defense.—*Wheeler v. Gilmore etc. R. Co.*, 23 Idaho, 479, 130 Pac. 801.

V. DEMURRER.

Amendment of demurrer. See post, VI.

Sufficiency of allegation "duly made and delivered."

See *Bail and Recognizance*.

Waiver of demurrer or of objections to pleadings by withdrawal or failure to demur or by answering over. See post, XIII.

Ambiguity in action to foreclose lien. See *Mechanics' Liens*, VII.

An objection that a pleading contains inconsistent allegations or defenses cannot be made by demurrer, but should be made by motion to strike out or to require the party to elect on which allegation or defense he will stand.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339; *Murphy v. Russel & Co.*, 8 Idaho, 133, 67 Pac. 421.

A demurrer on the ground of ambiguity and uncertainty should point out the ambiguity and uncertainty complained of.—*Naylor v. Vermont L. & T. Co.*, 6 Idaho, 251, 55 Pac. 297; *Younie v. Blackfoot L. & W. Co.*, 15 Idaho, 56, 96 Pac. 193.

Where a complaint states a cause of action and also contains items therein which are not properly alleged, a demurrer going to the whole cause of action is properly overruled, such defense being demurrable only on the ground of ambiguity and uncertainty.—*Dangel v. Levy*, 1 Idaho, 722.

Where there is both a demurrer and an answer to the same complaint, the issues of law should be first determined.—*Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107.

Facts not well pleaded and conclusions of law are not admitted by demurrer.—*Burkhart v. Reed*, 2 Idaho, 503, 22 Pac. 1.

Where an answer denies matter that has not been alleged in the complaint and further denies that a certain affidavit was an affidavit required by law, thus being a mere legal conclusion of the pleader, a demurrer thereto is properly sustained, though the better prac-

tice would be to move to strike out these portions of the answer.—*McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 403.

Where a second demurrer has been filed without permission of the court, it is in the discretion of the court to permit it to remain on file.—*Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Kelly v. Leachman*, 3 Idaho, 672, 34 Pac. 813.

By overruling demurrers to the complaint based on the ground that the complaint did not state facts sufficient to constitute a cause of action and that plaintiffs had no legal right to sue, the court necessarily decided that plaintiffs had legal capacity to sue.—*Sabin v. Burke*, 4 Idaho, 28, 37 Pac. 352.

Where a complaint does not show that another action arising out of the same transaction is pending, such question should be raised by answer and not by demurrer.—*Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779.

Where plaintiff sues on four causes of action, three being for personal services, and the fourth for the purpose of having a chattel mortgage executed by himself and wife on the separate property of the wife, declared fraudulent and void, and fails to make his wife a party, a demurrer on the ground that several causes of action were improperly united should be sustained.—*Beane v. Givens*, 5 Idaho, 774, 51 Pac. 987.

Ambiguity or uncertainty in a complaint, which states a cause of action, cannot be reached by an objection to the introduction of any evidence under the complaint, but only by special demurrer, alleging such ground and pointing out the defect specifically.—*Naylor v. Vermont Loan etc. Co.*, 6 Idaho, 251, 55 Pac. 297.

A complaint failing to set forth a material fact essential to the right to recover is bad on general demurrer.—*Bingham County v. Woodin*, 6 Idaho, 284, 55 Pac. 662.

Where a complaint states a good cause of action, though joined with a cause of action which is demurrable, a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, will not lie.—*Carter v. Wann*, 6 Idaho, 556, 57 Pac. 314.

To commingle in the same count of a complaint different causes of action is not ground for demurrer, the remedy being to require the plaintiff to elect which cause he will prosecute and to strike out all matter relating to the other causes of action.—*Fox v. Rogers*, 6 Idaho, 710, 59 Pac. 538.

A general demurrer to a complaint raises only the question of its sufficiency in stating a cause of action.—*First Nat. Bk. v. Sampson*, 7 Idaho, 564, 64 Pac. 890.

That a complaint sets forth the facts more particularly than is necessary is not ground of demurrer.—*Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105, 236.

Where the ultimate facts stated in a complaint for personal injuries inform the defendant of all acts or omissions charged against him so as to enable him to make a

full and complete defense thereto, a demurrer to the complaint on the ground that it is not sufficiently specific will be overruled.—*McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478.

An allegation that a transaction occurred "on or about" a specified date, where the time of such transaction may become material and essential to the right of recovery, is open to demurrer on the ground of uncertainty.—*Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

A judge at chambers has no authority to pass on a demurrer.—*Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.

Where a complaint states any cause of action that will put defendant on his defense, it is not subject to demurrer.—*Village of Sandpoint v. Doyle*, 11 Idaho, 642, 4 L. R. A., N. S., 810, 83 Pac. 598.

Where a plaintiff fails to demur to defendant's answer within ten days after service thereof, the time prescribed by R. S. 4193, he has no absolute right to do so thereafter without leave of court.—*Dunbar v. Griffiths*, 14 Idaho, 120, 93 Pac. 654.

The question as to the measure of damages is not one that can properly be raised by general demurrer to the complaint, but arises upon the trial, and may be raised on the introduction of evidence.—*West v. Johnson*, 15 Idaho, 681, 99 Pac. 709.

Where a complaint contains several causes of action separately stated, and the demurrer is a general demurrer directed against the complaint as a whole and not against any separate cause of action, it should be overruled if any one of the causes of action is well pleaded.—*Bonham Nat. Bank v. Grimes Pass etc. Min. Co.*, 18 Idaho, 629, 111 Pac. 1078.

In an action for damages, where the complaint as a whole states a cause of action, and a demurrer is filed to the entire cause of action, it is not error for the trial court to overrule such demurrer, even though the facts stated as to a particular item of damages are insufficient to entitle the plaintiff to recover for such particular damage.—*Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS.

Amendment in district court on appeal from probate court as discharge of sureties on appeal bond. See *Justices of the Peace*, V, (A), 4.

Amendment after remanding to trial court. See *Appeal and Error*, XVII, (F).

Review. See *Appeal and Error*, XVI, (F), 4.

Necessity of service. See *post*, X.

Trial courts should be liberal in permitting amendments to pleadings where it appears that they are in good faith and their allowance would serve the ends of justice.—*Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868; *Dunbar v. Griffiths*, 14 Idaho, 120, 93 Pac. 654; *Havlick v. Davidson*, 15 Idaho, 787, 100 Pac. 91.

Where pleadings are amended, they take the place of the original, and all subsequent proceedings in the case are based upon the amended pleadings.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361; *People v. Hunt*, 1 Idaho, 433; *Wooddy v. Jamieson*, 4 Idaho, 448, 40 Pac. 61.

Where application is made to amend a pleading to conform to the proof, it is not error for the trial court to disallow such proposed amendment, where there is no proof to support the same.—*Snowy Peak Min. Co. v. Tamarack etc. Min. Co.*, 17 Idaho, 630, 107 Pac. 60; *Heath v. Potlatch Lumber Co.*, 18 Idaho, 42, 108 Pac. 343; *Valentine v. Rosenhaupt*, 19 Idaho, 130, 112 Pac. 685.

Amendments of pleadings rest largely in the discretion of the court, and unless the exercise of such discretion deprives the complaining party of some substantial right, the action of the trial court will not be disturbed.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161; *Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461; *Mantle v. Jack Waite Min. Co.*, 24 Idaho, 613, 135 Pac. 854.

A demurrer is a pleading, and may be amended under R. S. 4228.—*Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Kelly v. Leachman*, 3 Idaho, 672, 34 Pac. 813; *Dunbar v. Board of Commrs. Canyon Co.*, 5 Idaho, 407, 49 Pac. 409.

Under R. S. 4841, the district court may allow amendments to the pleadings in an action appealed from the justice or probate court.—*Sebree v. Smith*, 2 Idaho, 359, 16 Pac. 915.

There is no abuse of discretion in refusing to permit an amendment of the answer after a new trial granted, where the amendments offered deny matters before admitted to be true.—*Palmer v. Utah etc. Ry. Co.*, 2 Idaho, 382, 16 Pac. 553.

Matters changing the relations of the parties to a suit, or either of them, which affect the matter in litigation and which have transpired since the filing of the original complaint, are proper matters for supplemental complaint.—*Dennison v. Willcutt*, 3 Idaho, 793, 35 Pac. 698.

Where an amendment to the pleadings would change the issues completely, the court may, in its discretion, impose terms as a condition precedent to amendment.—*Lowe v. Long*, 5 Idaho, 122, 47 Pac. 93.

After the filing of the answer in a suit to foreclose a mortgage, plaintiff asked leave to amend the complaint by alleging that defendant, acting as attorney for plaintiff's intestate, had collected for her certain moneys and that the mortgage had been given to secure the payment of the balance due plaintiff after deducting attorney's fees and commissions from the amount so collected. Held, error to refuse to permit the amendment.—*Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

Before filing an amended demurrer, leave to do so should be first obtained; but, as to a first amendment prior to a hearing on demurrer, the leave should be granted as a matter of course.—*Dunbar v. Board of*

Commrs. Canyon Co., 5 Idaho, 407, 49 Pac. 409.

An amendment to the complaint which in effect substitutes a new party plaintiff should not be allowed.—*Hallett v. Larcom*, 5 Idaho, 492, 51 Pac. 108.

Where defendant files an amendment to his cross-complaint and the amendment is, in substance, a reiteration of the allegations of the cross-complaint, previously denied by plaintiff, it is not necessary to again deny the affirmative allegations of the amendment.—*Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031.

In an action on a note, the principal and interest on which amounted to about \$11,000, the answer denied plaintiff's title and ownership. During the trial defendant asked leave to amend the answer by alleging that plaintiff held title by assignment and not by indorsement, which amendment plaintiff's counsel claimed would necessitate a continuance. The court granted leave to amend on defendant's paying costs, fixed at \$100. Defendant declined to accept terms. Held, that the amount was not unreasonable and that there was no abuse of discretion.—*Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 650.

The plaintiff, before issue joined, may by an amended pleading, state the facts on which an action is based, though there is a conflict between the facts as then alleged and as alleged in the original pleading.—*Keenan v. Washington Liquor Co.*, 8 Idaho, 383, 69 Pac. 112.

Where during the trial permission to amend the complaint is granted and plaintiff then submits another amendment more specific and comprehensive than the first, there is no error in refusing the second amendment if the first was sufficient to let in the evidence desired to be introduced thereunder.—*Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868.

Where a complaint is demurred to on the ground that the cause of action is barred by the statute of limitations and the plaintiff waits two years before asking permission to amend, the refusal of such application is not error under R. S. 4229 providing that the court may allow amendments in furtherance of justice, etc.—*Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

Where the record shows that defendant filed no cross-complaint nor prayed for any affirmative relief nor sought to do so until after the case had been tried and decided and remanded by the supreme court, and it also appears that the case has been pending for three or four years and that the allowance of the amendment and cross-complaint would necessitate a retrial of the case, there was no abuse of discretion in denying permission to amend and file a cross-complaint.—*Kindall v. Lincoln Hardware etc. Co.*, 10 Idaho, 13, 76 Pac. 992.

Where a complaint alleges facts which constitute a common-law action in trespass for cutting and removing timber from the lands of plaintiff and excavating and placing a line of railroad thereon, and after answer an

amended complaint is filed alleging substantially the same cause of action and claiming treble damages under R. S. 4531, the amendment is proper and does not so change the original cause of action as to authorize the striking of the amended complaint from the files on the ground that it constitutes a new cause of action.—*Eklund v. B. R. Lewis Lumber Co.*, 13 Idaho, 581, 92 Pac. 532.

Amendments of pleadings should not be allowed in the district court on appeal from the probate court in a probate matter.—*Estate of McVay* (on rehearing), 14 Idaho, 64, 93 Pac. 31.

Under R. S. 4228, where an answer has been filed and a demurrer interposed thereto, either the demurrer or answer may be amended as a matter of course at any time "before the trial of the issue of law thereon."—*Dunbar v. Griffiths*, 14 Idaho, 120, 93 Pac. 654.

Where a party applies to file an amended pleading under R. S. 4229, and asks leave to make a showing as to why he had not previously offered the amendment and why he has delayed and his reasons for invoking the discretion of the court, it is an abuse of discretion to refuse permission to amend without giving the applicant leave to make such showing.—*Dunbar v. Griffiths*, 14 Idaho, 120, 93 Pac. 654.

Where the time for demurring to an answer has expired without a demurrer thereto having been interposed, defendant is not thereafter entitled to amend his answer as of course, but must obtain leave to amend.—*Dunbar v. Griffiths*, 14 Idaho, 120, 93 Pac. 654.

Where one of the issues in the case is the value of property, it is not error for the trial court to permit the complaint to be amended to conform to the proof as to the value of such property.—*Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 108.

In allowing amendments to pleadings, the court is clothed with great discretionary power; but where it appears that the amendment offered is made for the purpose of conforming to the proof and does not present any new cause of action or issue, and the opposing party has not been misled or deprived of introducing any evidence which he might desire to offer in consequence of the amendment, it is error for the court to disallow such amendment.—*Harrison v. Russell*, 17 Idaho, 196, 105 Pac. 48.

Where application to amend a pleading to conform to the proof is made before the findings and decree are signed by the judge, such application is not too late, and should not for that reason be denied.—*Snowy Peak Min. Co. v. Tamarack etc. Min. Co.*, 17 Idaho, 630, 107 Pac. 60.

Under R. C. 4225 et seq., a trial court has large discretion in permitting amendments to pleadings and may permit such amendments at any stage of the proceedings almost as of course, to make the pleadings correspond with the proof.—*Pennsylvania etc. Min. Co. v. Gallagher*, 19 Idaho, 101, 112 Pac. 1044.

Editorial Notes.

Admissibility against pleader of pleading superseded by amended pleading: *Ann. Cas.* 1913A, 1132.

Right to amend petition or complaint by adding or substituting new plaintiff suing for use of original plaintiff: *Ann. Cas.* 1913B, 110.

VII. SIGNATURE AND VERIFICATION.

Waiver of defects. See post, XIII.

Where an amended complaint is not verified, the answer thereto need not be verified. *People v. Hunt*, 1 Idaho, 433.

An answer cannot be disregarded because of a defective verification, the proper mode of reaching such defect being by motion to strike out; and a judgment on the pleadings upon the ground of defective verification is erroneous.—*Pence v. Durbin*, 1 Idaho, 550.

A verification of a pleading made by a person not a party to the action is sufficient if it shows any statutory reason why it is not made by a party to the action.—*Pence v. Durbin*, 1 Idaho, 550.

A complaint by a public officer, in his official capacity, need not be verified, but the answer to it must be verified, unless it also be by a public officer in his official capacity; but if such complaint is not verified, a general denial is sufficient to put in issue the material allegations of the complaint under R. S. 4183.—*United States v. Shoup*, 2 Idaho, 493, 21 Pac. 656.

Editorial Notes.

Manner and sufficiency of verification of pleading by corporation: *Ann. Cas.* 1913A, 212.

VIII. EXHIBITS.

Pleading an instrument by attaching a copy to the complaint as an exhibit thereto does not tender an issue or involve an assertion of the truth of the statements and recitals contained in the exhibit; and, in order to tender an issue as to the truth or correctness of statements and recitals contained in such exhibit, it is necessary to plead them in appropriate terms; and a defendant is not called upon to deny or traverse the statement and recitals contained in an exhibit unless the pleading to which such exhibit is attached alleges, in appropriate terms, the truth and correctness of the statement or statements which it is intended to tender as an issue or issues.—*Sweeney v. Johnson*, 23 Idaho, 530, 130 Pac. 997.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

See *Mechanics' Liens*, VII; *Indictment and Information*, V.

Inherent power of court of equity to order. See *Equity*, IV.

R. C. 4209, requiring the adverse party to serve an itemized statement of the account sued on within ten days after demand there-

for, is not mandatory, but is directory, and vests a discretion in the trial court as to whether or not it should exclude evidence of such an account, because the party has failed to serve the statement within the time required.—*Miller v. Village of Mullan*, 17 Idaho, 28, 19 Ann. Cas. 1107, 104 Pac. 660.

X. FILING, SERVICE AND WITHDRAWAL.

Filing complaint on Sunday. See Sunday.

Deposit of complaint with clerk is commencement of action. See Action, IV.

Waiver of objections to lack of service. See post, XIII.

Where a complaint in a foreclosure action is sought to be amended by asking the reformation of the certificate of acknowledgment, the amended complaint need not be served on defendants in default who are not parties to the mortgage, since R. S. 4176 requires a copy of an amended complaint to be served only "on the defendants affected thereby."—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 102.

Where a complaint is amended in a matter of substance, the amended complaint must be served on each of the defendants.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

An amendment to a complaint must be in a material matter of substance to make service thereof necessary.—*Curtis v. Bunnell etc. Inv. Co.*, 6 Idaho, 298, 55 Pac. 659.

Under R. S. 4229 the trial court may, in its discretion, permit the withdrawal of an answer and cross-complaint, and the filing of an amended demurrer to the complaint.—*Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.

Where nonresident attorneys sign the name of a resident attorney to pleadings without his knowledge, service of papers thereafter on such resident attorney is sufficient.—*Beck v. Lavin*, 15 Idaho, 363, 97 Pac. 1028.

Where a defendant files a cross-complaint and all the parties to be affected thereby have appeared in the main action and are represented by counsel, it is a sufficient service of such cross-complaint to serve the same upon the attorneys who have appeared for the respective parties affected thereby.—*Collins v. Brown*, 19 Idaho, 360, 114 Pac. 671.

XI. MOTIONS.

Referee not authorized to enter judgment on pleadings. See Reference.

Striking pleading as containing no defense. See Bills and Notes, VIII.

Where any of the material allegations of the complaint are denied by the answer, it is error to render judgment on the pleadings.—*Johnson v. Manning*, 3 Idaho, 352, 29 Pac. 101; *Alspaugh v. Reid*, 6 Idaho, 223, 55 Pac. 300; *Coombs v. Collins*, 6 Idaho, 536, 57 Pac. 310; *Swinehart v. Pocatello Meat Co.*, 8 Idaho, 710, 7 Pac. 1054; *Mills Novelty Co. v. Dunbar*, 11 Idaho, 671, 83 Pac. 932.

Where plaintiff moves for judgment on the pleadings, he admits, for the purposes of his

motion, the truth of all the allegations of the answer and the untruth of all the allegations of the complaint which are denied in the answer.—*Walling v. Bown*, 9 Idaho, 184, 72 Pac. 960; *Mills Novelty Co. v. Dunbar*, 11 Idaho, 671, 83 Pac. 932; *Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

A judgment on the pleadings upon the ground of defective verification of the answer is erroneous.—*Pence v. Durbin*, 1 Idaho, 550.

Where the allegations of the complaint are not denied by the defendant, the plaintiff is entitled to a judgment on the pleadings, without any proof on his part.—*Alvord v. United States*, 1 Idaho, 585.

Where an answer is irrelevant, it may be stricken from the files on motion.—*Guthrie v. Fisher*, 2 Idaho, 111, 6 Pac. 111.

Falsity is the test of a sham answer and where shown to be sham by this test, such an answer may be stricken out.—*Goldstein v. Krause*, 2 Idaho, 294, 13 Pac. 232.

A frivolous answer is one which denies no material averment in the complaint, and which, if admitted to be true, does not constitute any defense to the plaintiff's cause of action.—*Goldstein v. Krause*, 2 Idaho, 294, 13 Pac. 232.

Where defendant in ejectment seeks to have a conveyance by him to plaintiff annulled on the ground of fraud, and tenders the consideration paid, but, on plaintiff's acceptance of the offer, withdraws the tender, it is proper to grant a motion to strike so much of the answer as sets up an equitable defense.—*Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928.

Allegations of evidence may be stricken from the answer on motion.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

An answer which consists of denials on information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous.—*First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302.

The remedy for commingling two or more causes of action in the same count is by motion to require the plaintiff to elect which cause he will prosecute and to strike out all matter relating to the other cause of action.—*Fox v. Rogers*, 6 Idaho, 710, 59 Pac. 538.

Where the complaint in an action is stricken from the files, it is the duty of the court to enter a formal judgment dismissing the action, so that plaintiff may be enabled to appeal.—*Havens v. Stewart*, 7 Idaho, 298, 62 Pac. 682.

Where one count of a complaint is based on the theory that the contract in controversy has been rescinded and another count seeks to recover damages for breach of the same contract, the causes of action are inconsistent, and a motion to compel plaintiff to elect is proper.—*Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.

Under R. S. 4168, providing that the complaint must contain a statement of the facts

constituting the cause of action in ordinary and concise language, it is error to strike out certain portions of the complaint set forth more particularly and more in detail than was necessary, where the sustaining of such motion would leave the complaint absolutely meaningless and where defendants were not prejudiced by the unnecessary allegations.—*Porter v. Allen*, 8 Idaho, 358, 69 Pac. 105.

Where a cause of action is stated and the answer pleads the statute of limitations, it is error to enter judgment for defendant on the pleadings even though the complaint shows on its face that the action is barred.—*Che-mung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

Where a plaintiff has two or more distinct and separate reasons for the relief he asks, or where there is some uncertainty as to the grounds of recovery, he may set forth such claim in several distinct counts or statements in his complaint, and it is error to compel plaintiff to elect on which count he will proceed.—*Spotswood v. Morris*, 10 Idaho, 129, 77 Pac. 216.

Where the first cause of action stated is on an express contract and the second on a quantum meruit, and the case is tried on the theory that it is based on an express contract, the failure of the court to sustain, in express terms, defendant's motion to compel plaintiff to elect, is not reversible error.—*Lewis v. Utah Constr. Co.*, 10 Idaho, 214, 77 Pac. 336.

Where the allegations of the complaint are denied and plaintiff offers no proof in support thereof, the court should dismiss plaintiff's complaint.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

A judgment on the pleadings is allowable not because of lack of proof, but because of lack of issue.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

A complaint alleged that there came into the hands of defendant the sum of \$10,000, belonging to plaintiff, that he expended \$6,000 thereof and still has \$4,000, for which judgment was asked. The answer admitted that defendant received \$10,000 and expended \$6,000, alleged that he had expended all of the \$10,000 and \$1,000 in addition thereto, and denied that he had in his hands \$4,000 or any other sum or that there was due to plaintiff that amount or any amount. Held, that a judgment on the pleadings was erroneous.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

Where some parts of the matter attempted to be stricken out from a pleading upon the ground that the same is sham, redundant and irrelevant are intermingled with facts which are relevant and proper, it is not error to overrule said motion, as it is necessary to separate, in the motion, the particular parts claimed to be sham, irrelevant and redundant from those which are relevant and proper.—*Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, 101 Pac. 94.

Where two or more causes of action are improperly united and commingled in one count in the complaint, the proper procedure

to reach the defect is by motion to require the plaintiff to separately state his several causes of action in different counts.—*Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Idaho, 61, 108 Pac. 536.

Where in an action due to a fall on a defective sidewalk, the allegations of the complaint are denied and as a further defense it is alleged that if plaintiff sustained any injury whatever from said fall, the same was caused by her own negligence and carelessness, each of such defenses should be pleaded in separate counts and if not so done, the court should sustain a motion to compel defendants to elect on which defense he would stand or to plead each defense in a separate count.—*Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 110.

Under R. C. 4229, authorizing great liberality in the amendment of pleadings, it was not an abuse of discretion, in an action to enjoin defendant from cutting and removing timber from plaintiff's land, wherein defendant answered, setting forth a written contract for the sale of timber, which contract he claimed covered the land in question, to overrule defendant's motion, based on the ground that it changed the issues, to strike an amended complaint which was filed after the answer, and set forth such contract, and alleged a mutual mistake therein in the description of the land.—*Panhandle Lbr. Co. v. Rancour*, 24 Idaho, 603, 135 Pac. 558.

Editorial Notes.

Answers, sham striking out as such: 72 Am. Dec. 521; 113 Am. St. Rep. 639; 115 Am. St. Rep. 950.

XII. ISSUES, PROOF AND VARIANCE.

Variance between pleading and proof cannot be considered on objection raised by demurrer. See *Bankruptcy*.

Waiver of objections. See post, XIII.

Under R. S. 4225, no variance between the allegations and the proof is deemed to be material unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits.—*Lewis v. Utah Constr. Co.*, 10 Idaho, 214, 77 Pac. 336; *Hawkins v. Pocatello Water Co.*, 3 Idaho, 766, 35 Pac. 711.

The necessity of having various forms of stating the same cause of action is fully obviated by the rule that it is considered no variance from the proof, if the facts show a substantial right to recover under the allegations.—*People v. Slocum*, 1 Idaho, 62.

Where an answer, taken as a whole, puts in issue the making of the contract sued on, defendant's right to cross-examine plaintiff's witness so as to contradict the material allegations of the complaint will not be denied on the ground that the denials in the answer are not sufficiently specific to raise an issue of facts.—*Idaho Merc. Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

A complaint alleged that defendant agreed to pay one S. and his employees a specified sum for carrying the mails, said amount to be

paid out of the moneys which should be received by defendant from the United States; that the work was performed and that S. assigned to plaintiff a part of the money due on said contract; that defendant did receive from the United States certain payments, and thereafter promised to pay the amount due plaintiff; that to enable S. to carry out the contract, plaintiff paid certain expenses. Held, that it was error to exclude evidence showing what plaintiff did in carrying out the contract; that defendant had agreed to pay the amount due plaintiff out of moneys received from the government; that he did receive such moneys; and that the expenses advanced were with the consent of defendant and that he agreed to pay for them.—*Rauh v. Oliver*, 10 Idaho, 3, 77 Pac. 20.

Though the allegations of a complaint be defective or uncertain as to the nature and character of certain work performed for which recovery is sought, if the denials and averments of the answer on that point are sufficient to put that question in issue, evidence is admissible to show the nature and character of the work done.—*Lewis v. Utah Constr. Co.*, 10 Idaho, 214, 77 Pac. 336.

Under R. S. 4217, the plaintiff is deemed to have denied all allegations of new matter contained in the answer, but such statutory denials do not impose upon the plaintiff the necessity of proving any such allegations in the event he desires to rely on or avail himself of any admissions therein contained.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81.

Admissions made in pleadings on which the trial is had are solemn admissions in the case in which they are made, and are not required to be supported by evidence on the part of the adverse party.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81.

It is error to admit evidence in relation to matters which have been stricken from the pleadings.—*Unfried v. Libert*, 20 Idaho, 708, 119 Pac. 885.

Under the provisions of R. C. 4225, no variance between the allegations of the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

Where plaintiffs sue to recover commissions as real estate brokers, if the proof and findings of the court show plaintiffs acted merely as middlemen in bringing the parties together and in no way acted as agents for either, the variance is not fatal, as an amendment could be made to conform to the proofs.—*Clopton v. Meeves*, 24 Idaho, 293, 133 Pac. 907.

Where a complaint alleges a cause of action for the sale and delivery of goods, and the evidence shows a tortious taking and conversion, the action will be treated as in assumpsit and there is no variance between the pleading and proof.—*Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929.

"Variance" means "material difference." It is not a variance when the proof does not show all the points in a declaration. Variance arises when there is a substantial departure from the issue in the evidence adduced, and must be in some matter which in point of law is essential to the charge or claim.—*Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929.

Editorial Notes.

Non est factum, evidence admissible under plea of: 9 Am. Dec. 432.

Payment, admissibility of under the general issue and a general denial: 61 Am. Dec. 59.

XIII. DEFECTS AND OBJECTIONS, WAIVER AND AID BY VERDICT OR JUDGMENT.

Right to raise question of variance for the first time on appeal. See *Appeal and Error*, V, (B).

Necessity of taking exceptions to rulings in lower court. See *Appeal and Error*, V, (C).

Failure to object, effect on appeal. See *Appeal and Error*, V, (B).

Review and raising questions of sufficiency on appeal. See *Appeal and Error*, V, (B).

Where a complaint is ambiguous, unintelligible or uncertain, and the defendant fails to demur thereto on these grounds, he waives them.—*Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322; *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393.

The objection that a complaint does not state facts sufficient to constitute a cause of action is never waived.—*Greathouse v. Heed*, 1 Idaho, 482.

An answer by a party, after the overruling of his demurrer, waives all defects in the complaint, except those which may properly be taken advantage of on a motion in arrest of judgment.—*Pence v. Durbin*, 1 Idaho, 550.

Where defendant demurred to the complaint in the trial court, but afterward waived such demurrer, he cannot have the same considered on appeal.—*Guthrie v. Phelan*, 2 Idaho, 95, 6 Pac. 107.

Where inconsistent averments in a complaint are not questioned by motion or demurrer before trial, objection thereto will be deemed waived if the complaint states a cause of action.—*Burke v. McDonald*, 2 Idaho, 339, 13 Pac. 351.

If, during the trial of a case, the defendant is misled to his prejudice because of variance between the allegations of the complaint and the proofs, he should then and there notify the court of that fact, and ask for proper relief, or he will be deemed to have waived his objection.—*Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322.

If there is a variance between the cause of action, as stated in the complaint, and the proofs, the objection cannot first be made on motion for new trial or on appeal.—*Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322.

Where no motion is made to strike from the complaint allegations which are mere sur-

plusage, objection on that ground is waived. *Co.*, 13 Idaho, 273, 121 Am. St. Rep. 268, 10 L. R. A., N. S., 499, 90 Pac. 341.

A defect in the complaint may be cured by the allegations of the answer.—*State v. Thum*, 6 Idaho, 323, 55 Pac. 358.

Objections to a complaint, "(1) that the action is not brought in the name of the real parties in interest, (2) that the plaintiff has not legal capacity to sue in this action, (3) that several causes of action have been improperly united, (4) that the complaint is ambiguous, unintelligible and uncertain," are grounds of demurrer under R. S. 4174, and if not raised by demurrer, such objections are deemed waived under R. S. 4178.—*Carter v. Wann*, 6 Idaho, 556, 57 Pac. 314.

By filing an amended complaint after a motion to strike out portions of the original complaint is granted, plaintiff does not waive error of the court in sustaining such motion.—*Corcoran v. Sonora Min. etc. Co.*, 8 Idaho, 651, 71 Pac. 127.

Under R. S. 4427, relating to appeals from an order overruling or sustaining a demurrer, the right to have an order sustaining a demurrer reviewed is not waived by filing an amended complaint.—*Corcoran v. Sonora Min. etc. Co.*, 8 Idaho, 651, 71 Pac. 127.

Where a complaint alleges that a transaction occurred "on or about" a specified date, failure to demur is a waiver of any objection thereto on the ground of uncertainty, and evidence to establish the real date will be admissible under the pleadings.—*Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226.

Where, in a suit on a contract, there is a discrepancy between the amount of the judgment and the amount shown to be due by the evidence, and such discrepancy is attributable to a variance between appellant's pleading and proofs and was not brought to the attention of the trial court, the judgment will not be reversed on that account.—*Ford v. Washington etc. Assn.*, 10 Idaho, 30, 109 Am. St. Rep. 192, 76 Pac. 1610.

Where amendments are made in open court over the objection of defendants' counsel and no continuance is asked for nor any showing of surprise, the trial court's action in allowing the amendments will not be disturbed on the ground that such amendments were not served on some of the defendants.—*Richardson v. Ruddy*, 10 Idaho, 151, 77 Pac. 972.

Where by consent of both parties evidence is introduced as to matters not within the issues, and no objection is made thereto prior to findings and judgment, the pleadings will be treated on appeal as though amended to conform to the proof.—*Lindstrom v. Hope Lbr. Co.*, 12 Idaho, 714, 88 Pac. 92.

Where defendant contends that plaintiff is not the owner of the property for which he sues and has no property therein, such objection is not waived by failure to demur on the ground provided by R. S. 4174, "that the plaintiff has not the legal capacity to sue," such statute not being applicable to such case.—*Pratt v. Northern Pacific Express*

Where the complaint fails to allege the place where the injury occurs, the defendant, to avail himself of such defect in the complaint, must rest upon the court's ruling upon the demurrer and refrain from pleading such facts as a defense.—*McClain v. Lewiston etc. Assn.*, 17 Idaho, 63, 25 L. R. A., N. S., 691, 20 Ann. Cas. 60, 104 Pac. 1015.

Where an application is made for an injunction, and the complaint is defectively verified and the defendants thereafter appear and file an answer and join issue, and a hearing is had upon such application without any objection to the sufficiency of the verification of such complaint, the sufficiency of the verification is waived by the conduct of the parties.—*Moore v. Hupp*, 17 Idaho, 232, 105 Pac. 209.

The insufficiency of the allegations of a complaint cannot be urged upon the appeal, where it appears from the record that the defect in the complaint urged is cured by allegations in the answer covering the matter which is claimed should have been contained in the complaint.—*Ludwig v. Ellis*, 22 Idaho, 475, 126 Pac. 769.

Where the complaint is ambiguous, unintelligible or uncertain, and a demurrer is not filed to said complaint setting forth said grounds, or a demurrer is filed and withdrawn and an answer filed, such defect in the complaint is waived, where the objection is not as to a material fact, or want of averment of a fact essential to constitute a cause of action, and is purely one of ambiguity or uncertainty.—*Ludwig v. Ellis*, 22 Idaho, 475, 126 Pac. 769.

Where the record shows that the action was tried upon the theory that all of the material allegations of the complaint and cross-complaints were put in issue, and no evidence was objected to as not within the issues, the sufficiency of the answers cannot be questioned.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

Where the cross-complaint is not answered, and the cross-complainant proceeds to trial without objection, as though an answer had been filed, he thereby waives the answer.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

Editorial Notes.

General verdict, when cures defects in pleading: 1 Am. Dec. 210.

PLEDGES.

See Bailment; Chattel Mortgages.

Attachment of pledged shares of stock. See Attachment and Garnishment, II.

A contract in writing, absolute on its face, but in reality made to transfer personal property to secure a debt, is a pledge.—*Murphy v. Braase*, 3 Idaho, 544, 32 Pac. 208.

Where a party takes any property as a pledge for the security of a debt which through his gross neglect is lost, he must bear such loss and he must exercise ordinary dili-

gence in all cases.—*Murphy v. Bartsch*, 2 Idaho, 636, 23 Pac. 82.

Where a person as security for a debt takes a demand against a third person admitted to be due and there is no agreement on the part of the pledgee to collect such debt and the debt is lost through the subsequent insolvency of the third person, the burden is on the pledgor to show that such debt was lost through the negligence of the pledgee.—*Murphy v. Bartsch*, 2 Idaho, 636, 23 Pac. 82.

Editorial Notes.

Definition and nature of pledges: 49 Am. Dec. 730.

Collateral security, diligence required of one who holds negotiable paper as pledge: 34 Am. Dec. 451.

Care required of pledgees: 83 Am. St. Rep. 392.

POISONS.

Murder committed by means of poison. See *Homicide*, II, VIII, (D).

POLICE POWER.

See *Constitutional Law*, IV.

Police power to regulate as to fish and game. See *Fish and Game*.

Requirement of fences along railroad tracks as exercise of police power. See *Railroads*, VI.

POLYGAMY.

See cross-references under *Mormons*.

Associations teaching. See *Associations*.

POSSESSORY ACTION OR CLAIM.

Possessory action not action for ejectment. See *Ejectment*.

Admissibility of possessory notice or claim in evidence. See *Ejectment*.

Actions for recovery of personal property. See *Claim and Delivery*.

POSTOFFICE.

An action on a postmaster's bond, given to the United States, cannot be maintained by a private person for the negligent loss of money or property by such postmaster, the action being maintainable against the postmaster only.—*Idaho Gold Reduction Co. v. Croghan*, 6 Idaho, 471, 56 Pac. 164.

A postmaster is liable to private persons for money or property lost through the negligence or wrongful act of the postmaster, his assistants or servants.—*Idaho Gold Reduction Co. v. Croghan*, 6 Idaho, 471, 56 Pac. 164.

Editorial Notes.

Liability of postmasters for loss of mail: 42 Am. Dec. 208.

POWERS.

Powers of sale in mortgages. See *Mortgages; Chattel Mortgages*.

Powers to agent or attorney. See *Principal and Agent*.

PRIMARY ELECTION.

Primary election. See *Elections*.

PRINCIPAL AND AGENT.

I. THE RELATION.

II. MUTUAL RIGHTS, DUTIES AND LIABILITIES.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Real estate brokers. See *Brokers*.

Sufficiency of proof of agency to show liability for lien claim. See *Mechanics' Liens*, II.

Contractor as agent for owner. See *Mechanics' Liens*, II.

Insurance agents. See *Insurance*, III.

Indorsement of note payable to agent. See *Bills and Notes*, V, (B).

Location of mining claim by agent. See *Mines and Minerals*, I, (B), 3, (b).

I. THE RELATION.

Where the purchaser of a note, after allowing the payee to collect the same, brought action thereon against the maker, the question of agency was a proper one, under sufficient instructions, to be submitted to the jury.—*Morgan v. Neal*, 7 Idaho, 629, 97 Am. St. Rep. 264, 65 Pac. 66.

Where the purchaser of a note permits the payee thereof to collect the principal and interest and fails to notify the maker thereof of his ownership, he is estopped to deny the agency of the payee after the note is fully paid.—*Morgan v. Neal*, 7 Idaho, 629, 97 Am. St. Rep. 264, 65 Pac. 66.

Where a power of attorney is executed by A. and others to H., appointing H. attorney in fact "in all matters pertaining to or relating to the settlement of my interest, share or portion of the estate of S. . . . that lawfully comes to me as daughter and heir at law. I hereby authorize, empower and delegate to my said attorney full authority to act for me," it creates a fiduciary relation between the attorney and client.—*Ainsworth v. Harding*, 22 Idaho, 645, 128 Pac. 92.

Editorial Notes.

Authority of agent, general rules respecting: 16 Am. St. Rep. 493.

Liability of principal for unauthorized acts of agent: 22 Am. St. Rep. 189; 88 Am. St. Rep. 779.

II. MUTUAL RIGHTS, DUTIES AND LIABILITIES.

(No paragraphs.)

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

In an action for damages for failure to deliver fifty thousand pounds of alfalfa seed in accordance with an alleged written contract, the evidence showed that defendant's agent in the presence of plaintiff telephoned to defendant for authority to make the sale. Defendant testified that he told his agent in the telephone conversation not to make the

sale, that he did not have that much to sell, that he had only five thousand pounds and that he gave the agent authority to sell only that amount. This testimony was corroborated by defendant's bookkeeper and stenographer, who were present in defendant's office at the time of the telephone communication. The telephone operator testified that he heard part of the conversation over the line, that defendant had authorized a sale of fifty thousand pounds. Plaintiff testified as to what the agent said in such conversation, which tended to show that defendant had given him authority to sell the larger amount. The check sent by plaintiff to defendant in partial payment of the seed bought was immediately returned with a letter stating that defendant's agent had been told not to make the sale. Held, that there was no substantial conflict in the evidence and that it was insufficient to show the authority of defendant's agent to make the contract in question.—*Wilson v. Vogeler*, 10 Idaho, 599, 79 Pac. 508.

In an action for goods sold and delivered, the evidence showed that for a period of nearly four years after the date of an alleged sale of defendant's business to his agent W., the business continued to be advertised without any direction on defendant's part to discontinue said advertisement, that W. continued to run the business after the sale as he had before, having entire charge thereof, that goods were ordered, shipped and received in defendant's name with his knowledge, that there was no apparent change in the ownership of the business, that in consideration of the sale to him W. gave a promissory note, on which nothing had been paid. Defendant admitted that before the sale he had purchased goods from plaintiff, but failed to notify them of such sale. Held, that defendant was liable for the goods purchased in his name by W.—*Feldman v. Shea*, 6 Idaho, 717, 59 Pac. 537.

Where an agent makes a contract in his own name and conceals the fact of his agency, he may be treated as the principal by the party with whom he deals, and may be held liable on the contract to the same extent as if he were in fact the principal in interest.—*Whitney v. Woodmansee*, 15 Idaho, 735, 99 Pac. 968.

"Ratification" signifies the adoption or acceptance by the principal of that which was done for and in the name of the principal by an agent acting as agent, and not as the principal.—*Linn v. Alameda Min. & Mill Co.*, 17 Idaho, 45, 104 Pac. 668.

Where plaintiff was employed by M. to do certain work and perform certain services, and the labor was performed for M. as principal, and the credit was extended to M., no question of agency arises, and the law of ratification is not involved in an action against a third party for the collection of such claim for services.—*Linn v. Alameda Min. & Mill Co.*, 17 Idaho, 45, 104 Pac. 668.

The payment by a mining company of certain claims for labor performed on or in con-

nection with its property under employment of a third person does not amount to an adoption or ratification or recognition of the claims of other laborers for services performed for such third person under similar circumstances and at the same time as the claim paid by the company, where the services had all been performed and the labor done prior to such payment.—*Linn v. Alameda Min. & Mill Co.*, 17 Idaho, 45, 104 Pac. 668.

Where the question of the authority of an agent to make a contract is in issue, all evidence which tends in any way to show such authority or the limitation upon such authority is admissible.—*Keane v. Pittsburg Lead Mining Co.*, 17 Idaho, 179, 105 Pac. 60.

Where the question of the authority and action of an agent is involved, it is not error to permit the principal to state whether or not he authorized the act in question.—*Rosnagle v. Armstrong*, 17 Idaho, 246, 105 Pac. 216.

A ratification cannot take place without full knowledge of all the material facts; and, where a person assumes to act as agent in making a contract, and the person with whom such contract is made proceeds to a performance of the same under protest from the principal, and during such performance is advised and notified by the principal that such person is not in his employ, and that no one had authority to employ him, and that he does not desire or need his services, the mere fact that after the cessation of such labor the principal pays to such person an amount which he deems such service is worth will not alone amount to a ratification of the contract made by the person assuming to act as such agent, and will not support an action based upon such contract, upon the ground that the contract was ratified.—*Findlay v. Hildenbrand*, 17 Idaho, 403, 105 Pac. 790.

Whether an assistant general manager of a lumber company, in charge of the operation of the company's plant, has authority to make a contract with an injured employee in compromise of damages claimed by such employee is immaterial if such company ratifies the acts of the assistant general manager in making such compromise agreement, and makes payments in accordance with the terms thereof.—*Heath v. Potlatch Lumber Co.*, 18 Idaho, 42, 108 Pac. 343.

Editorial Notes.

Ratification of unauthorized execution of written instrument, what amounts to: 27 Am. Dec. 343.

Ratification, effect of: 5 Am. St. Rep. 109.

Undisclosed principals, suits by on contracts made with their agents: 55 Am. St. Rep. 916.

Ratification of what contracts not possible: 59 Am. St. Rep. 638.

Liability of principal on negotiable paper executed by an agent: 21 L. R. A., N. S., 1046.

PRINCIPAL AND SURETY.

See Bail and Recognizance; Bonds.

Collateral promises of guaranty. See Guaranty.

— Of indemnity. See Indemnity.

Contracts of suretyship by particular classes of persons. See Infants; Partnership; Corporations.

Particular forms of suretyship. See Bail; Bonds.

For performance of particular acts in judicial proceedings. See Arrest; Attachment; Injunction; Claim and Delivery, etc.

On attachment bonds. See Attachment and Garnishment.

Liability of surety on bond of tax collector. See Taxation, VIII, (A).

Where, in an undertaking for two thousand dollars, the figures "\$1000," entered between the signature and seal of one of the sureties, were erased, there was no fraud upon any other surety who signed the undertaking after the erasure.—*Dangel v. Levy*, 1 Idaho, 722.

A surety, guarantor or indorser of a promissory note is deemed to contract that the principal maker is in every way competent to contract in the way he has done.—*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339.

A material alteration of a promissory note made without the knowledge or consent of a surety on such note renders the note void as to such surety.—*Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949.

Where a promissory note has been materially altered without the knowledge or consent of a surety thereon, a verbal promise by such surety without consideration to pay the note will not support an action against the surety.—*Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949.

In a suit on a note by the payee against the maker and a surety, the surety pleaded want of consideration, that he signed the note as surety, and that an extension of time had been granted to the payee without the surety's knowledge or consent, thus releasing the surety. Held, that the surety should have been permitted to prove such defense.—*Maydole v. Peterson*, 7 Idaho, 502, 63 Pac. 1048.

In a suit against the maker of a note and his surety thereon, the surety answered alleging that certain property of principal had been attached in proceedings to collect the debt and that the plaintiff voluntarily released and discharged the attachment and by reason thereof failed to collect such debt from the principal. Held, that the answer was demurrable for failure to show that the property attached was of any value and consequently, that the surety suffered any loss by reason of such release of the attachment.—*First Nat. Bank v. Watt*, 7 Idaho, 510, 64 Pac. 223.

In a suit against the maker of a note and his surety thereon, the surety answered alleging that certain property of the principal had been attached in proceedings to collect the debt and that the plaintiff voluntarily released and discharged the attachment and by reason thereof failed to collect such debt from the principal. Held, that the answer was not specifically certain, in that it failed

to allege that the release of said attachment was not made by or with the consent of defendant.—*First Nat. Bank v. Watt*, 7 Idaho, 510, 64 Pac. 223.

Where the creditor attaches property of the principal debtor and releases the attachment without the consent of the sureties, either express or implied, such release of the attachment will release the sureties to the extent of the value of the security acquired by reason of such attachment.—*First Nat. Bank v. Watt*, 7 Idaho, 510, 64 Pac. 223.

The principal debtor gave a joint note executed by himself and sureties. Afterward the sureties executed another note for the same debt. Thereafter the principal debtor gave another note with a different surety for the same debt. Judgment was obtained on the last note and on failure to collect the note, suit was instituted on the note executed by the sureties. Held, that the suit and judgment on the last note made did not release the original sureties, since the execution of the separate note by them severed their obligation from that of the principal debtor.—*First Nat. Bank v. Watt*, 7 Idaho, 510, 64 Pac. 223.

Where a surety on a building contract assumes the same on default of the principal, it assumes responsibility for all defects in work or materials, or damages occasioned by the default, and is entitled to the benefits of the contract from the time of the default of the principal, together with any sum that may be due the principal at the time the default is declared.—*American Bonding Co. v. Regents of University*, 11 Idaho, 163, 81 Pac. 604.

A contractor's bond provided that if the principal should fail to comply with all the conditions of the contract to such an extent that the same should become forfeited, the surety should have the right and privilege to assume said contract and to sublet or complete the same, whichever the surety might elect to do, provided it is done in accordance with said contract. Held, that the surety may elect to complete the contract, stand on the terms of the bond, or voluntarily pay any damages resulting from the principal's default.—*American Bonding Co. v. Regents of University*, 11 Idaho, 163, 81 Pac. 604.

In an action by a county against a sheriff and his surety, the surety is not entitled to have the amount represented by warrants previously issued to the sheriff credited on the judgment against the sheriff, unless such warrants are produced and surrendered at the trial or it appears that the sheriff is still the owner of such warrants.—*Bingham County v. Fidelity etc. Co.*, 13 Idaho, 34, 88 Pac. 829.

Where S. subscribes his name to a contract executed by B. and K., and no mention of S.'s name appears in the body of the contract, and no reference to his liability is made in the contract, S. will be held to have signed as surety.—*Sanders v. Keller*, 18 Idaho, 590, 111 Pac. 350.

Where a building contract was indefinite or uncertain in certain particulars, and the principal obligor placed his own construction and interpretation on the contract, and erected the

building in accordance therewith, and there does not appear to have been any fraud or collusion between the contractor and the owner of the building, the surety will be bound by the construction placed on the contract by his principal.—*Sanders v. Keller*, 18 Idaho, 590, 111 Pac. 350.

Where it appears that defendant surety company received a sum of money from the debtor of its principal for the purpose of applying the same on the debts owed by the principal at the time of the receipt of the money, the creditor for whose benefit the money was so paid may maintain an action against the surety company as an original promisor.—*Beymer v. Monarch*, 19 Idaho, 304, 113 Pac. 739.

Editorial Notes.

Release of surety by indulgence of principal: 30 Am. Dec. 257.

Release of principal, when may not relieve surety: 73 Am. Dec. 297.

Release of surety, what operates as: 28 Am. St. Rep. 691.

Amendment of claim or pleading as discharge of sureties on bonds given to dissolve attachments or on bail bonds in civil actions: 42 L. R. A., N. S., 484.

PRISONS.

Pardon and parole. See Pardon.

Under R. S. 8539, requiring the sheriff to receive all persons committed to jail by competent authority and feed and clothe them, for which he shall be allowed a reasonable compensation, and act of February 9, 1899, section 2 (Laws 1899, p. 118), providing that the sheriff shall be allowed actual and necessary expense for the care of prisoners, an individual furnishing the sheriff with such board and supplies must look to the sheriff for his pay and not the county.—*Mombert v. Bannock County*, 9 Idaho, 470, 75 Pac. 239.

Under Laws, pages 405, 406, providing that county officers shall at the end of each quarter file with the clerk of the county commissioners a sworn statement, with proper vouchers of all expenses incurred and fees received to be audited by the board, a sheriff must file such vouchers before his claim for the board and support of prisoners can be allowed.—*Mombert v. Bannock County*, 9 Idaho, 470, 75 Pac. 239.

Under Const., article 10, section 5, giving the state prison commissioners the control, direction and management of the penitentiaries of the state, a meeting of the state prison commissioners can be lawfully held by a majority of the board without giving notice to a member who is not within the state at the time of calling and holding the meeting.—*Ackley v. Perrin*, 10 Idaho, 531, 79 Pac. 192.

Under R. S. 14 providing that "wherever joint authority is given to three or more public officers or other persons to act, the majority may act unless it is otherwise expressed in the act giving the authority," a majority of the state board of prison commissioners created by Const., article 10, section 5, may

transact the business of the board.—*Ackley v. Perrin*, 10 Idaho, 531, 79 Pac. 192.

PRIVATE ROADS.

Existence of as breach of covenant. See Covenants.

R. S. 933, providing for laying out private or by roads is not unconstitutional as an attempt to take private property for private use, since such road, when opened, can be used for any purpose to which it is adapted by the general public or by any individual thereof. *Latah County v. Peterson*, 3 Idaho, 398, 29 Pac. 1089.

Under R. S. 933, providing that private roads may be opened for the convenience of one or more residents of a road district in the same manner as public roads are opened, it is not necessary that the petition for such road shall be signed by ten resident taxpayers, but such road may be established on the petition of the one party who is the beneficiary of such road.—*Russell v. Alt*, 12 Idaho, 789, 88 Pac. 416.

R. S. 923, requiring the board of county commissioners to appoint three viewers in proceedings to open a private road, does not require the appointment of the county surveyor as one of the viewers, and when he is appointed, he must take the statutory oath the same as the other viewers.—*Latah County v. Hasfurther*, 12 Idaho, 797, 88 Pac. 433.

Where the record in a proceeding to establish a road shows that all the viewers did not take the statutory oath, the proceeding is irregular and voidable and should be reversed on appeal.—*Latah County v. Hasfurther*, 12 Idaho, 797, 88 Pac. 433.

Under Laws 1899, page 273, section 4, an appeal from a decision of the district court reversing the order of the board of county commissioners establishing a private road is in time if taken within ninety days from the judgment, and such appeals are not governed by Laws 1899, page 249, requiring appeals to be taken within five days.—*Latah County v. Hasfurther*, 12 Idaho, 797, 88 Pac. 433.

Where a land owner is dissatisfied with the award for damages or with any of the proceedings of the board of county commissioners with reference to the laying out of a private road, he may appeal to the district court, where the case will be heard de novo, or he may refuse to accept the award and thus compel condemnation proceedings.—*Latah County v. Hasfurther*, 12 Idaho, 797, 88 Pac. 433.

PRIZE LOGS.

See Logs and Logging.

PROBATE COURTS AND JUDGES.

See Judges.

Right of probate court to retax costs. See Costs, VI. Civil jurisdiction and proceedings. See Justices of the Peace.

Jurisdiction in general. See Courts, V.

Legislative discretion to regulate appeals from. See Appeal and Error, III, (A).

Appeal from order refusing to admit will to probate. See Wills, V.

PROCEEDS.

Meaning of. See Contracts, II, (C).

PROCESS.

- I. NATURE, ISSUANCE, REQUISITES AND VALIDITY.
- II. SERVICE.
- III. DEFECTS, OBJECTIONS AND AMENDMENT.

See Obstructing Justice.

Process against and service of process on particular classes of persons. See Infants; Corporations, etc.

Process for arrest or other special remedies in actions. See Arrest; Attachment; and other specific heads.

Appearance as waiver of objections to process or service thereof. See Appearance.

For attendance of jurors or witnesses. See Jury; Witnesses.

In criminal proceedings. See Criminal Law; Arrest; Extradition.

Writs in general. See Appeal and Error; Certiorari; Habeas Corpus; Mandamus; Prohibition; Quo Warranto; Injunction.

Designation of agent for service of process in case of foreign railroad corporation. See Railroads, II. Constitutionality of law authorizing constructive service of summons in suits to determine water rights. See Constitutional Law, II.

Appearance as waiver of irregularity or insufficiency. See Appearance.

In divorce actions. See Divorce, IV, (B).

Service of process on Indian reservation. See Indians.

In actions against corporations. See Corporations, VII, (F); XII, (I).

Order quashing summons not appealable. See Appeal and Error, XII, (E).

In Justices' courts. See Justices of the Peace.

Amendment of return. See Justices of the Peace, IV, V, (A).

Issuing summons on Sunday. See Sunday.

I. NATURE, ISSUANCE, REQUISITES AND VALIDITY.

A summons to A, B, C, or D is a nullity, inasmuch as it is in the alternative, and not to all nor to any one of them.—*Alexander v. Leland*, 1 Idaho, 425.

R. S. 1879, providing that "process" includes all writs, warrants, etc., does not name all the papers which may be denominated "process."—*Blumaur-Frank Drug Co. v. Branstetter*, 4 Idaho, 557, 95 Am. St. Rep. 151, 43 Pac. 575.

The original summons in an action stated "that by reason of the aforesaid acts the plaintiffs have been damaged in the sum of \$12,000." The alias summons stated "that by reason of the aforesaid acts of the defendants, as such mining partners, the plaintiffs have been damaged in the sum of \$12,000." Held, that the alias summons, though not in the same words as the original, was in the same form as required by R. S. 4141.—*Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323.

A summons stating the amount of damages sustained by plaintiffs by reason of certain acts of defendants and concluding with the

notification that unless defendant appeared and answered within ten days after service, etc., the plaintiffs will apply for the relief demanded in the complaint, sufficiently complies with R. S. 4140 though it does not state the amount demanded.—*Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323.

R. S. 4145, authorizing a probate judge to order publication of a summons in a case pending in the district court, is not in conflict with Const., article 5, section 13, which provides that the legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government.—*McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

Under R. S. 4140, as amended by Laws 1907, page 530, a summons requiring defendant to appear and answer within ten days if served within the county where issued, should be quashed on motion.—*Ridenbaugh v. Sandlin*, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827.

R. S. 4140, subdivision 5, requires the summons in certain actions to contain "a notice that unless defendant so appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint." Held, that, where a copy of the complaint was served with the summons, the summons reciting "you are notified that unless you appear and answer . . . plaintiff will take judgment against you for dissolution of the bonds of matrimony between you and the plaintiff herein," was sufficient.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

The omission of the seal of the court on an alias summons is not fatal, but is a mere irregularity and does not render the process void.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Where a summons or an alias summons is published by order of the court, and the name of the attorney for the plaintiff as indorsed on the summons does not appear in the summons as published, the omission is not fatal to the jurisdiction and does not invalidate the service by publication, the provision of subdivision 5, section 4140, requiring that "the name of plaintiff's attorney, with his post-office address or residence must be indorsed on the summons," being directory and not mandatory.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

Editorial Notes.

Efficacy of process issued without official seal required by law: Ann. Cas. 1912D, 786; 20 L. R. A. 424.

II. SERVICE.

A nonresident in attendance upon a term of the United States circuit court for the district of Idaho as plaintiff in a suit brought by him against G., a resident of Idaho, was not exempt from service of a summons in an action commenced by G. against him in a district court of the state of Idaho.—*Guynn v. McDanel*, 4 Idaho, 605, 95 Am. St. Rep. 158, 43 Pac. 74.

Where there is a material variance between the cause of action stated in the complaint and that stated in the affidavit for publication of summons, an order for publication of the summons and publication of summons thereon are void and do not give the absent defendant constructive notice of the pendency of the action.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

Where proof of the service of summons by publication is not filed till after judgment, the judgment is void.—*Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.

The mere fact that a defendant has knowledge of a suit pending against him is not sufficient to give the court jurisdiction.—*Strode v. Strode*, 6 Idaho, 67, 96 Am. St. Rep. 249, 52 Pac. 161.

Where the affidavit for service of summons by publication is shown to be false in that the plaintiff knew defendant's address to be other than that stated in the affidavit, the order of publication thereon and subsequent judgment in the action are void.—*Strode v. Strode*, 6 Idaho, 67, 96 Am. St. Rep. 249, 52 Pac. 161.

Where, after an order of publication was made, the summons was personally served on defendant outside the state, the service did not become complete until the expiration of the time prescribed in the order of publication, and where such order prescribed one month for such publication, defendant, served out of the state, has one month and forty days to appear and answer.—*Bowen v. Harper*, 6 Idaho, 654, 59 Pac. 179.

Publication of a summons under proper order directing such publication was made in a weekly newspaper for five consecutive weeks, the first issue being on July 18th and the last on August 15th. Held, that this was a publication each week for at least one month as required by R. S. 4146, though the time of publication was less than a calendar month.—*Foreman v. Bright*, 8 Idaho, 467, 69 Pac. 473.

Under R. S. 4145, providing when service by publication may be made, an affidavit for service of summons by publication which states that "due and diligent search has been made for defendants and that they cannot be found within the state," without showing what plaintiff has done to obtain personal service or find the defendants, is insufficient. *Mills v. Smiley*, 9 Idaho, 325, 76 Pac. 783.

Under R. S. 4145, providing when service by publication may be made, an affidavit for service of summons by publication should show whether defendant is a nonresident of the state or conceals himself to avoid service, or, if a resident of the state, that he is absent therefrom and cannot be found; and it should further show defendant's last place of residence in the state or that such place of residence is unknown and cannot be ascertained. *Mills v. Smiley* (on rehearing), 9 Idaho, 325, 76 Pac. 786.

The return of the sheriff made seven months prior to application for an order of publication, which return showed that he was unable to find the defendants, cannot be considered

in connection with the affidavit for publication.—*Mills v. Smiley* (on rehearing), 9 Idaho, 325, 76 Pac. 786.

Before constructive service of summons can be legally made, necessity therefor must be shown.—*Bear Lake County v. Budge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

Where an affidavit for the publication of summons shows that defendant resides outside of the state, that he has resided outside of the state for a long time prior thereto, that he is not within the state and resides in another state named, it is unnecessary to make further showing as to diligence in endeavoring to find defendant within the state. *McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

Where in the publication of a summons the word "filed" was omitted from the following "you are hereby notified and required to appear in the above-entitled cause and answer the complaint of the plaintiff filed herein," such omission was not fatal to the jurisdiction where the copy of the summons and complaint mailed to defendant were correct.—*McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

Where the order for publication of summons directed that publication be made "at least once a week for one full month," and the summons is published in a weekly newspaper for five consecutive weeks, the first publication being made on September 16th and the last publication on October 14th following, this was in compliance with R. S. 4146, which requires that if such publication is made in a weekly newspaper, it must not be less than a month.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Summons was issued on August 29th, 1904, and filed on return the following day with the statement that the sheriff was unable to find defendant within his county. On affidavit, an order for publication was made September 7th. The affidavit of mailing the summons was made on the 9th and filed on the 10th day of September. An alias summons, being a copy of the original, was issued on the 10th and published. Held, that the mailing of a copy of the original was a substantial compliance with R. S. 4146, which requires a copy of the summons to be mailed to the defendant.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

The affidavit of the publisher of a newspaper showed that a summons was published for sixty days "commencing March 29th, 1899, and ending May 27th, both days inclusive, and in every issue of said paper during said time, to wit": March 29th, 30th, 31st, April 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th, 27th, 28th, 29th, 30th; May 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th and 27th, said paper having been published daily except Mondays. Held, sufficient to show a publication for two months.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

The affidavit of publication of summons should be construed to support the validity of the judgment if it can be reasonably so construed.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

An order for service of summons by publication in a California court required the summons to be published for two months and not less than once a week during said time. The first publication was made on March 29, 1899, and the last on May 28, 1899. Held, that the publication was made for two months. *Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Laws 1903, page 333, requiring that state and county printing, when done by a weekly newspaper, shall be done only by newspapers that have been published for fifty-two consecutive weeks prior to such publication, is not applicable in cases where the publication of summons is made under an order of court.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Where a judgment recites that the summons has been published for sixty days and the proof of publication clearly shows that it was published for two months, such recitation in the judgment does not negative the fact that it was published for two months, as the actual time of publication of summons controls and not the formal proof thereof.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Editorial Notes.

Defects in the service of process: 61 Am. St. Rep. 485.

Civil process, exemption from service of: 76 Am. St. Rep. 534.

Requirement of certain number of days' publication as meaning continuous publication: Ann. Cas. 1912B, 1273.

Sending newspaper containing advertisement as valid service of notice: Ann. Cas. 1912D, 1000.

Constitutionality of substituted service in action by leaving summons at defendant's residence, or last or usual place of abode, etc.: Ann. Cas. 1913A, 1188.

Recital in judgment or decree that service has been had on defendant as supplying failure of record to show proper service: Ann. Cas. 1913B, 27.

When service by mail is complete: 18 Ann. Cas. 286.

What constitutes personal service: 16 L. R. A. 200.

Effect of omission of statement that owner is unknown in affidavit for service by publication in proceedings in rem to enforce tax: 36 L. R. A., N. S., 1064.

Character of inquiry as to whereabouts of party necessary to sustain constructive service of process: 37 L. R. A., N. S., 206.

Exemption of nonresident party from service of civil process while in state in connection with case: 42 L. R. A., N. S., 1101.

III. DEFECTS, OBJECTIONS AND AMENDMENT.

Defects or failure to issue as ground for dissolution of attachment. See Attachment and Garnishment, VII.

Where a summons is irregular or defective, the remedy, if any, is by application to the trial court, to quash or set it aside.—*Parke v. Wardner*, 2 Idaho, 285, 13 Pac. 172.

Defendant moved to quash the return upon the summons and in support of the motion filed his affidavit that no copy of the complaint had been served with summons. The sheriff's return showed that he served a copy of the complaint with the copy of the summons. On affidavit in plaintiff's behalf that a paper purporting to be a copy of the complaint was served with the summons, an order was made directing defendant to present the said paper to the court. This the defendant refused to do. Held, that the trial court properly refused to quash the return to the summons.—*Forsman v. Bright*, 8 Idaho, 467, 69 Pac. 473.

Where motions to quash a summons and an alias summons and the return thereon are sustained and plaintiff excepts to such rulings, he does not waive his objections by obtaining an order for a new summons.—*Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323.

Where some of the defendants are nonresidents of the state and it is shown that a copy of the summons and complaint has not been served on them pursuant to R. S. 4146, the summons is properly quashed as to such defendants.—*Hill v. Morgan*, 9 Idaho, 718, 76 Pac. 323.

Though a summons failed to follow the statutory language prescribed by R. S. 4140, subdivision 3, it was held that defendant was neither deceived nor misled thereby as to the time in which he was required to answer and therefore that the summons was sufficient.—*McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

Where plaintiff's true name was "H. B. McKnight," and it appeared correctly in the summons and complaint and in the copies thereof mailed to defendant, but in the summons as published the name appeared as "H. B. Knight," the mistake was not fatal and a judgment by default entered thereon was not void.—*McKnight v. Grant*, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989.

A summons once returned and filed with the papers in the case becomes a file of the court and cannot be withdrawn without an order of court, but the court may order a summons already issued and on file to be withdrawn for service, or order an entirely new summons, as justice and the exigencies of the case may demand.—*Ridenbaugh v. Sandlin*, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827.

Under R. S. 3862, the court may order a defective summons to be amended so as to conform to the statute, and after amendment

may order it withdrawn from the files and served.—*Ridenbaugh v. Sandlin*, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827.

Jurisdiction to enter a judgment against a defaulting defendant rests upon the fact of service itself, and the return of service is simply the evidence of the jurisdictional fact, and is subject to amendment so as to make it conform to the facts.—*Call v. Rocky Mountain Bell Tel. Co.*, 16 Idaho, 551, 133 Am. St. Rep. 135, 102 Pac. 146.

Where the notice contained in a summons is given under the provisions of R. C. 4140, subdivision 4, instead of under the provisions of subdivision 5 of that section, and notifies the defendant that, if it fails to appear, the plaintiff "will take judgment for the sum demanded in the complaint," naming it, instead of notifying the defendant that the "plaintiff will apply to the court for the relief demanded in the complaint," and the plaintiff applies to the court for the relief demanded instead of taking a default judgment by the clerk, the error or mistake is not fatal to the jurisdiction of the court.—*Snake River Valley Irr. Dist. v. Stevens*, 18 Idaho, 541, 110 Pac. 1038.

Editorial Notes.

Right to amend jurisdictional writ made returnable at unauthorized time: *Ann. Cas.* 1913A, 556.

PROFITS.

Prospective profits. See *Damages*, VI.

PROHIBITION.

I. NATURE AND GROUNDS.

II. JURISDICTION, PROCEEDINGS AND RELIEF.

Preventive relief by injunction. See *Injunction*.

I. NATURE AND GROUNDS.

The writ of prohibition is an extraordinary remedy, granted, not as a matter of right, but in the sound discretion of the court, to restrain an inferior tribunal from exceeding its jurisdiction and it should not issue in doubtful cases, nor in any case where a plain, speedy and adequate remedy in the ordinary course of law exists.—*Bellevue Water Co. v. Stockslager*, 4 Idaho, 636, 43 Pac. 568; *Rust v. Stewart*, 7 Idaho, 558, 64 Pac. 222.

Writ of prohibition does not lie to arrest the action of a district court upon a mere question of pleadings.—*Willman v. District Court*, 4 Idaho, 11, 35 Pac. 692.

The writ of prohibition will not issue where the act to be restrained has already been performed, even where the act has been performed during the pendency of the application for the writ, for the reason that the writ would be without any effect whatever.—*Bellevue Water Co. v. Stockslager*, 4 Idaho, 636, 43 Pac. 568.

A writ of prohibition to prevent proceedings before a district court or the judge thereof will not be issued in any case, unless

it is so clear that such judge or court is acting beyond its jurisdiction that there can be no reasonable doubt of the fact.—*In re Miller*, 4 Idaho, 711, 43 Pac. 870.

Where it is apparent that the action of the district court in hearing and determining de novo an appeal from an order of the board of county commissioners, sitting as a board of water commissioners, can be reviewed by the supreme court in the ordinary course of law, a writ of prohibition will not lie.—*Rust v. Stewart*, 7 Idaho, 558, 64 Pac. 222.

The writ of prohibition will not issue to restrain the county auditor from his clerical duty to place on the official ballot the names of candidates properly certified to him by the Secretary of State.—*Miller v. Davenport*, 8 Idaho, 593, 70 Pac. 610.

The writ of prohibition will lie to restrain the action of a ministerial officer when it appears that such action is illegal and beyond his jurisdiction.—*Williams v. Lewis*, 6 Idaho, 184, 54 Pac. 619.

The writ of prohibition authorized by Const., article 5, section 9, and R. S. 4994 et seq. is the common-law writ of prohibition.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

A writ of prohibition will not lie to restrain a purely ministerial act.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

A writ of prohibition against city authorities will be denied where it is shown they are acting within the authority given by statute.—*Denning v. City of Moscow*, 11 Idaho, 415, 83 Pac. 339.

Const., article 4, section 18, provides that the governor, Secretary of State and attorney general shall constitute a board of examiners with power to examine all claims against the state, except salaries or compensation of officers fixed by law. Laws 1905, page 366, section 3, provides that such board may approve or disapprove any claim or demand against the state, except salaries and compensation of officers fixed by law. Held, that in refusing to allow a claim of the state auditor for compensation for clerk hire, the board acted within its jurisdiction and that therefore a writ of prohibition commanding the board to allow such claim would not lie.—*Bragaw v. Gooding*, 14 Idaho, 288, 94 Pac. 438.

A writ of prohibition may issue even though there be a remedy by appeal, where such appeal, by reason of the length of time before it can be heard, is not a plain, speedy and adequate remedy in the ordinary course of law.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

Though prohibition will not lie against the governor to restrain him from performing an executive act, the fact that the governor is a member of the state board of land commissioners does not exempt the board from the operation of the writ; the board being a distinct constitutional body, and the governor as a member thereof not acting as chief executive.—*Balderston v. Brady*, 17 Idaho, 567, 107 Pac. 493.

Where the proposed or contemplated action of the state land board involves the exercise of judgment and discretion vested in the board, the courts will not attempt to control or direct such discretion, or in any manner interfere with their action, so long as it is exercised within the scope of their authority. Where, on the other hand, the proposed or contemplated action is without the authority of law, or has no legal sanction, the courts may interfere and interrupt their action, and declare the law on the subject, and point out to them the legal scope within which their judgment and discretion is to be exercised.—*Balderston v. Brady*, 17 Idaho, 567, 107 Pac. 493.

Where application is made for a writ prohibiting a trial judge from proceeding in a condemnation suit to appoint commissioners, and upon hearing said application is not contested as a proper remedy, this court will not pass upon the question as to whether or not prohibition is a proper remedy.—*McLean v. District Court*, 24 Idaho, 441, 134 Pac. 536.

Editorial Notes.

Writ of prohibition, when lies: 12 Am. Dec. 604; 18 Am. Dec. 238; 111 Am. St. Rep. 929.

Prohibition as process for review and correction of errors: Ann. Cas. 1913D, 593.

Prohibition to restrain ministerial acts: 1 Ann. Cas. 713.

II. JURISDICTION, PROCEEDINGS AND RELIEF.

On application for a writ of prohibition, the petition must show all the facts necessary to entitle petitioner to the writ.—*In re Francis*, 7 Idaho, 98, 60 Pac. 561.

Under R. S. 4955, an application for a writ of prohibition against the state board of examiners should be entitled in the name of the applicant as plaintiff against A, B and C, constituting and comprising the board of examiners.—*Bragaw v. Gooding*, 14 Idaho, 288, 94 Pac. 438.

One who seeks relief by writ of prohibition need not necessarily be named as a party in the original action, but he may make himself a party by showing that he has an interest in the controversy and by moving to set aside a judgment or order made without or in excess of jurisdiction, and if his motion is denied and an appeal would not be a plain, speedy and adequate remedy, he may have the writ of prohibition issued to protect his rights.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

Under R. S. 4994, declaring that a writ of prohibition is the counterpart of a writ of mandate, the same degree of strictness in regard to parties is not maintained in prohibition proceedings as prevails in applications for a writ of mandate.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

Under supreme court rule 67, requiring that service of a copy of the affidavit and a no-

tice of the time of hearing the application for a writ of prohibition must be made on the parties in interest, a creditor attacking the appointment of a receiver of a private corporation need not serve all the other creditors with notice, especially where the record does not disclose the names of all the other creditors.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

PROPERTY.

Shares of stock personal property. See Corporations, IV, (A).

Under R. S. 2825, an easement of a right of way for a mining ditch through lands of another is real estate.—*Welch v. Garrett*, 5 Idaho, 639, 51 Pac. 405.

Possessory rights to ditch and water rights are real estate.—*Ada County etc. Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 40 L. B. A. 485, 51 Pac. 990.

A hotel building affixed to land and conveyed with the land as real estate cannot thereafter, by mere agreement of the parties, become personal property, and legally encumbered by a chattel mortgage without severance from the land.—*Beeler v. C. C. Mercantile Co.*, 8 Idaho, 644, 60 L. B. A. 283, 1 Ann. Cas. 310, 70 Pac. 943.

Under the laws of this state a water right is real estate.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81.

A legal and valid conveyance of real estate, whether it be by tax deed or deed from the original owner, carries with it a prima facie right of possession, and where the property is vacant and unoccupied, the constructive possession of the premises is deemed to be in the holder of the title.—*Steltz v. Morgan*, 16 Idaho, 368, 101 Pac. 1057.

Where the right of ownership and the possession of personal property is in issue, it is proper to admit evidence tending to show that the plaintiff purchased the property in dispute, and the location of the property, and the possession of such property, and the continued possession, and the right to the possession of the same.—*McMahon v. Cooper*, 23 Idaho, 413, 130 Pac. 456.

PROSTITUTION.

See Disorderly House.

Charge of, not actionable per se. See Libel and Slander, I.

PROTEST.

See Bills and Notes, VI.

PUBLICATION.

Of summons. See Process.

Of libel. See Slander and Libel.

PUBLIC ADMINISTRATORS.

See Executors and Administrators, II.

PUBLIC LANDS.**I. GOVERNMENT OWNERSHIP.****II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.**

- (A) Surveys.
- (B) Entries, Sales and Possessory Rights.
 - 1. Rights Acquired by Occupancy or Entry.
 - 2. Homestead.
 - 3. Desert Lands.
 - 4. Townsites.
 - 5. Abandonment or Relinquishment.
- (C) Donations and Bounty Lands.
- (D) Reservations to United States.
- (E) School and University Lands.
- (F) Swamp and Overflowed Lands.
- (G) Grants to States for Internal Improvements.
- (H) Grants in Aid of Railroads.
- (I) Proceedings in Land Office.
- (J) Patents.
- (K) Remedies in Case of Fraud, Mistake, or Trust.
- (L) Relief of Bona Fide Settlers and Claimants.
- (M) Conveyances, Contracts and Exemptions.

III. DISPOSAL OF LANDS OF THE STATE.

When lands become assessable and taxation of improvements thereon. See *Taxation*, III, (C), (D).
 Mining locations on public lands. See *Mines and Minerals*.

Easements over as breach of covenant. See *Covenants*.

Indian lands in general. See *Indians*.

Insurance of buildings on homestead. See *Insurance*, X.

I. GOVERNMENT OWNERSHIP.

It is no defense to an action or prosecution for trespass committed upon public land, that such land is the property of the United States.—*People v. Maxon*, 1 Idaho, 330.

The police power of the state extends over public lands of the United States within the state.—*Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995.

The power of Congress over the public lands is plenary so long as title thereto remains in the government and no right of property therein has vested in another.—*Oregon etc. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

The acts of Congress relative to the public lands, providing for entries thereof, and authorizing easements and rights of way thereover, must be construed together and in the light of the conditions of the country as they existed when the several acts were passed, as well as to the purposes declared by the acts, and force and effect should be given to the provisions of each and every act in so far as it is possible to do so.—*Minidoka etc. R. Co. v. Weymouth*, 19 Idaho, 234, 113 Pac. 455.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.**(A) SURVEYS.**

See *Boundaries*.

Of school lands. See *post*, II, (E).

In hearing evidence as to the correctness of a resurvey of lands and the establishment of a true boundary line between adjoining owners, the inquiry should be directed to the question as to where the line of original survey was actually established on the ground, without reference to the question as to whether or not the original survey was correct or incorrect.—*Richardson v. Bohnney*, 19 Idaho, 369, 114 Pac. 42.

(B) ENTRIES, SALES AND POSSESSORY RIGHTS.**1. Rights Acquired by Occupancy or Entry.**

Possessory rights in mining claims. See *Mines and Minerals*, I, (B), 4.

Possessory action is not ejectment. See *Ejectment*.
 Admissibility of possessory notice or claim. See *Ejectment*.

If the public lands of the United States are claimed by virtue of the possession alone, those claiming are bound to take such precautionary steps as will advise all the world of their rights.—*Forsythe v. Richardson*, 1 Idaho, 459.

With the public lands, which are not mineral lands, the title, as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him; but this possession must be actual and not constructive, and the right it confers must be distinguished from the right given by the possessory act of the state.—*Feirbaugh v. Masterson*, 1 Idaho, 135.

The rule in relation to possessory rights is that prior possession is prima facie evidence of title.—*Feirbaugh v. Masterson*, 1 Idaho, 135.

Where a person who has gone into actual possession of public lands with intention to enter the same under the public land laws and has pointed out his lines to one subsequently claiming the same land, such actual notice is sufficient to bind the subsequent locator.—*Feirbaugh v. Masterson*, 1 Idaho, 135.

Where a person goes into actual possession of public lands, he is entitled to a reasonable length of time in which to inclose them, so as to be able to hold them as against one subsequently claiming possession thereof.—*Feirbaugh v. Masterson*, 1 Idaho, 135.

Where a party locates and claims for agricultural purposes a tract of public land, and resides upon, cultivates and incloses a portion of the same, having artificial monuments sufficient to indicate generally the boundaries of the entire claim, this would substantially comply with the rule requiring actual possession, and such possession of a part would draw after it the possession of the whole.—*Feirbaugh v. Masterson*, 1 Idaho, 135.

The fact that a party has pastured his cattle on the public lands of the United States without claim of title, or connecting himself therewith under some of the possessory acts, will not give him a legal or equi-

table right therein, since act of Congress, February 25, 1885 (23 U. S. Stats. at Large, p. 321), is expressly contrary to the assertion of such right.—*McGinnis v. Friedman*, 2 Idaho, 393, 17 Pac. 635.

A railroad company cannot enter upon and take possession of the possessory claim of one claiming rights thereto under the homestead or pre-emption laws without due compensation.—*Washington etc. R. R. Co. v. Osborne*, 2 Idaho, 557, 21 Pac. 421.

A citizen, who settles on unsurveyed United States lands and has peaceable possession thereof and constructs a ditch across the land, secures thereby a right of way for such ditch across the land, though the land when subsequently surveyed is found to be on an odd-numbered section and hence within the grant of the United States to the N. P. Railroad Company.—*Childs v. Sharai*, 8 Idaho, 378, 69 Pac. 111.

An action to quiet title to land which is part of the public domain which is unsurveyed cannot be maintained, in the absence of a showing that the plaintiff or his predecessor in interest had ever filed a possessory claim to the property or had ever lived upon or occupied it.—*Branca v. Ferrin*, 10 Idaho, 239, 77 Pac. 636.

R. S. 4538 provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. R. S. 16, 2825, recognize possessory rights to land as real property. Held, that one who enters land, claiming title thereto under a patent from the government, and improves, cultivates and exercises complete dominion over it for seventeen years, can maintain an action to quiet title, although his government title thereto should entirely fail.—*Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784.

An entry on public lands in the proper land office does not create any vested right in the entryman as against the United States, and Congress may by subsequent legislation dispose of the land to anyone, notwithstanding such entry.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

Though no vested right is acquired as against the United States in public lands until all the prerequisites for acquirement of title have been complied with, parties may acquire as against each other a preference right to take title to the public lands, and in all such cases the first in time is first in right.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

The mere occupancy of public lands by a settler gives him no vested rights therein as against the United States, and consequently none as against a purchaser from it.—*Le Fevre v. Amonson*, 11 Idaho, 45, 81 Pac. 71.

Editorial Notes.

Pre-emption, right of before payment: 23 Am. Dec. 492.

Title of purchaser to public lands before patent: 50 Am. Dec. 434.

Pre-emptors of public lands, rights of: 87 Am. Dec. 132.

2. Homestead.

See Adverse Possession.

Pendency of homestead contest, effect as to adverse possession of claimant to. See Adverse Possession.

Homestead entry as private property within meaning of statute requiring railroad company to fence track. See Railroads, VI.

Heirs of deceased entryman are tenants in common. See Tenancy in Common, I.

Insurance of buildings on homestead. See Insurance, X.

Under the homestead act, title to land entered cannot inure to the benefit of any person other than the entryman, nor can trust relations legally exist between the entryman and any other person in respect to the land entered.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361.

It is the practice of the land department of the government to issue patents to the "heirs or devisees," in case of the death of the entryman, leaving no widow or minor children, and to leave it to the courts to determine who are the devisees or heirs of the deceased, and the extent of their respective interests.—*Hays v. Wyatt*, 19 Idaho, 544, 34 L. R. A., N. S., 397, 115 Pac. 13.

Where a deceased homestead entryman had complied with the homestead law in every respect at the date of his death, had given notice of the time of making his final proof, and all that remained for him to do was to present his final proof, he was then entitled to a patent, and the right to a patent once vested is treated by the general government when dealing with the public lands as equivalent to a patent issued.—*Hays v. Wyatt*, 19 Idaho, 544, 34 L. R. A., N. S., 397, 115 Pac. 13.

C. made a homestead entry on certain land in 1902, and erected a cabin thereon, and on February 15, 1906, K. entered upon said land and took possession of said cabin, with the intention of contesting C.'s entry and entering said land as a homestead, and thereafter, in May, 1906, filed a contest in the United States land office, and in July, 1906, a large amount of the timber standing on said land was destroyed by a fire, alleged to have been negligently set by the railway company, and thereafter, on the 18th day of December, 1907, said contest was decided in K.'s favor, and on January 14, 1908, K. entered said land as a homestead. Held that, as K. had not made her homestead entry prior to the date of the destruction of said timber by fire, she was not the owner of said timber, and could not maintain an action to recover the value of the timber so destroyed.—*King v. Great Northern Ry. Co.*, 20 Idaho, 687, 119 Pac. 709.

Editorial Notes.

Succession to rights of homesteader, on his death before perfection of title: Ann. Cas. 1912C, 696.

3. Desert Lands.

Patent to heirs. See post, II, (J).

It was not the intention of Congress, in enacting desert land laws, to permit desert entries to be made by persons who were to be dummies for others, or by persons who had no intention to reclaim the land, but relinquish the same to others, to be held temporarily merely for the purposes of speculation. *Altschul v. Rogers*, 22 Idaho, 512, 126 Pac. 1048.

4. Townsites.

Dedication of water to occupants of townsite. See Dedication.

Abandonment by occupant of lot. See post, II, (B), 5.

An action under the townsite act to settle the rights of the parties to enter lots in such townsite assimilates more to a suit in equity to quiet title than to any other form of action.—*Forsythe v. Richardson*, 1 Idaho, 459.

In an action to settle rights under the townsite act, the mayor of the city is not a necessary party.—*Forsythe v. Richardson*, 1 Idaho, 459.

An applicant for a mayor's deed for lots in a townsite, entered under the act of Congress, must set forth in his application all the facts necessary to entitle him to such deed, as required by the territorial law.—*Greathouse v. Heed*, 1 Idaho, 482.

In order to entitle a person to a deed for lots or lands in the city of Lewiston from the mayor of the city under the townsite act, he must be an occupant thereof, and the occupancy must consist of actual residence thereon according to its legal subdivision into lots, blocks, etc., an inclosure of the subdivision or a part thereof, or some improvement thereon at the time of his application for the deed.—*Thompson v. Holbrook*, 1 Idaho, 609.

An occupancy of one legal subdivision by the claimant of lands of the city of Lewiston under the townsite act does not draw to it another legal subdivision, though contiguous to or immediately adjoining it.—*Thompson v. Holbrook*, 1 Idaho, 609.

A townsite occupant must comply with the townsite act of Congress in regard to occupation, possession and improvement and make application for a deed in accordance with the law and pay the price for the land, in order to acquire a legal title to the land.—*Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697.

Where a ditch is constructed on public land and thereafter such land is entered as a townsite and streets are laid out crossing the ditch, and afterward it becomes necessary to build a bridge across the ditch for the reasonable use of the street by the public, it is the duty of the owners of the ditch to construct the bridge at their own expense, since the ditch and right of way therefor were acquired, constructed and held subject to the restriction that such ditch must be so used as not to injure the public.—*Boise City v. Boise City Rapid Transit Co.*, 6 Idaho, 779, 59 Pac. 716.

Where a ditch is constructed on public land and thereafter such land is entered as a townsite and streets are laid out crossing the ditch and a bridge at one of such crossings becomes dangerous and unsafe, the maintenance of such bridge in such condition is a public nuisance, abatable by the city; and on the owner's failure to repair the bridge after due notice, he may be charged with the expense thereof by the city.—*Boise City v. Boise City Rapid Trans. Co.*, 6 Idaho, 779, 59 Pac. 716.

Where a townsite situated on the public domain is entered pursuant to United States R. S. 2387, the interests which the occupants possessed previous to the entry, either in the land occupied by them or in the rights of way over adjoining streets, were secured by such entry and could not be interfered with by any subsequent action of the surveyor in platting the townsite.—*Scully v. Squier*, 13 Idaho, 417, 90 Pac. 573.

The city of Lewiston was entered by the mayor thereof in trust for the several use and benefit of the occupants thereof according to their respective interests pursuant to United States R. S. 2387. Under Laws 1872-73, page 16, a surveyor was employed to survey and plat the lands in said town, and was directed by said act to so arrange and adjust the plat as to conform to the conditions of the improvements and occupation of the lots, and the mayor was directed thereafter to make and deliver to the bona fide occupants of said lands good and sufficient deeds of conveyance in fee simple to the lots claimed by them according to their respective rights. Held, that the surveyor had no right or authority to cut off a portion of lots covered by improvements and possessed and occupied, and include the portion so cut off in a street. *Scully v. Squier*, 13 Idaho, 417, 90 Pac. 573.

Under United States R. S. 2387, providing for the entry of townsites on the public lands, by the town authorities or by the county judge in trust for the several use and benefit of the occupants thereof, the trust provided for exists for the benefit of the occupants as individuals and also collectively as a community, and the title to the occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time such entry is made, while the title to the balance of the lots is taken in trust for the occupants of the townsite collectively.—*Scully v. Squier*, 13 Idaho, 417, 90 Pac. 573.

On November 23, 1867, the mayor of Boise City made his application to enter the townsite of Boise City according to the official plat filed with the application, and thereafter, on May 2, 1870, a patent to said townsite was issued to the mayor by the United States in accordance with U. S. Rev. Stats. 2387. Held, that, as the patent related back to the date of entry, the city council had the right to dedicate streets to public use at any time after the entry.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

"Entry" under U. S. Rev. Stats. 2387, providing that corporate authorities may enter certain public lands for townsite purposes, means the filing of the application by the

proper officer with the register of the land office and proof of the performance of the conditions in respect to the settlement and occupancy of the townsite.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

Under the townsite law, U. S. Rev. Stats. 2387, the lots and blocks in the plat filed with the townsite application are for the several use and benefit of the occupants of said town according to their respective interests, and the streets and alleys are dedicated to the use of the public generally, and therefore all settlers and squatters upon such land before entry, who have in no manner connected their claims and settlements with the government under any of its land laws, are supposed to take whatever interests they may have in accordance with the plat and adjust their holdings to such plat.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

On November 23, 1867, the mayor of Boise City made his application to enter the townsite of Boise City according to the official plat filed with the application, and thereafter on May 2, 1870, a patent to said townsite was issued by the United States to the mayor in accordance with U. S. Rev. Stats. 2387. Held, that the patent related back to the date of entry.—*Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148.

It was the purpose of the townsite law to pass title to bona fide occupants and claimants of lots for use and occupancy and not for speculative purposes and that if any surplus land should be left it should inure to the benefit of the city.—*Hodges v. Lemp*, 24 Idaho, 399, 135 Pac. 250.

In an action by the mayor of Boise City for the cancellation of certain deeds issued by one of plaintiff's predecessors in office and praying for a decree adjudging the title thereof to be in plaintiff for the benefit of the inhabitants of said city, held that the complaint states a cause of action which was not barred by the statute of limitations.—*Hodges v. Lemp*, 24 Idaho, 399, 135 Pac. 250.

Under the townsite act, U. S. Rev. Stats. 2387 (U. S. Comp. Stats. 1901, p. 1457, 6 Fed. St. Ann. 344), and the act of the territorial legislature of Idaho, providing for the disposition of the townsite of Boise City pursuant to the provisions of said U. S. Rev. Stats. 2387 (Special and Local Laws of Idaho, p. 30), the mayor of Boise City took title to the townsite of Boise City by patent from the United States in trust for all the individual occupants of the townsite who made claims to the respective lots or tracts occupied by them and it became his duty to convey the title held by him to the respective occupants or claimants who, in compliance with the statute, showed themselves entitled thereto; and such tracts or parcels of the townsite as were not claimed by individual occupants were held by him in trust for the community in its collective capacity.—*Hodges v. Lemp*, 24 Idaho, 399, 135 Pac. 250.

In an action by the mayor of Boise City for the cancellation of certain deeds issued by one of plaintiff's predecessors in office and praying for a decree adjudging the title

thereof to be in plaintiff for the benefit of the inhabitants of said city, held, that the facts alleged did not show that plaintiff was estopped to maintain the action or that there was any laches.—*Hodges v. Lemp*, 24 Idaho, 399, 135 Pac. 250.

5. Abandonment or Relinquishment.

Effect of relinquishment by heir prior to issuance of patent to heirs of deceased entryman. See Descent and Distribution.

Where a person has at one time been the occupant of a lot within the meaning of the law relating to townsites, by erecting an inclosure around it, but before his application for a deed has suffered such inclosure to be destroyed by freshets or taken away by tenants, so as to leave the lot open to the public, he shall be deemed to have abandoned it, and another person may enter thereon and become an occupant, so as to entitle him to a deed from the mayor.—*Thompson v. Holbrook*, 1 Idaho, 609.

Evidence in an action of ejectment held to show that plaintiff, a townsite occupant, had abandoned the land in dispute.—*Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697.

Where an occupant of the public domain, which land is thereafter platted under the "townsite act" of Congress, approved March 2, 1867, shows his intention to conform to the plat by making application for a deed to a portion of the premises occupied and no application is made by such occupant or his grantee for the land in controversy, and such grantee afterward repeatedly promises the city to remove certain improvements and fences placed thereon, the city claiming the land in controversy as a street, and it is shown that neither the occupant nor his grantees ever paid taxes thereon and that it was never listed for taxation, an abandonment of the land is sufficiently shown.—*Boise City v. Flanagan*, 6 Idaho, 149, 53 Pac. 453.

(C) DONATIONS AND BOUNTY LANDS.

(No paragraphs.)

(D) RESERVATIONS TO UNITED STATES.

Under act of Congress of August 30, 1890 (26 Stats. at Large, 391; 6 Fed. Stats. Ann. 508) providing that "in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the land in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States," the word "constructed" has a general reference and application to ditches and canals constructed by authority of the United States without reference to the time of such construction.—*Green v. Wilhite*, 14 Idaho, 238, 93 Pac. 971.

(E) SCHOOL AND UNIVERSITY LANDS.

Under act of Congress, February 18, 1881, and the amendment thereof, granting to the

territory seventy-two sections of land for university purposes, and under admission act of Idaho (Act July 3, 1890, 26 Stat. 216, c. 656), sections 5, 8, and Const., article 9, section 4, providing that the public school fund of the state shall consist of the proceeds of such lands as have been granted by the general government and known as school lands, and lands acquired by gift from other persons, the interest on the proceeds of such lands cannot be used for the erection or equipment of university buildings or buildings connected therewith, but can be used only in the support of said university, in the payment of current expenses and charges for conducting the same.—*Roach v. Gooding*, 11 Idaho, 244, 81 Pac. 642.

The state board of land commissioners has no power or authority conferred upon it, either by the constitution or statute of this state, to relinquish the state's right or title to sections 16 and 36, granted by the general government for common school purposes, and any action taken by the board, or under its direction or authority, attempting to relinquish or waive the state's right to such lands, is void.—*Balderston v. Brady*, 17 Idaho, 567, 107 Pac. 493.

Whether a school section has been "lost," so far as the state is concerned, is to be determined by the government in every case where the state makes application for lieu lands to reimburse for such "loss."—*Balderston v. Brady*, 18 Idaho, 238, 108 Pac. 742.

Where the government has caused a survey to be made, and by such survey the identity of a school section is established, a lessee of the state has such an interest and equity in the property as to enable it to maintain an action to enjoin and restrain trespassers from entering upon the property and committing waste, and this is especially true where such trespasser in no way connects himself with the government or the title to the land or shows that he has any right to acquire title to the land under any of the laws of the United States.—*Azcuenaga Bros. etc. Land Co. v. Corta*, 19 Idaho, 537, 115 Pac. 18.

Where the government has caused school lands to be surveyed, the evidence of identification is competent and sufficient even though the survey has not been formally approved and accepted.—*Azcuenaga Bros. etc. Land Co. v. Corta*, 19 Idaho, 537, 115 Pac. 18.

Senate Bill No. 47, approved February 8, 1911, which authorizes the state land board to relinquish to the general government unsurveyed school sections in exchange for surveyed, unreserved, and unappropriated public lands within the limits of the state "equivalent thereto in area and value, in legal subdivisions and as contiguous as may be to the section in lieu of which the same is taken," is not, in contemplation of the constitution, a "sale" of school lands which would subject the transfer to the constitutional limitation that such lands must be sold for not less than \$10 per acre, and that a sale or disposal of the land must be made at public auction, but is rather a simple exchange of lands, whereby the state would be enabled to procure an equivalent area of land to which it could ob-

tain immediate possession.—*Rogers v. Hawley*, 19 Idaho, 751, 115 Pac. 687.

Senate Bill No. 47, approved February 8, 1911, entitled "An act prescribing certain powers and duties of the state board of land commissioners in relation to the location, protection, relinquishment, selection and exchange with the national government of certain lands granted to the state by the general government and filling the quantity of the grant, and adopting, ratifying and approving the action of the state board of land commissioners in relinquishing certain state lands and in selecting indemnity lands in lieu thereof," is not in violation of either section 7 or 8 of article 9 of the constitution, but is a valid and constitutional exercise of the authority conferred on the legislature to regulate and prescribe by law the manner and method by which the land board may exercise the constitutional powers conferred on such board, whereby it is given the "direction, control and disposition of the public lands of the state," and is commanded "to provide for the location, protection, sale or rental of all the lands heretofore or which may hereafter be granted to the state."—*Rogers v. Hawley*, 19 Idaho, 751, 115 Pac. 687.

The legislature, acting for and on behalf of the state as the representative of the people, has the right to approve and ratify the action of the state land board in a transaction wherein the legislature would have had, in the first place, the power to authorize the doing of the thing which the land board has done, and which it is proposed to ratify, adopt, and confirm, even though the act when performed by the land board was without and in excess of the powers then conferred on such board.—*Rogers v. Hawley*, 19 Idaho, 751, 115 Pac. 687.

(F) SWAMP AND OVERFLOWED LANDS.

(No paragraphs.)

(G) GRANTS TO STATES FOR INTERNAL IMPROVEMENTS.

(No paragraphs.)

(H) GRANTS IN AID OF RAILROADS.

Limitation of action by railroad to quiet title over.

See Limitation of Actions, I, (B).

Control and use of station grounds on grant abutting on navigable lake. See Carriers, I.

The lands granted to the Northern Pacific Railway by act of Congress, July 2, 1864, are not within the operation of the act of March 3, 1875, granting the right of way to railroads, etc.—*Washington etc. Ry. Co. v. Northern Pac. Ry. Co.*, 2 Idaho, 550, 21 Pac. 658.

Act of Congress, July 2, 1864, section 3, granting to the Northern Pacific Railway Company every alternate odd-numbered non-mineral section of land, etc., was a grant in praesenti and vested in the company an equity in the lands, subject to be defeated, however, on noncompliance with the terms of the grant.—*Washington etc. Ry. Co. v. Northern Pac. Ry. Co.*, 2 Idaho, 550, 21 Pac. 658.

The grant of a railroad right of way over public lands under act of Congress, March 3, 1875, is a separate and distinct matter from the grant of lands to aid in the construction of such road.—*Hamilton v. Spokane etc. R. R. Co.*, 3 Idaho, 164, 28 Pac. 408.

On November 7, 1888, W. filed a declaratory statement under the pre-emption laws for certain government land and relinquished the same, October 5, 1889, on which day D. made homestead entry of the same tract and on April 29, 1890, made cash entry of said tract. On September 3, 1890, D. conveyed by warranty deed a portion of said tract to plaintiff. Defendant railroad company claimed a right of way over plaintiff's said tract by reason of compliance with act of Congress, March 3, 1875, and the approval of the profile map of its road by the Secretary of the Interior, July 11, 1889. Plaintiff claimed damages by reason of defendant grading its roadbed through his said tract. Held, that W.'s pre-emption filing did not exempt said land from the grant of the right of way to the railroad company, as he relinquished the same before perfecting the title; that there was no privity of estate between W. and D; and that the patent to D. would take effect by relation, October 5, 1889, the date of D.'s homestead entry and would not antedate the grant to the defendant.—*Hamilton v. Spokane etc. R. R. Co.*, 3 Idaho, 164, 28 Pac. 408.

R. S. 4538 provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. R. S. 16, 2825, recognize possessory rights to land as real property. Held, that a railroad company may maintain an action to quiet title to a right of way granted to it over the public lands.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

Since a railway company cannot by its grant convey any part of its right of way over public lands in any manner that would sever the right of possession from the franchise to operate and maintain a railway line thereon, it cannot do so by any act which might be construed into a recognition of adverse possession.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

A grant of a right of way over public lands by Congress to a railroad company becomes definitely fixed by the actual construction of the road as effectually as it could be by filing a map of its location in accordance with the requirements of the granting act.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

Act of Congress, March 3, 1873, granted a right of way over public lands to the Utah & N. Ry. Company and required the company to file a map of its route with the Secretary of the Interior. The road was actually constructed within the time prescribed by the act. Held, that settlers on such public lands were not prejudiced by failure to file the map, since the road as actually constructed was sufficient notice as to the exact location of the right of way.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

Where a railroad company purchased a right of way over public lands from occupants thereof prior to entry thereof by such occupants and subsequently the railroad company by grant from Congress obtained title to a wider right of way than that deeded by such occupants, the company was not estopped to deny their title to the increased area obtained by the grant.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

The grant by Congress of a right of way to a railroad company is not an absolute fee for all purposes, but is in the nature of a conditional grant, and limited to use and occupation by the grantee and its successors and assigns for the purposes of maintaining and operating a railroad.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

The grant by Congress to the Utah and N. Railway Company, under act of March 3, 1873, of a right of way one hundred feet on each side of the central line of its track was a conclusive determination of the reasonable and necessary quantity of land to be dedicated to such use, and carried with it the right of possession in the grantee therein named and its successor and the question of the reasonable amount necessary for such use is not open to inquiry by the courts.—*Oregon etc. R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

When a railroad company files with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization and thereafter selects land for its right of way and station grounds under act of Congress March 3, 1875, granting to railroad companies rights of way through public lands, and files its maps and plats as required by said act, the grant becomes a fixity, not only as to the grantee, but as to the thing granted.—*Oregon etc. R. R. Co. v. Stalker* (on rehearing), 14 Idaho, 371, 94 Pac. 59.

Act of Congress, March 3, 1875 (18 U. S. Stats. at Large, p. 482; U. S. Comp. Stats. 1901, p. 1568), granting to railroad companies rights of way through public lands and also granting station grounds adjacent to the right of way, contains no requirements for the filing of maps and plats designating the station grounds selected, and all proceedings relative thereto are governed by the rules and regulations of the Interior Department.—*Oregon etc. R. R. Co. v. Stalker* (on rehearing), 14 Idaho, 371, 94 Pac. 59.

Where the Secretary of the Interior approves maps for station grounds under act of Congress, March 3, 1875 (18 U. S. Stats. at Large, p. 482), granting to railroad companies rights of way and station grounds on public lands, that was an adjudication of the fact that such station grounds were necessary for the purposes mentioned, and the grant attached, and relates back to the time of filing the maps.—*Oregon etc. R. R. Co. v. Stalker* (on rehearing), 14 Idaho, 371, 94 Pac. 59.

Under act of Congress, March 3, 1875 (18 U. S. Stats. at Large, p. 482), granting to railroad companies rights of way and station grounds on public lands, the estate

acquired by the railroad company is more than a mere easement and amounts to a base, qualified or limited fee, and so long as the company maintains its line of road and its station where said station ground is located, it has the right to the exclusive possession of the same.—*Oregon etc. R. Co. v. Stalker* (on rehearing), 14 Idaho, 371, 94 Pac. 59.

A railroad company in compliance with act of Congress, March 3, 1875, section 1 (18 U. S. Stats. at Large, p. 482), filed in the local land office a profile map of its right of way and station grounds on September 12, 1888. The profile map was approved by the Secretary of the Interior on December 15, 1888, and thereafter returned to the register of the local land office. The register and receiver of the local land office neglected to note the depot and station grounds on the plats in the land office, and the plat filed was lost or destroyed. On October 18, 1888, an entryman entered and filed on the government subdivision on which such station grounds were located, under the pre-emption laws, and thereafter on April 24, 1899, made final proof and patent issued to him on August 4, 1891, for the entire legal subdivision, including the station grounds. The company failed for more than seventeen years to take possession of the property claimed for station grounds. Held, that the rights of the railroad company as grantee of such station grounds could not be defeated by the failure of the officers of the local land office to make the proper notations on the plat filed and therefore the railroad company could maintain ejectment against the entryman.—*Oregon etc. R. Co. v. Stalker* (on rehearing), 14 Idaho, 371, 94 Pac. 59, overruling 14 Idaho, 362, 94 Pac. 56.

Under act of Congress, July 2, 1864, chapter 217 (13 Stat. 365), and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof, there was granted to the Northern Pacific Railroad Company certain lands along its right of way upon the conditions mentioned in said act. The line of said railroad company was definitely fixed opposite the land in controversy, and a plat thereof filed in the office of the commissioner of the general land office on December 12, 1882. Thereafter the said railroad company complied with the terms and conditions of said acts, and said railroad and telegraph line were constructed and accepted by the President of the United States. Held, that said land was within the limits of said grant and became a part thereof, and under a mortgage foreclosure sale, said land was sold and conveyed, with other land, to the appellant herein, the Northern Pacific Railway Company; that said grant to the Northern Pacific Railroad Company was in praesenti; and that the legal title to said land passed to said railroad company upon its filing its map of definite location and thereafter complying with the terms and conditions of said grant.—*Northern Pac. Ry. Co. v. Pyle*, 19 Idaho, 3, 112 Pac. 678.

Lands withdrawn under the act of Congress of June 17, 1902, known as the reclamation act (Act June 17, 1902, c. 1093, 32 Stat. 388 [U. S. Comp. Stats. Supp. 1909, p. 596]), for the purposes of irrigation under an irri-

gation system constructed by the government, and which lands are subject to homestead entry under the act of Congress, are "public lands" within the meaning of the act of March 3, 1875, known as the railroad right of way act (Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. Stats. 1901, p. 1568]), and are subject to railroad rights of way for any railroad company which complies with the provisions of the act.—*Minidoka & S. W. R. Co. v. Weymouth*, 19 Idaho, 234, 113 Pac. 455.

The act of Congress of August 30, 1890 (Act August 30, 1890, c. 837, 26 Stat. 391 [U. S. Comp. Stats. 1901, p. 1570]), reserving to the government an easement for ditches and canals over all lands west of the one hundredth meridian, which might thereafter be patented by the government to any entryman, does not apply to railroad rights of way acquired under the provisions of the act of March 3, 1875 (Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. Stats. 1901, p. 1568]).—*Minidoka & S. W. R. Co. v. Weymouth*, 19 Idaho, 234, 113 Pac. 455.

The act of Congress of August 30, 1890 (Act Aug. 3, 1890, c. 837, 26 Stat. 391 [U. S. Comp. Stats. 1901, p. 1570]), which refers to lands "taken up," and land "entries," and lands "patented," does not refer to or include easements and rights of way granted for specific purposes, where the fee does not pass, and where no patents are issued, and where the amount of land covered by the easement is not limited in area or extent.—*Minidoka & S. W. R. Co. v. Weymouth*, 19 Idaho, 234, 113 Pac. 455.

(I) PROCEEDINGS IN LAND OFFICE.

Where a pre-emption entryman obtained his final receipt or certificate from the government illegally or fraudulently, the fact that he has sold or conveyed the land so entered to an innocent purchaser will not prevent the commissioner of the general land office from canceling the entry.—*Jones v. Meyers*, 3 Idaho, 51, 35 Am. St. Rep. 259, 26 Pac. 215; *Sorrenson v. Meyers*, 3 Idaho, 61, 26 Pac. 218.

The commissioner of the United States general land office has authority to cancel the final receipt or certificate issued to a pre-emption entryman, at any time before patent issues to such entryman, upon a proper showing, made in accordance with the rules and regulations of the land department, that said entryman obtained such certificate illegally or fraudulently.—*Jones v. Meyers*, 3 Idaho, 51, 35 Am. St. Rep. 259, 26 Pac. 215; *Sorrenson v. Meyers*, 3 Idaho, 61, 26 Pac. 218.

The state courts have no jurisdiction to determine the character of public lands as to being mineral or nonmineral while the claims of the respective parties are pending before the general land department.—*Le Fevre v. Amonson*, 11 Idaho, 45, 81 Pac. 71.

The decision of the land department as to the mineral or nonmineral character of public lands is conclusive on the courts.—*Le Fevre v. Amonson*, 11 Idaho, 45, 81 Pac. 71.

Where the Secretary of the Interior in a contest proceeding between W. and the pro-

bate judge on behalf of townsite claimants, under United States B. S. 2387, has found as a fact that W.'s claim to the land in the controversy was prior to that of the townsite claimants, the facts found will be held conclusive on our courts and the court will not find that W. holds the legal title as trustee for the townsite claimants.—*White v. Whitcomb*, 13 Idaho, 490, 90 Pac. 1080.

In an action where two persons claim the title and right of possession of certain lands under entries made under the laws of the United States, one a mining location, the other a homestead entry, and the contest is solely between the two parties, and the government is not a party, and the evidence shows that a certificate has been issued upon the homestead entry, and it is further shown that said entry was recognized as legal by the Secretary of the Interior in a contest between the respective parties, this court will follow such decision, and hold, as between the parties to the suit, that the homestead entryman has the right to protect his possession and occupancy of the land as against trespass upon the same.—*Fall Creek Sheep Co. v. Walton*, 24 Idaho, 760, 136 Pac. 438.

Where a homestead entry has been made and the land office has issued a certificate to the applicant and such entry is recognized as valid by the government, such certificate, under the provisions of R. C. 5983, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein, but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.—*Fall Creek Sheep Co. v. Walton*, 24 Idaho, 760, 136 Pac. 438.

Editorial Notes.

Land offices, action of, when conclusive: 20 Am. Dec. 273.

Determination of mineral or nonmineral character of public land: Ann. Cas. 1912A, 1302.

Cancellation of entry of public lands, right of entrymen to notice and hearing before: 75 Am. St. Rep. 880.

(J) PATENTS.

To townsites. See ante, II, (B), 4.

To mining claims. See Mines and Minerals.

Where the government issues a patent to fractional lots abutting on a meandered stream and the patentee, under his patent, takes possession of lands between the meander line and the stream and thereby gains a larger acreage than he paid for, he is entitled to be protected in his title and possession against all third persons not claiming title under the government.—*Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784.

The conclusive presumption attending all United States patents for lands does not prevail in a case where the land department has no jurisdiction to convey said land.—*Oregon*

etc. R. Co. v. Stalker (on rehearing), 14 Idaho, 371, 94 Pac. 59.

Where A's homestead entry was made on the 14th of January, 1908, after a successful contest against a prior entryman, upon the issuance of the patent, the right of the contestant, under the doctrine of relation, only relates back to the date of her entry, and not to the date when the contest was begun.—*King v. Great Northern R. Co.*, 20 Idaho, 687, 119 Pac. 709.

Grants by the United States of its public land bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. *Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47, reversed by 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.

Where an entryman under the desert land laws of the United States dies before completing his improvements and reclaiming the land, and his administratrix thereafter completes the work required, reclaims the land, and pays the balance of the purchase price, and a patent is issued to the heirs of the deceased entryman, the heirs take by purchase and not by inheritance, and land so acquired is not subject to administration by the probate court as a part of the estate of the deceased.—*Powell v. Powell*, 22 Idaho, 531, 126 Pac. 1058.

Where a patent issues from the United States "to the heirs" of a deceased person, and there is no act of Congress specifying or designating who shall be deemed heirs, in such case resort must be had to the laws of the state where the land is situated for the purpose of determining who were the heirs of the deceased.—*Powell v. Powell*, 22 Idaho, 531, 126 Pac. 1058.

Editorial Notes.

Patent to public lands, effect of, and how may be attacked: 2 Am. Dec. 568; 12 Am. Dec. 564.

(K) REMEDIES IN CASES OF FRAUD, MISTAKE, OR TRUST.

In an action to have the patentee of lands taken under the Carey act declared trustee for the plaintiff, the complaint should show that plaintiff was entitled to the patent, that he performed all the acts required by law to entitle him thereto, that in consequence of an erroneous ruling of the land department on questions of law the patent was denied him, from which ruling he had no appeal or other legal remedy, and if prevented from performing any of the acts requisite to obtain a patent by reason of an error of law committed by the land board, he must allege that he was ready, willing and able to perform such acts and would have done so had he not been prevented by such erroneous ruling of the board.—*Pierson v. Loveland*, 16 Idaho, 628, 102 Pac. 340.

(L) RELIEF OF BONA FIDE SETTLERS AND CLAIMANTS.

Where a person has in good faith entered upon public lands of the United States and

made valuable improvements thereon, he is entitled to remove such improvements after reasonable notice upon his entry being defeated.—*Bingham Co. etc. Assn. v. Rogers*, 7 Idaho, 63, 59 Pac. 931.

A contract entered into by trespassers upon and occupants of lands within an Indian reservation before the same is thrown open for entry, that such persons will make homestead entry when the land is open for entry, and after acquiring title will make conveyances so as to adjust their title to the lands occupied before entry, is against public policy and void.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361.

Where a party enters upon public lands in good faith, and makes, or causes to be made, valuable improvements or grows crops thereon, although his right to make entry of such lands or purchase the same under the land laws may be defeated, he should be allowed to remove such improvements or crops within a reasonable time after notice that his title is not good, or that he is not the owner of the lands on which he has entered.—*Richardson v. Bohney*, 19 Idaho, 369, 114 Pac. 42.

(M) CONVEYANCES, CONTRACTS AND EXEMPTIONS.

Acquisition of desert lands by "dummy" entrymen.
See ante, II, (B), 3.

Improvements upon the public lands of the United States are lawful subjects of sale and are a sufficient consideration to support promissory notes and other contracts.—*Caldwell v. Buddy*, 2 Idaho, 1, 1 Pac. 339.

Where a person purchases the right of possession of persons, who had located and settled upon agricultural land belonging to the United States, and thereafter resided constantly upon the same and was qualified in law to initiate proceedings to obtain title thereto, such person is the owner of the land against all persons except the United States.—*Washington etc. R. R. Co. v. Osborne*, 2 Idaho, 557, 21 Pac. 421.

Where H. borrowed money to pay the government price for public land on which he resided and gave K. a mortgage therefor, the mortgage was a purchase money mortgage, and valid whether signed by H.'s wife or not.—*Kneen v. Halin*, 6 Idaho, 621, 59 Pac. 14.

The possessory claim and improvements of one settling on public lands are subject to levy and sale on execution.—*Maydole v. Watson*, 7 Idaho, 66, 60 Pac. 86.

In an action to quiet title to unsurveyed public land of the United States, the evidence showed that defendants were in possession of the land, that plaintiffs had never occupied it nor filed a possessory claim thereto. Plaintiff claimed title by virtue of a sale in foreclosure proceedings under a mortgage executed by persons who formerly owned the improvements on the land. Held, that the title to the land being in the United States, it was error to admit in evidence the record of the foreclosure proceedings.—*Branca v. Ferrin*, 10 Idaho, 239, 77 Pac. 636.

Pending a contest against a homestead entry, the entryman leased a portion of the land
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with a covenant against subletting. The contest was finally decided in favor of the entryman, plaintiff in this action. The lessee sublet the premises to defendants. Defendants claimed title through various quitclaim deeds from various persons whose title to the land was not shown. Plaintiff showed his patent title issued subsequent to the commencement of this action. Held, that plaintiff was entitled to judgment for the recovery of the land and damages for the detention thereof.—*White v. Johnson*, 10 Idaho, 438, 79 Pac. 455.

Where B. entered into a written contract with H. for the purchase of a claim or squatter's right on unsurveyed lands of the United States, and a ditch and water right belonging thereto and used therewith, paid a part of the purchase price, took possession and remained in possession continuously thereafter and two years later received a deed from H. for such property, B.'s claim of title was not broken by the fact that H. had parted with possession two years prior to the deed, and that B.'s water right was entitled to date from the original appropriation and application thereof by H.—*Brown v. Newell*, 12 Idaho, 166, 85 Pac. 385.

A void contract to convey a part of a homestead cannot be validated by an oral agreement to convey in conformity with such contract, after patent has been received.—*Harris v. McCrary*, 17 Idaho, 300, 105 Pac. 558.

Under U. S. Rev. Stats. 2290 (U. S. Comp. Stats. 1901, p. 1389), any agreement, oral or written, whereby the homestead entryman agrees to convey a part of the homestead is absolutely void and not enforceable.—*Harris v. McCrary*, 17 Idaho, 300, 105 Pac. 558.

Under U. S. Rev. Stats. 2291 and 2292 (U. S. Comp. Stats. 1901, pp. 1390, 1394), it is left to the option of the homesteader, either to leave his homestead to his adult heirs, where he has no widow or minor children, without making a will, or, if he prefers to devise the homestead to some one other than his heirs, he may do so, and thereby cut off the adult children.—*Hays v. Wyatt*, 19 Idaho, 544, 34 L. R. A., N. S., 397, 115 Pac. 13.

W. settled on unsurveyed government land in 1885 and resided thereon continuously till his death in 1899. His wife obtained a divorce from him in 1886. After the land was surveyed, W. filed a homestead entry thereon in 1896 and in December 1899 gave notice of final proof, but died before such proof was submitted. In February, 1899, he executed a will devising all his real estate to J., who made final proof on said homestead entry in 1900, and a patent was duly issued "to the heirs or devisees of said W." The youngest of his children was of age and the wife was dead, when W. died. Held, that W. was entitled to devise his homestead so as to cut off the adult heirs.—*Hays v. Wyatt*, 19 Idaho, 544, 34 L. R. A., N. S., 397, 115 Pac. 13.

III. DISPOSAL OF LANDS OF THE STATE.

House Joint Resolution No. 10 (Laws 1909, p. 451), has no force or effect as a law of the state, and can furnish no authority or

justification for the state board of land commissioners either acting or refusing to act on any matter coming before them. They cannot rest or justify their action in any matter upon the authority or direction of such resolution, or any action taken by the commission created by that resolution.—*Balderston v. Brady*, 17 Idaho, 567, 107 Pac. 493.

Under Const., article 9, section 5, and R. C. 1564, the state land board has power to acquire title to any and all lands which the general government may at any time give or grant to the state, whether such grant be general or special or in lieu of lands lost or otherwise disposed of.—*Balderston v. Brady*, 18 Idaho, 238, 108 Pac. 742.

It is within the power and authority of the state land board to require a person, company, or corporation that may apply to purchase state lands to enter into an agreement to bid a given price upon such lands in the event they are offered for sale as a condition precedent to advertising such lands for sale.—*Pike v. State Board of Land Commrs.*, 19 Idaho, 268, Ann. Cas. 1912B, 1344, 113 Pac. 447; *State v. Hoover*, 19 Idaho, 299, 113 Pac. 455.

Const., article 9, section 8, does not limit the amount of state lands that may be sold within any year, except as to sections 16 and 36 in each township, known as "school lands."—*Pike v. State Board of Land Commrs.*, 19 Idaho, 268, Ann. Cas. 1912B, 1344, 113 Pac. 447; *State v. Hoover*, 19 Idaho, 299, 113 Pac. 455.

The constitution and statutes of this state circumscribe the direction, control, and disposition of the public lands of the state, in that such lands shall be held in trust, and may be disposed of only at public auction for the use and benefit of the respective objects for which such land has been granted to the state, and limit the power of the state land board with reference to the disposition of such lands to leasing, sale, or condemnation, and that no land shall be sold or condemned for less than its appraised value, nor for less than \$10 per acre.—*Tobey v. Bridgewood*, 22 Idaho, 566, 127 Pac. 178.

PUBLIC POLICY.

As affecting contracts. See *Contracts*, I, (F).

PUBLIC SERVICE CORPORATIONS.

See *Carriers*; *Waters and Watercourses*.

PUBLIC UTILITIES.

See *Telegraphs and Telephones*; *Railroads*; *Carriers*. Supply of water to municipalities. See *Waters and Watercourses*.

QUANTUM MERUIT.

Joinder with cause of action on express contract. See *Action*, III.

Will not lie for services under void contract. See *Counties*, III, (B).

QUIA TIMET.

Proof sufficient to recover not available in ejectment action. See *Ejectment*.

QUIETING TITLE.

I. RIGHT OF ACTION AND DEFENSES.

II. PROCEEDINGS AND RELIEF.

Action to set aside sheriff's deed under execution sale. See *Execution*, VII.

Limitation of action by railroad to quiet title for right of way over public lands. See *Limitation of Actions*, I, (B).

Right to trial by jury. See *Jury*, II.

R. S. 4538 does not abolish action of ejectment. See *Ejectment*.

Quieting title to right of way for railroad over public lands. See *Public Lands*.

I. RIGHT OF ACTION AND DEFENSES.

Where, in an action to quiet title, it appears that the land is a part of the public domain, and that neither plaintiff nor his predecessor in interest ever occupied the land or filed a possessory claim thereto as provided by R. S. 4552, it cannot be maintained.—*Branca v. Ferrin*, 10 Idaho, 239, 77 Pac. 636.

Under R. S. 4538, an action lies to quiet title to any estate or interest in lands of which the law takes cognizance, and it is not necessary to show a fee-simple title.—*Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784.

An action to quiet title to a leasehold estate in which the answer "admits that defendants and each of them claim an estate and interest in and to said premises, and to every portion and part thereof adverse to the interest of the plaintiff in and to said premises and to plaintiff's right to possession thereof," is an action in equity authorized by R. S. 4538, which provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.—*Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 391.

Under R. S. 4538, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim, any person, whether in or out of possession, whether holding the legal or equitable title may bring an action to have determined any estate or interest he may have in real property.—*Coleman v. Jagers*, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894.

Editorial Notes.

Clouds on title, bills to remove: 67 Am. Dec. 110.

Cloud on title, what is and who may maintain suit to remove: 45 Am. St. Rep. 373.

Effect of remedy at law: 12 L. R. A., N. S., 50.

II. PROCEEDINGS AND RELIEF.

Defendants recovered judgment against certain persons including the husband of plaintiff. Execution was issued, and levied upon certain mining property of plaintiff "as community property," plaintiff claiming such property as her separate property. Plaintiff sued under R. S. 4538 to enjoin the sale and vacate

the writ of execution as to such property. Held, that as plaintiff was not a party to the suits in which judgments were rendered, the decree should enjoin defendants from executing their judgments only as to plaintiff.—*Young v. First National Bank*, 4 Idaho, 323, 39 Pac. 557.

In an action to quiet title, brought under R. S. 4538, it is not necessary for the plaintiff to set out what interest the defendant claims, that being a matter for defendant to set up.—*Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118.

Complaint to quiet title and to obtain a perpetual injunction against defendant interfering with plaintiff's possession or in any manner obstructing the free use thereof, examined and held to state a cause of action in the absence of demurrer thereto.—*Murry v. Nixon*, 10 Idaho, 608, 79 Pac. 643.

In a suit to quiet title, it was shown that defendant executed his note due one year after date to plaintiff, secured by a deed to unpatented mining property, that before the note was due he notified plaintiff that he was unable to pay the note and that he soon thereafter left the state. The note and deed at the time of their execution were placed in escrow with the condition that if defendant paid the note, it should be returned to him, otherwise it was to be surrendered to plaintiff. Defendant did not demand the deed or offer to pay the note until twelve years after plaintiff had done the annual assessment work on the property, besides a large amount of development work. Held, that defendant's cross-complaint seeking to quiet title should be dismissed on the ground of laches.—*Bradley v. Johnson*, 11 Idaho, 689, 83 Pac. 927.

In an action to quiet title, the fact that defendant claimed to own the title in fee would not prevent him from showing in defense of the action that he had a lien on the premises by virtue of certain tax certificates.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

In an action to quiet title, where defendant relies upon title in himself, a cross-complaint is not necessary.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

In an action to quiet title, where the defendant seeks to enforce an equitable title against the plaintiff as the holder of the legal title, a cross-complaint is proper.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

In an action to quiet title, the defendant may put in issue the plaintiff's right to recover by denials alone, but where he seeks affirmative relief based upon an equitable title, and to have the title quieted in himself as against plaintiff, it is necessary that he file a cross-complaint.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

In an action to quiet title, defendant claimed title under certain tax certificates and tax deeds. Held, that the tax certificates were admissible to show that plaintiff was not entitled to have his title quieted without first discharging the lien of such certificates.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

Where both parties to an action to quiet title to certain land are each claiming to be the owner thereof and entitled to the possession, upon a proper showing an injunction will be granted to preserve the property in statu quo pending the litigation.—*Castlebury v. Harte*, 15 Idaho, 399, 98 Pac. 293.

Where it appears from the affidavits, complaint, answer and cross-complaint that each of the parties to a suit to quiet title to certain land, claimed to be the owner thereof and in the possession thereof and entitled to the possession; and that one of the parties entered upon the land and cut certain standing timber thereon, the granting of an injunction pendente lite is not an abuse of discretion, although the party against whom it is granted files an affidavit in the case stating that he has no intention of cutting and removing any more timber from the premises in dispute during the pendency of the action.—*Castlebury v. Harte*, 15 Idaho, 399, 98 Pac. 293.

The description of the real estate in the judgment or decree, required to be conveyed by the defendant to the plaintiff, held, sufficient.—*Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

Under R. C. 4538, an action may be maintained by a remainderman for the protection of a contingent remainder, as against one who claims an estate or interest in the property adverse to such remainderman.—*Wilson v. Linder*, 18 Idaho, 438, 138 Am. St. Rep. 213, 110 Pac. 274.

An action was brought to quiet title to a strip of land and to restrain defendant from using a private way thereover and from other acts with reference to trespass on said premises, and also to enjoin defendant from maintaining or using sewer and water pipes across said lands. A mandatory injunction commanding defendant to remove certain buildings, sewer and water pipes was prayed. Held, an action to quiet title and not solely an action for a permanent injunction.—*Brinton v. Steele*, 19 Idaho, 71, 112 Pac. 319.

In an action to quiet title and secure the cancellation of a sheriff's deed on foreclosure sale, it appeared that the plaintiff had tendered the proper amount necessary to redeem, and that the purchaser at the foreclosure sale refused to accept such amount unless he should be paid a further amount due under another mortgage. Within ten hours after such refusal, the purchaser notified the redemptioner that he would accept the amount tendered, but the redemptioner then refused to pay and brought this action to quiet his title on the ground that the mortgage lien was divested by refusal to accept the tender. Held, that under the maxim that he who seeks equity should do equity, the court would require the redemptioner to pay said amount as a condition precedent to the quieting of his title.—*Kelley v. Clark* (on rehearing), 23 Idaho, 31, 129 Pac. 921.

Evidence in an action to quiet title examined but not stated and held sufficient to support the findings.—*Union Sav. etc. Co. v. McClain*, 23 Idaho, 325, 130 Pac. 84.

In an action to quiet title, held, that the complaint states a cause of action, and that the court did not err in overruling the demurrers thereto.—*Welch v. Bigger*, 24 Idaho, 169, 133 Pac. 381.

Editorial Notes.

Right of purchaser at judicial or execution sale to bring suit to quiet title: *Ann. Cas.* 1912B, 380; 15 L. R. A. 784.

Right of holder of equitable title to land to maintain action to quiet title against holder of legal title: *Ann. Cas.* 1913B, 89.

Necessity that plaintiff in action to quiet title allege title or possession at time of commencement of action: *Ann. Cas.* 1913D, 386.

QUO WARRANTO.

See Elections, I.

The statutory proceeding in the nature of a quo warranto is quasi criminal in character, and in such action, the right to intervene does not exist.—*People v. Green*, 1 Idaho, 235.

After the joinder of issue on the demurrer to a petition in a quo warranto proceeding and the submission of the case thereon, it is too late to file a petition in intervention.—*People v. Green*, 1 Idaho, 235.

The district court has jurisdiction on quo warranto to determine the rights of several parties who claim to be entitled to the office of sheriff; and the judge of that court may properly decide, in such case, whether it is necessary to allege in the complaint that there has been an actual usurpation of the office; and if there be error in the ruling, such error may be corrected on appeal.—*People v. Lindsay*, 1 Idaho, 394.

Where the action of a board of county commissioners is only voidable, it will not be reviewed by a proceeding in the nature of quo warranto.—*Johnson v. Savidge*, 11 Idaho, 204, 81 Pac. 616.

In proceedings by information in the nature of quo warranto under R. S. 4612 to 4619, district courts have original jurisdiction.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Quo warranto proceedings under R. S. 4612 to 4619 must be prosecuted in the name of the state on the relation of the prosecuting attorney or attorney general, except in the case of a person claiming to be entitled to the office, and if not so prosecuted good reason therefor must be given and permission of the court obtained by the relator to prosecute the action in his own name.—*Toneray v. Budge*, 14 Idaho, 621, 95 Pac. 26.

Editorial Notes.

Pleadings and proceedings in quo warranto: 30 Am. Dec. 44.

Quo warranto when may be maintained by a private person: 125 Am. St. Rep. 633; 22 L. R. A., N. S., 810.

Election contest and quo warranto proceeding contrasted: *Ann. Cas.* 1913C, 161.

RAILROADS.

I. CONTROL AND REGULATION IN GENERAL.

II. RAILROAD COMPANIES.

III. PUBLIC AID.

IV. LOCATION OF ROAD, TERMINI AND STATIONS.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

VI. CONSTRUCTION, MAINTENANCE AND EQUIPMENT.

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(A) Duty to Operate.

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Adverse possession as against railroad grant from United States. See Adverse Possession.

As common carriers; rights and liabilities as carriers of goods or passengers. See Carriers.

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Compelling railroad to fence or build switch. See Specific Performance, I, II.

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Grants of public land in aid of railroads. See Public Lands.

Grant of right of way over public land. See Public Lands.

Injuries to children by railway turntables. See Negligence.

Liability for acts of servants in building dam causing overflow of plaintiff's lands. See Master and Servant.

Limitations against railroad seeking to quiet title to right of way over public lands under grant of right of way. See Limitations of Actions, I.

Obstructing navigation by railroad. See Navigable Waters, I, (C).

Railroad companies as employers. See Master and Servant.

Regulations of commerce. See Commerce.

— Of carriers. See Carriers.

Street railroads. See Street Railroads.

Taxation of railroads. See Taxation.

I. CONTROL AND REGULATION IN GENERAL.

Under Const., article 11, section 5, providing that "all railroads shall be public highways and all railroad, transportation, and express companies shall be common carriers, and subject to legislative control," a railroad organized under the laws of the state as a railroad corporation and for public use, is

governed by the constitutional provision and the statutes of the state, and all railroads are to be public highways and common carriers, subject to legislative control.—*McLean v. District Court*, 24 Idaho, 441, 134 Pac. 536.

II. RAILROAD COMPANIES.

R. S. 2653, requiring foreign corporations to designate an agent upon whom process may be served, does not apply to railroad corporations.—*Boyer v. Northern Pacific R. Co.*, 8 Idaho, 74, 70 L. R. A. 691, 66 Pac. 826.

III. PUBLIC AID.

Grants of public lands in aid of or for right of way.

See Public Lands, II, (H).

Subscription to building of railroad. See Subscriptions.

Sess. Laws 1909, page 238, providing for the formation of railroad districts and the voting of bonds and purchase or construction of railroads by such districts and providing for operating or leasing the same, is in violation of the provisions of Const., article 8, section 4, and contrary to the spirit of article 8, sections 2, 3, and article 12, section 4.—*Atkinson v. Board of Commrs. of Ada County*, 18 Idaho, 282, 108 Pac. 1046.

IV. LOCATION OF ROAD, TERMINI AND STATIONS.

Control and use of station grounds on grant abutting on navigable lake. See Carriers, I.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

A railroad company purchased a right of way across plaintiff's land and obtained a deed thereto from plaintiff. No agreement was made concerning the removal of plaintiff's buildings therefrom. Held, that the company was entitled to the use of the whole right of way and could not be compelled to pay the expense of removing plaintiff's buildings therefrom.—*Delsol v. Spokane etc. Ry. Co.*, 4 Idaho, 456, 40 Pac. 59.

The term "right of way" of a railroad company can only be understood as embracing the land used as a way for the road, and not such additional grounds as may be used for the convenience of the railroad, but not a part of its way.—*Oregon Short Line Ry. v. Gooding*, 6 Idaho, 773, 59 Pac. 821.

A contract provided that a land owner should pay to a railroad company a specified sum as soon as the railroad company "have constructed and put into operation an electric railway line from the city of Boise to the strip of land above described. The land owner also agreed in said contract to deliver a warranty deed to said strip of land. Held, that to entitle it to recover the sum specified, the railroad company was required only to construct "to" the said strip of land and not over or across the same.—*Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 29 L. R. A., N. S., 968, 105 Pac. 1070.

A contract, whereby the obligor promises and agrees to pay a railroad company the

sum of \$600 "as soon as said first parties [the railroad company], or their assigns, have constructed and put into operation an electric railway line from the city of Boise to the strip of land above described, said first parties to give street-car service of intervals of not more than thirty minutes, and to charge a fare from the city of Boise to said strip of land of not more than five cents," is certain and definite as to the time the obligation becomes due.—*Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 28 L. R. A., N. S., 968, 105 Pac. 1070.

The constitution and laws of this state clearly confer the right upon a railway company to construct its railway within a city or village upon complying with the laws of the state, and also grant power and authority to cities and villages to pass ordinances granting a right of way to a railway company to lay its track and use as a right of way streets within said city or village; and in all such cases both the city or village and the railway company must comply with the provisions of the law, and also the ordinances of such village.—*Trueman v. Village of St. Maries*, 21 Idaho, 632, 123 Pac. 508.

Editorial Notes.

Uses to which right of way may be devoted: 36 L. R. A., N. S., 512.

VI. CONSTRUCTION, MAINTENANCE AND EQUIPMENT.

Railroad construction contract. See Contracts, II, (B), (F).

R. S. 2679 requiring railroad companies to construct fences along their tracks which pass through or contiguous to private property, is an exercise of the police power, enacted for the good of the general public and not merely for the protection of private abutting or contiguous land owners.—*Johnson v. Oregon etc. R. Co.*, 7 Idaho, 355, 53 L. R. A. 744, 63 Pac. 112.

Under R. S. 5983 making the certificate of entry issued in pursuance of any law of the United States primary evidence that the holder or assignee of such certificate is the owner of the land described therein, a homestead entry is private property within the meaning of R. S. 2679 requiring railroad companies to fence their track passing through or contiguous to private property or inclosed land in the actual possession of another.—*Johnson v. Oregon etc. R. Co.*, 7 Idaho, 355, 53 L. R. A. 744, 63 Pac. 112.

The language used in R. C. 2815, as follows: "Where the same passes through, along or adjoining inclosed or cultivated fields or inclosed lands"—refers to country districts, or where a railroad runs along, adjoining, or through cultivated fields or inclosed lands, and was not intended to apply to municipalities or towns, whether incorporated or not, unless such town was so extended as to include cultivated fields or inclosed lands other than residence lots.—*Bernardi v. Northern Pac. Ry. Co.*, 18 Idaho, 76, 108 Pac. 542.

A railroad company is not required, under R. C. 2815, to fence its road where the same runs through a narrow canyon, with a public traveled road occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on one side of the track and residences and stores occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on the other side, and there are no cultivated fields or inclosed lands through, along, or adjoining which such road runs at the place of the accident.—*Bernardi v. Northern Pac. Ry. Co.*, 18 Idaho, 76, 108 Pac. 542.

VII. SALES, LEASES, TRAFFIC CONTRACTS AND CONSOLIDATION.

(No paragraphs.)

VIII. INDEBTEDNESS, SECURITIES, LIENS AND MORTGAGES.

Services performed as superintendent in superintending the construction of railroad work constitute a lienable item under the laws of this state.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

A charge for the use of tools in construction work, for which the employer agrees to pay, is a lienable item.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

The rendering of an account for labor performed and material furnished, for work upon a railway right of way, which account is accepted and approved by the railway company, is sufficient proof of the performance of such labor and the furnishing of the material used in the construction of such improvement, and authorizes the filing of a lien therefor.—*Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 789, 96 Pac. 573.

Editorial Notes.

Application of mechanic's lien laws to railroads: Ann. Cas. 1913C, 95; 8 L. R. A. 700.

IX. RECEIVERS.

Receiverships in general. See *Receivers*.

X. OPERATION.

Contributory negligence of servants. See *Master and Servant*, III, (G).

Actions by servants against railway company for injuries. See *Master and Servant*, III, (H).

Action against railway company for damages for wrongful acts of employees. See *Master and Servant*, IV.

(A) DUTY TO OPERATE.

(No paragraphs.)

(B) STATUTORY, MUNICIPAL AND OFFICIAL REGULATIONS.

Liabilities for injuries to animals due to failure to fence tracks. See *post*, X, (H).

R. S. 2679 provides that "railroad corporations must make and maintain a good and sufficient fence on either or both sides of their

track or property, wherever the line of their road at any time passes through or along, or abuts upon or is contiguous to private property or inclosed land in the actual possession of another." Held, that the intent of the statute was to require railroad companies to fence their tracks wherever such tracks ran through land owned by private persons.—*Patrie v. Oregon etc. R. Co.*, 6 Idaho, 448, 56 Pac. 82.

The fencing of a railroad track, when required by statute, where it passes through private property, implies the construction of sufficient cattle-guards at the ends of such fences.—*Patrie v. Oregon etc. R. Co.*, 6 Idaho, 448, 56 Pac. 82.

Editorial Notes.

Depot or station grounds within purview of statute requiring railroad to fence tracks: Ann. Cas. 1912D, 628; 11 Ann. Cas. 20; 7 L. R. A., N. S., 203.

Meaning of "adjacent" in statute relating to fencing railroad property: Ann. Cas. 1913B, 172.

Constitutionality of statute requiring fence: 31 L. R. A., N. S., 862.

(C) COMPANIES AND PERSONS LIABLE FOR INJURIES.

Relation between employee of lumber company directed to work on railroad and the railroad company. See *Master and Servant*, I, III, (B).

A railroad company cannot avoid responsibility for damages in operating its road by allowing others to have the control and management of its roadbed or trains without the consent of the power whence it obtained its franchise.—*Palmer v. Utah etc. Ry. Co.*, 2 Idaho, 382, 16 Pac. 553.

Where the proof shows that a railroad company has used a right of way and operated trains over the track on the same for many years, and has fenced the same, and there is no evidence in rebuttal of such facts, the evidence is sufficient to show the company has control of such right of way to the extent that it is responsible for negligence in permitting combustible material to accumulate upon such right of way, and which becomes ignited from sparks from its engines, and such fire spreads to property outside of said right of way, which is thereby damaged.—*Fodey v. Northern Pac. Ry. Co.*, 21 Idaho, 713, 123 Pac. 835.

Editorial Notes.

Liability of railroads for injuries or losses arising from the operation of cars not owned by them: 130 Am. St. Rep. 33.

(D) INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL.

In an action by a parent under R. S. 4100 for the death of his minor child, the court instructed the jury at defendant's request that in determining the degree of care defendant should have exercised under the circumstances "precaution is a duty only so far

as there is reason for apprehension," and that the exercise of ordinary care to prevent injury arose only after the defendant "became aware of the danger to which the child was exposed; or after they might have become aware thereof by the exercise of ordinary care." Held, that the following instruction when construed in connection with the foregoing was not error, to wit: "The court instructs you that notwithstanding you may find that the child of the plaintiff was a trespasser upon the tracks of the defendant, and that the parent may have been guilty of negligence, yet such fact does not relieve the defendant from using reasonable and ordinary care to avoid injuring it, and the defendant is bound to use and exercise such care, and if the plaintiff's child be in a position of danger, it must be the highest and greatest care, and a failure to exercise such care under these circumstances where it may reasonably be inferred that the injury will follow as a result of such failure amounts to wanton and reckless conduct."—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

Editorial Notes.

Liability of railroads to persons with whom they have no contract relations but who are lawfully on their tracks, cars, or premises: 90 Am. Dec. 55.

Trespassers on the track, duties to: 30 Am. St. Rep. 53; 41 L. R. A., N. S., 264.

Trespassers upon cars, liability for injuries to: 55 Am. Rep. 42.

(E) ACCIDENTS TO TRAINS.

(No paragraphs.)

(F) ACCIDENTS AT CROSSINGS.

Action against street railroad for death of pedestrian at crossing. See *Street Railroads*.

Plaintiff alleged that in the discharge of his duties he was compelled to cross and recross defendant's railroad in passing along a street which was blocked by defendant's railroad train, that in order to so cross plaintiff was compelled to go under one of defendant's freight-cars, and that while so crossing, defendant, without any warning, suddenly, carelessly, negligently and unlawfully started its freight train, running over plaintiff, etc. Held, not demurrable.—*Rumpel v. Oregon etc. R. Co.*, 4 Idaho, 13, 22 L. R. A. 725, 35 Pac. 700.

Plaintiff, in passing along a street blocked by defendant's railroad train, to which was attached an engine, passed under one of the cars of said train five times within an hour and a half, and the sixth time was caught under the car by the train suddenly starting without warning. Held, that plaintiff was guilty of contributory negligence, barring recovery, though defendant's servants failed to ring the bell or sound the whistle before starting.—*Rumpel v. Oregon etc. R. Co.*, 4 Idaho, 13, 22 L. R. A. 725, 35 Pac. 700.

In an action against a railroad company for injuries received by plaintiff while crossing under defendant's cars at a public crossing, blocked by defendant's cars, the custom of the inhabitants of the town to creep under the cars so blockading the streets and the custom of the company in blockading such streets are immaterial, and evidence thereof is inadmissible.—*Rumpel v. Oregon etc. R. Co.*, 4 Idaho, 13, 22 L. R. A. 725, 35 Pac. 700.

An exception to the rule requiring a person approaching a railway crossing to stop, look and listen is where the circumstances are such that it would avail nothing in preventing the injury if the injured party does look and listen, as it is only when it appears that he might see if he look, or might hear if he listen, that his failure to look and listen will necessarily constitute negligence.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

R. C. 2821, requiring a railroad company to ring the bell or blow the whistle of its locomotive when approaching a railway crossing over a street or highway, does not limit the liability of a railroad company to damages for injuries which result from the failure to ring the bell or blow the whistle, but declares absolutely that where the bell is not rung or the whistle blown and damages are sustained, the company is liable.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

The rule that it is contributory negligence for a person to go upon a railway track without looking or listening to ascertain whether there is danger from an approaching train depends upon the circumstances and conditions; and the question whether a person failing to look and listen is exercising the care which a reasonable and prudent person would exercise under such circumstances is a question for the jury.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

As a general proposition of law, a person approaching a railroad crossing, whether a street crossing in a city or a crossing over a public highway in a country district, is required to stop, look and listen for an approaching train; and if he omits to do so and walks thoughtlessly upon the track, or if by looking and listening he could have seen the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives an injury, he so far contributes to it as to deprive him of any right to complain.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

R. C. 2821, requiring a railroad company to ring the bell or blow the whistle of its locomotive when approaching a railway crossing over a street or highway, makes the failure of the railroad company to comply with its provisions negligence per se, and plaintiff makes a prima facie case by showing the negligence or noncompliance with the law and the injury; but the statute does not deny the right to the defendant to show that the plaintiff is not entitled to recover because of

contributory negligence on the part of the plaintiff which was the proximate cause or one of the proximate causes of the injury.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

In an action against a railroad company for the death of a child, killed at a railway crossing while in the custody of its grandmother, the question as to whether the grandmother was guilty of contributory negligence in stepping upon the railroad track of defendant in an effort to escape an apparent danger from a fractious team, without looking or listening for a warning from an approaching train, depends wholly upon the question whether in view of all the circumstances as they appeared to the grandmother at the time, she exercised reasonable care and acted in a prudent and reasonable manner, which is a question of fact for the jury.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

Where the employees of a railroad company are running a train over a public crossing at such a high and dangerous rate of speed as to become within itself negligent management and operation of the train and engine, and an accident results as a consequence thereof, or while such train is being operated at such high and dangerous rate of speed, it is proper that the evidence of such fact be submitted to the jury, and that the jury consider the same in determining whether or not the company was guilty of negligence in the commission of the resulting injury.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

A prima facie presumption arises in the absence of evidence to the contrary that one who is killed while attempting to cross a railroad track at a public crossing stopped, looked and listened before going upon the track.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

The same duty to observe diligence and care at public crossings for the prevention of injury rests equally and alike on both the railroad company and pedestrians and other travelers crossing a railroad track, subject, however, to that other duty of pedestrians and other travelers crossing a railroad track to look and listen for oncoming trains and to clear the track that they may pass without injury being inflicted.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

The fact that a railway train is run at a high and dangerous rate of speed at a street crossing is no excuse or justification for a person subjecting himself to the danger and hazard of being run over by attempting to cross the track in front of such train.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

The duty of a railroad company to ring a bell or blow a whistle in approaching a crossing is imposed by positive statute of this state, and a failure to do so is negligence per se.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

Though the duty of a railroad company to maintain gates and station a flagman at a

crossing is not enjoined by statute, under certain conditions and circumstances a failure to do so would constitute negligence at common law and the question of negligence in failing so to do is for the jury.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

The law governing a person approaching a railroad crossing is that a person approaching the railroad crossing, whether a street crossing in a city or a crossing over a public highway in a country district, is required to stop, look and listen for an approaching train, and that the failure to do so is negligence per se.—*Burrow v. Idaho etc. R.*, 24 Idaho, 652, 135 Pac. 838.

The traveler approaching a railroad crossing has a right to assume that the railroad company will give the required signals of the trains' approach, and that it will be running and operating its trains at such places at the usual and ordinary rates of speed.—*Burrow v. Idaho etc. R.*, 24 Idaho, 652, 135 Pac. 838.

A railroad company has the right to assume that the traveling public will look and listen for a passing train, and that having looked and listened, they will discover the oncoming train and clear the track.—*Burrow v. Idaho etc. R.*, 24 Idaho, 652, 135 Pac. 838.

Evidence in an action against a railroad company for causing the death of plaintiff's intestate at a crossing, held to show that defendant was not negligent and that deceased was guilty of contributory negligence.—*Burrow v. Idaho etc. R.*, 24 Idaho, 652, 135 Pac. 838.

Editorial Notes.

Duty of traveler on highways to use his senses of sight, hearing, etc., to avoid dangers at crossings: 90 Am. Dec. 780.

Crossings, duty to keep flagman or other person at, to give warning of approaching trains or cars: 100 Am. Dec. 412; 37 Am. Rep. 443; 4 Ann. Cas. 294; 17 Ann. Cas. 982.

Crossings, flagman at, liability for injuries due to absence of: 17 Am. Rep. 363.

Crossings of highways, care which must exercise at: 26 Am. Rep. 207.

Negligence, contributory of persons not looking for approach of cars: 51 Am. Rep. 360.

Crossing railroad track when gates are down as negligence: Ann. Cas. 1913C, 1366.

Duty to stop, look and listen at railroad crossing when flagman is stationed: 10 Ann. Cas. 418; 13 Ann. Cas. 854.

Passing over, under, or between cars obstructing crossing as negligence: 12 Ann. Cas. 593.

(G) INJURIES TO PERSONS ON OR NEAR TRACKS.

Statements of engineer as part of res gestae. See Evidence, IV, (E).

Injuries to servants working on or about tracks.

See *Master and Servant*, III.

Fellow-servants. See *Master and Servant*, III, (B).

A railroad company is bound to exercise a higher degree of care and watchfulness for the detection of trespassers on its track and the prevention of injury to them at points upon its track where people may be expected on the track, or where the roadbed is used constantly by pedestrians, than it is required to observe with reference to trespassers generally or at other places and under different circumstances.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

Where an engineer sees an adult on the track ahead of him, he ordinarily has a right to presume that he will get off the track before the train reaches him; but this presumption cannot be indulged in in the case of a child of tender years on the track.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

In an action for damages caused by the negligent conduct of a railroad company running over and killing plaintiff's four year old child, it was not error to admit evidence which tended to establish the fact of the existence of a trail along or across the road at or near the place where the accident occurred. *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

It is the duty of an engineer on a railway locomotive, when he discovers a child of tender years on the track ahead of him, to take immediate action to control his train so that he may stop it before reaching the child, and where he fails so to do, he fails to act as a reasonably prudent man would act under such circumstances, and if he wounds or kills the child, his company is properly chargeable with reckless and wanton conduct.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

Where the employees of a railway company operating its locomotive see a child of tender years upon its track in front of the train, "ordinary care," under such circumstances, is the highest and greatest degree of care that one can exercise in order to avoid injury to such child.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

Evidence in an action by a parent for the death of his minor child held to show such a substantial conflict that a verdict therein will not be disturbed on appeal.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

In an action against a railroad company for the death of a child defendant requested an instruction that "if you find from the evidence that as soon as the employees of defendant saw M. and the child who was in her custody step on the track, they immediately attempted to stop the train, then I charge you that defendant did all that the law required of them, and your verdict should be for defendant." Held, properly refused, as the instruction wholly ignores the question of negligence, and places the company's liability on the basis that the company acted as

soon as it saw the child and its custodian approach the track.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

Where K. was walking from a market to his residence and was following a footpath across a railroad right of way and walking down the side of the track at a reasonable distance from the track and along the station grounds within forty or fifty feet of the depot and in the same direction as a moving train, and was exercising reasonable care to avoid danger or injury, the railroad company owed him the duty to exercise reasonable care and take reasonable precaution against inflicting an injury upon him.—*Keim v. Gilmore etc. R. Co.*, 23 Idaho, 511, 131 Pac. 656.

A greater and higher degree of care and diligence is required of a railroad company to protect even a trespasser against injury, where such person is upon its right of way at a station or depot grounds, where the company transacts business with the public, and where it invites persons to enter its premises, and has reason to expect at all times that there will be persons upon its grounds and premises, than it owes a mere trespasser at an unfrequented place.—*Keim v. Gilmore etc. R. Co.*, 23 Idaho, 511, 131 Pac. 656.

Where a railroad company has attached to a train of cars a steam shovel car, and hauls the same over its road with jackarms extending to a distance of from eleven to twenty-two inches beyond the ordinary width of cars and beyond the sides of such car, the company is liable for damages inflicted by reason of the jackarm striking a truck on a station ground and hauling it upon a passing pedestrian. In such case the railroad company set a danger in motion of which the pedestrian had no notice or knowledge, and against which he could not reasonably guard.—*Keim v. Gilmore etc. R. Co.*, 23 Idaho, 511, 131 Pac. 656.

"Notwithstanding the fact that the plaintiff has been guilty of some negligence in exposing his person to an injury at the hand of the defendant, yet if the defendant discovered the exposed situation of the plaintiff in time, by the exercise of ordinary or reasonable care after so discovering it, to have avoided injuring him, and nevertheless failed to do so, the contributory negligence of the plaintiff does not bar a recovery of damages from the defendant. Where a person negligently walks upon a railroad track, if the engineer, after noticing his exposed situation, fails to give the proper signals, or otherwise acts willfully and recklessly, in consequence of which the person is killed or injured, the company shall be liable in damages." The foregoing instruction states the law applicable to the surrounding facts and circumstances of the present case as they are alleged in the pleadings and shown by the evidence.—*Denbeigh v. Oregon-Washington R. etc. Co.*, 23 Idaho, 663, 132 Pac. 112.

Instruction No. 11 correctly states the law applicable to this case in express language, that if the jury finds from the evidence that, after discovering plaintiff upon the track, the

servants of the defendant did not sound alarm signals, either by whistle or the bell upon the engine until it was too late for plaintiff to escape, such failure to so give the alarm signals was negligence.—*Denbeigh v. Oregon-Washington R. etc. Co.*, 23 Idaho, 663, 132 Pac. 112.

While there is a conflict in the evidence as to the negligence of the appellant in not giving proper signals and exercising the diligence and care required under the circumstances after the signals had been given, after the engineer recognized that the respondent did not appreciate the signals given or the danger, yet there was testimony which raised an issue for the jury on the question of diligence and care in the time of giving the signals and controlling the train.—*Denbeigh v. Oregon-Washington etc. R. Co.*, 23 Idaho, 663, 132 Pac. 112.

"In determining the question of negligence and contributory negligence in this case, the jury should take into consideration the place at which the accident occurred, the nature of the surrounding country, the condition of the roadbed, the manner in which the train was being propelled, the character of the use of that railroad track, the probability of pedestrians being on the track at that time and place, if any, and from all of the facts and circumstances determine whether or not the servants of the defendant in charge of the train exercised ordinary care and prudence in the management and operation of the train at the time and place mentioned, and whether the plaintiff was guilty of contributory negligence under the instructions covering the same." The foregoing instruction is approved as stating the law applicable to the facts of this case, and did not prejudice the jury.—*Denbeigh v. Oregon-Washington R. etc. Co.*, 23 Idaho, 663, 132 Pac. 112.

Editorial Notes.

Weight of testimony by person injured at railroad crossing that he did not see or hear train approaching when evidence shows that he must have seen or heard it if looking or listening: *Ann. Cas.* 1912B, 1133.

Standing or walking so close to railroad track as to be injured by passing train as negligence: *Ann. Cas.* 1912B, 1242.

Care required of railroads to prevent injuring children upon the track: 25 L. R. A. 784.

Duty to maintain lookout for persons on track: 25 L. R. A. 287; 8 L. R. A., N. S., 1069; 31 L. R. A., N. S., 980.

(H) INJURIES TO ANIMALS ON OR NEAR TRACKS.

R. S. 2680, making railroad companies liable for stock killed, is unconstitutional.—*Catril v. Union P. Ry. Co.*, 2 Idaho, 576, 21 Pac. 416; *Jones v. Oregon Short Line Ry.*, 6 Idaho, 441, 56 Pac. 76.

Where suit is brought against a railway company to recover damages for the killing of plaintiff's horses at a railway crossing by

reason of the negligence of the agent or servants of the company, and defendant relies on such contributory negligence of the plaintiff or his servants as to prevent a recovery, this is a defense to be established by the defendant.—*Hopkins v. Utah Northern Ry. Co.*, 2 Idaho, 300, 13 Pac. 343.

In an action against a railroad company for killing plaintiff's bull, where the employees of defendant were the only witnesses to the accident, it is incumbent on the defendant to show that there was no want of ordinary care on its part.—*Kelly v. Oregon etc. R. Co.*, 4 Idaho, 190, 38 Pac. 404.

In an action against a railroad company for killing a bull, one witness testified that the animal had run with his band of cattle within a few days prior to the killing; another that he knew the animal well and examined it a few days after it was killed. The owner described the animal, giving age, marks and brands. Held, that the identity of the animal was sufficiently established, notwithstanding a statement by another witness that he found no brand upon the animal.—*Kelly v. Oregon etc. Ry. Co.*, 4 Idaho, 190, 38 Pac. 404.

In an action against a railroad company, the evidence showed that plaintiff's bull was on the track; that the track was covered with snow; that the bull was black; that the track was straight for more than a mile; that the bull ran between the rails for some distance and was knocked off and killed. Held sufficient to establish a prima facie case of negligence on the part of the defendant.—*Kelly v. Oregon etc. R. Co.*, 4 Idaho, 190, 38 Pac. 404.

In an action against a railroad company for killing cattle, the evidence showed that plaintiff, without leave from defendant, went upon its right of way, erected a cabin there, and engaged in the occupation of cutting and hauling ties and other timber from adjoining lands. Plaintiff's cattle were turned loose to graze on defendant's right of way, in charge of an attendant. During the temporary absence of such attendant they strayed on defendant's track and were killed. No negligence of defendant was shown. Held that plaintiff was guilty of contributory negligence, precluding recovery.—*McDonald v. Great Northern Ry. Co.*, 5 Idaho, 8, 46 Pac. 766.

Where there is an entire absence of proof as to the manner or time in which stock was killed by a railroad company and no proof of negligence is shown, the railroad company will not be liable.—*Jones v. Oregon etc. R. Co.*, 6 Idaho, 441, 56 Pac. 76.

In an action against a railroad company for killing a stallion by reason of its failure to fence its track, the jury found that the stallion was not running at large at the time in violation of statute, but that he had escaped from the pasture in which he had been kept. Held, that the finding of the jury was conclusive on the question.—*Patrie v. Oregon etc. R. Co.*, 6 Idaho, 448, 56 Pac. 82.

Where it is admitted that stock were killed on a railroad track at a point where it was the duty of the railroad company to maintain a fence, the presumption is, in the absence of proof, that the animals came upon the track at such point.—*Patrie v. Oregon etc. R. Co.*, 6 Idaho, 448, 56 Pac. 82.

A railroad company is liable for stock killed on account of its failure to fence its track as required by R. S. 2679.—*Patrie v. Oregon etc. R. Co.*, 6 Idaho, 448, 56 Pac. 82.

Where the complaint in an action against a railroad company for killing a cow alleged that defendant was negligent in running, managing and operating its locomotive and train, evidence to show that the accident occurred because of defendant's failure to fence its track is inadmissible.—*Haner v. Northern Pac. Ry. Co.*, 7 Idaho, 305, 62 Pac. 1028.

Where the complaint in an action against a railroad company for killing a cow alleged that defendant was negligent in running, managing and operating its locomotive and train, evidence to show that the accident occurred because of the failure to give the statutory signals at highway crossings is inadmissible.—*Haner v. Northern Pac. R. Co.*, 7 Idaho, 305, 62 Pac. 1028.

Where the evidence in an action against a railroad company for killing plaintiff's cattle clearly shows that if defendant had fenced its track as required by R. S. 2679, the cattle would not have gone on the track, a verdict for plaintiff will not be disturbed.—*Johnson v. Oregon etc. R. Co.*, 7 Idaho, 355, 53 L. R. A. 744, 63 Pac. 112.

Where, in an action against a railroad company for killing cattle, the only eye-witnesses were the engineer and fireman of the locomotive which struck the cattle and their testimony shows no negligence, a verdict for plaintiff will be reversed and a new trial granted.—*Jensen v. Northern Pacific R. Co.*, 8 Idaho, 599, 70 Pac. 790.

In an action against a railroad company for killing cattle, a witness for the plaintiff, who did not see the accident, was permitted to give his opinion as to how and where the cattle were injured. Held, error.—*Jensen v. Northern Pacific R. Co.*, 8 Idaho, 599, 70 Pac. 790.

Where the evidence in an action against a railroad company for killing stock is such that reasonable men might differ as to which witnesses they might believe and as to whether negligence had been shown, the verdict of the jury will not be disturbed.—*McKissick v. Oregon etc. R. Co.*, 13 Idaho, 195, 89 Pac. 629.

Where an engineer observes an animal on the right of way and not on the track and there are no indications that the animal will go on the track before the train reaches it, the failure to check the speed of the train or stop it is not negligence.—*Wallace v. Oregon etc. R. Co.*, 16 Idaho, 103, 100 Pac. 904.

Where an animal was first seen going toward the track about one hundred and fifty feet in front of the train and the head-

light illuminated the track for a distance of two hundred feet, and the evidence showed that it was impossible to stop the train within the distance of one hundred and fifty feet, the railroad company does not come within the rule that it is negligence to operate a train at such speed that it is impossible to stop it within the distance that the locomotive headlight illuminates the track.—*Wallace v. Oregon etc. R. Co.*, 16 Idaho, 103, 100 Pac. 904.

It is the duty of a railroad company to equip its railroad locomotives with proper headlights of such power that the engineer can see an animal a sufficient distance ahead of the locomotive to enable him to stop the train before it reaches such animal.—*Wallace v. Oregon etc. R. Co.*, 16 Idaho, 103, 100 Pac. 904.

In an action against a railroad company for the killing of a colt, which had come on defendant's track through a gate in its right of way fence, the court instructed the jury that "if you find that the railroad was not securely fenced and such fence was not properly maintained by the defendant at the point the colt entered upon said road, you should find for the plaintiff." Held, that the trial court did not thereby tell the jury that the right of way was not securely fenced, and that though it would have been better to use the word "gate" instead of "fence," the instruction left it to the jury to determine the issue as to whether the gate was properly maintained.—*Wallace v. Oregon etc. R. Co.*, 16 Idaho, 103, 100 Pac. 904.

In an action against a railroad company for the killing of a colt, plaintiff testified without objection that he had made written demand for compensation. Thereafter plaintiff offered in evidence a letter written to him by defendant's attorney containing reference to a claim made by plaintiff for the loss of said colt. Held, that the admission of such letter was not reversible error.—*Wallace v. Oregon etc. R. Co.*, 16 Idaho, 103, 100 Pac. 904.

In an action against a railway company for the killing of a colt, held, that the evidence failed to establish negligence on the part of defendant in maintaining a proper gate in its right of way fence, or in keeping such gate closed.—*Wallace v. Oregon etc. R. Co.*, 16 Idaho, 103, 100 Pac. 904.

Under R. C. 2815, requiring railroad companies to fence their track, held, that the evidence is sufficient to support the verdict of the jury.—*Monical v. Northern Pacific R. Co.*, 19 Idaho, 150, 112 Pac. 764.

Where the evidence shows that plaintiff's cattle went on defendant's track where it crossed a public road or highway and walked along the track till they were struck by defendant's train and that there were no proper cattle-guards thereat, a judgment for plaintiff will be affirmed.—*Brown v. Oregon etc. R. Co.*, 20 Idaho, 364, 118 Pac. 768.

By the provisions of R. C. 2816, it was not intended to require the railroad company to erect gates in places where the railroad track was not fenced nor required to be fenced.—*Brown v. Oregon etc. R. Co.*, 20 Idaho, 364, 118 Pac. 768.

That part of R. C. 2815, as amended by Laws 1911, chapter 223, which provides that proof of the wounding, maiming, or killing of livestock by a railroad company shall be prima facie evidence of negligence or willfulness on the part of the company, applies only to stock that has been killed on the company's line where it is required to fence it, and not at a highway crossing.—*Yates v. Camas Prairie R. Co.*, 22 Idaho, 802, 128 Pac. 545.

Evidence in an action for killing stock at a railroad crossing held sufficient to support a verdict for plaintiff.—*Yates v. Camas Prairie R. Co.*, 22 Idaho, 802, 128 Pac. 545.

Attorneys' fees in actions against railroad companies for killing stock are only allowed when the action is brought under the statutes requiring the fencing of tracks and the maintenance of fences and cattle-guards and are not allowed in actions for killing stock at a public crossing.—*Yates v. Camas Prairie R. Co.* (on rehearing), 22 Idaho, 802, 128 Pac. 545.

Editorial Notes.

Animals on the track, duty of railroads to: 49 Am. Dec. 261; 20 Am. St. Rep. 161.

Trespassing animals, liability of railroads for negligently or willfully killing: 96 Am. Dec. 681.

(I) FIRES.

Right of homestead entryman to recover for fires prior to entry. See *Public Lands*, II, (B), 2.

Where it is shown that plaintiff's property has been destroyed by fire communicated from defendant railway company's engines, the presumption of negligence which arises therefrom is repelled and rebutted by proof of proper construction of the company's locomotives and the use of proper appliances and careful management and operation, and plaintiff cannot thereafter recover without producing proof of actual negligence or want of ordinary care.—*Osburn v. Oregon R. etc. Co.*, 15 Idaho, 478, 19 L. R. A., N. S., 742, 98 Pac. 627.

In cases for damages caused by fires set from locomotives of a railway company, negligence is the gist of the action.—*Osburn v. Oregon R. etc. Co.*, 15 Idaho, 478, 19 L. R. A., N. S., 742, 98 Pac. 627.

In an action against a railroad company for damages caused by fire set from an engine running on defendant's road, where the engine that must have set the fire is identified, and it is shown by defendant's witnesses that the particular engine that set the fire is no better than any of its other engines, it is not error to admit evidence of the setting of other fires a short time previous to the destruction of plaintiff's property.—*Osburn v. Oregon R. etc. Co.*, 15 Idaho, 478, 19 L. R. A., N. S., 742, 98 Pac. 627.

In an action against a railroad company for the destruction of property by fire set by sparks emitted from the company's loco-

motive, it is sufficient to establish a prima facie case for the plaintiff to show that fire has been communicated from the company's engine to his property, which resulted in its damage or destruction, and such proof, when made, even though resting entirely on circumstantial evidence, raises the presumption of negligence of the company either in the construction and equipment or management and operation of its engine, and casts the burden upon the defendant of rebutting this presumption of negligence.—*Osburn v. Oregon R. etc. Co.*, 15 Idaho, 478, 19 L. R. A., N. S., 742, 98 Pac. 627.

In an action to recover damages for loss by fire, by reason of the negligence of a railway company in its equipment and operation of its engines, if the evidence shows that the fire which caused the damage came from sparks of the railway company's engines, such evidence proves a prima facie case, and negligence is presumed; and the evidence is sufficient to entitle the plaintiff to recover for negligence on the part of the railway company in its equipment and operation of its engines, and, such proof being made, the burden then shifts to the defendant to rebut this presumption of negligence.—*Fodey v. Northern Pac. Ry. Co.*, 21 Idaho, 713, 123 Pac. 835.

In an action to recover damages, alleged to have been caused by fire from sparks emitted from engines of a railway company, where negligence of the company is alleged on account of combustible material accumulating on its right of way near where the fire occurred, and negligence in equipment and operation is also alleged, it is proper to receive proof, offered by the plaintiff, of other fires set by other engines of the railway company in the vicinity of the fire complained of, and which occurred at or about the same time as the fire involved in the suit, as tending to show a possibility and consequent probability that the fire complained of originated from the same cause shown by such proof.—*Fodey v. Northern Pac. Ry. Co.*, 21 Idaho, 713, 123 Pac. 835.

In an action for damages on account of negligence of a railway company in operating its trains, and because of such negligence sparks are emitted from its engines, and fires are ignited and property destroyed, the plaintiff is entitled to recover when such facts are shown, in the absence of clear and satisfactory evidence on the part of the railway company showing the absence of negligence; and such evidence on the part of the plaintiff may be circumstantial or direct evidence.—*Fodey v. Northern Pac. Ry. Co.*, 21 Idaho, 713, 123 Pac. 835.

Where the evidence shows that a certain engine which passed the point where the fire started was properly equipped and provided with appliances to prevent the emitting of sparks, and the evidence also shows that another train also passed the point where the fire was started within a short time before the fire, and there is no evidence which tended in any way to show that the latter engine was skillfully handled or properly equipped, and the evidence does not show the kind of fuel

used by either engine, and there is evidence which shows that difference in fuel makes a difference in the quantity and nature of sparks thrown by the engine, and that an engine might be equipped with the best spark-arrester, and with one kind of fuel would throw sparks and pieces of live coal out on the ground, and with another kind of coal sparks would not be emitted, such evidence presents a question of negligence which should be determined by the jury.—*Fodey v. Northern Pac. Ry. Co.*, 21 Idaho, 713, 123 Pac. 835.

Where an action is brought to recover damages, alleged to have been caused by the negligence of the railway company in failing to equip its engines with proper spark-arresters and devices to prevent the scattering of fire, and in failing to keep such engines in proper repair, and by negligence in the operation of its trains, and plaintiff's proof shows facts and circumstances which clearly show that the fire was set by sparks from the railway company's engines, then it will be presumed that the negligence of the railway company arose; and the railway company was then required to negative every fact proven by the plaintiff which inferred and gave rise to the presumption of negligence, and such proof should be of such character and degree as to make the defendant's case clear and satisfactory that there was no negligence, and must negative every act on the part of the company which would constitute negligence; and, where the evidence as a whole may cause different persons to form different conclusions as to whether or not there was negligence, the question of negligence should be submitted to the jury. *Fodey v. Northern Pac. Ry. Co.*, 21 Idaho, 713, 123 Pac. 835.

The following instruction states a correct principle of law which might properly be given where the facts of the case involve such question: "The court instructs you that, if you find from the evidence that the damage to plaintiff's property was caused by two or more fires uniting, and that only one of these fires was traceable to the fire alleged to have started on or near the Raymond property, the other fires or any one of them not being traceable to any responsible origin, but being of such efficient or superior force that it would have produced the damage to plaintiff's property regardless of the fire which started on or near the Raymond property, then I instruct you that the plaintiff cannot recover, and your verdict must be for the defendant."—*Miller v. Northern Pac. R. Co.*, 24 Idaho, 567, 135 Pac. 845; *Studebaker v. Northern Pac. R. Co.*, 24 Idaho, 600, 135 Pac. 850.

The following instruction held to be a correct statement of the law applicable to the facts of this case: "A person who negligently sets a fire is responsible for the damage done by it, although such fire is joined by a fire set by another person, and the two concurrently do the damage, if it appears that the first fire would have done the damage without the assistance of the second fire. And so in this case, if you find that the defendant negligently set a fire about one-half mile

north of Cocolalla, and that such fire spread from there to the plaintiff's premises, and damaged his property, then you should find a verdict for the plaintiff, even though you find that another fire mingled with said fire so set by the defendant, unless you should find that the fire so set by the defendant would not have done the damage to the plaintiff's property without the assistance of the other fire."—*Miller v. Northern Pac. R. Co.*, 24 Idaho, 567, 135 Pac. 845; *Studebaker v. Northern Pac. R. Co.*, 24 Idaho, 600, 135 Pac. 850.

In an action against a railroad company for damages caused by fire, there was evidence as to the existence of two fires, for one of which the defendant was responsible, the origin of the other being unknown. Held, that an instruction was properly refused which required the jury to find for defendant if they found that the two fires united and thereafter burned plaintiff's property.—*Miller v. Northern Pac. Ry. Co.*, 24 Idaho, 567, 135 Pac. 845; *Studebaker v. Northern Pac. Ry. Co.*, 24 Idaho, 600, 135 Pac. 850.

Evidence in an action against a railroad company for setting fires, held sufficient to go to the jury upon the question of the efficient or proximate cause of the injury and the negligence causing the injury.—*Miller v. Northern Pac. R. Co.*, 24 Idaho, 567, 135 Pac. 845; *Studebaker v. Northern Pac. R. Co.*, 24 Idaho, 600, 135 Pac. 850.

Editorial Notes.

Fire, liability for when caused by coals or sparks from locomotives: 38 Am. Dec. 70; 78 Am. Dec. 185; 6 Am. Rep. 597.

Fires, statute imposing liability for, whether constitutional: 42 Am. St. Rep. 538.

Presumption of negligence arising from communication of fire by railroad engine: Ann. Cas. 1913E, 971.

RAPE.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

II. PROSECUTION AND PUNISHMENT.

- (A) Indictment and Information.
- (B) Evidence.
- (C) Trial and Review.
- (D) Sentence and Punishment.

III. CIVIL LIABILITY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

Laws 1895, page 19 (amending R. S. 6765), which defines rape, was regularly passed by the legislature.—*State v. McGraw*, 6 Idaho, 635, 59 Pac. 178.

In order to warrant a conviction of the crime of assault with intent to commit rape, the state must show beyond a reasonable doubt that the defendant made an assault upon the female, with intent to use sexual force as was necessary in order to have sexual intercourse with her against her will and

without her consent.—*State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

The unchaste conduct of a girl under the age of consent is no defense for the one who committed rape upon her.—*State v. Henderson*, 19 Idaho, 524, 114 Pac. 30.

Editorial Notes.

What constitutes rape: 80 Am. Dec. 361.

II. PROSECUTION AND PUNISHMENT.

(A) INDICTMENT AND INFORMATION.

An information charged that "the said B. on or about the fifteenth day of January, 1899, at the county of B. and state of Idaho, and prior to the filing of this information, in and upon one L., a female child under the age of eighteen years, not the wife of said B., an assault did make, and her, the said L., then and there, did beat, bruise, wound and ill-treat, with intent her, the said L., violently and against her will feloniously to ravish and carnally know and carnally abuse." Held, not demurrable.—*State v. Beard*, 6 Idaho, 614, 57 Pac. 867.

In a prosecution for rape, the prosecutrix testified that the crime was committed on a certain date; evidence of two previous acts of the same nature committed by defendant on prosecutrix nine months and a year respectively prior to the act charged in the information was admitted. The prosecuting attorney stated that such evidence was introduced only in corroboration, and not for the purpose of showing separate and distinct offenses. Held, that the state had sufficiently elected on which act it would rely for conviction.—*State v. Lancaster*, 10 Idaho, 410, 78 Pac. 1081.

An information for assault with intent to commit rape, charging that defendant did assault the prosecutrix with intent to have sexual intercourse with her "willfully, feloniously, violently, unlawfully and against her will, wish, consent and resistance," sufficiently charges the intent to overcome the resistance of the female by means of force or fear.—*State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

Editorial Notes.

Necessity of using word "feloniously" in indictment for rape: 7 Ann. Cas. 263.

Necessity of express allegation in indictment that act was done against will or without consent of female: 9 Ann. Cas. 417.

Necessity that indictment negatives marital relations between accused and prosecutrix: 16 Ann. Cas. 902.

(B) EVIDENCE.

Other offenses and character of accused. See Criminal Law, X, (C).

Declaration of co-conspirator. See Criminal Law, X, (G).

Where the person on whom an alleged rape was committed was ten years of age and therefore incapable of consenting to the act, evidence of the character or reputation or acts

of the girl showing want of chastity is irrelevant and immaterial.—*State v. Anthony*, 6 Idaho, 383, 55 Pac. 884.

Evidence in a prosecution for rape held not to support a verdict of guilty.—*State v. Baker*, 6 Idaho, 496, 56 Pac. 81.

Though a defendant may be convicted of the crime of rape upon the uncorroborated testimony of the prosecutrix, such conviction should be had only when the character of the prosecutrix for chastity, as well as for truth, is unimpeached and where the circumstances surrounding the commission of the offense are clearly corroborative of the statements of the prosecutrix.—*State v. Anderson*, 6 Idaho, 706, 59 Pac. 180.

In a prosecution for rape, it was shown that A. was the sister of the woman alleged to have been raped and that F., the complaining witness, was her brother; that an engagement of marriage existed between A. and defendant, which was terminated after it was alleged to have been discovered that A. occupied the same bed with her brother, F.; that at the time of such alleged discovery it was claimed that defendant went to the bed and forcibly ejected F. therefrom; that thereafter F. and defendant were not on friendly terms. The theory of the defense was that there was a conspiracy on the part of A., F., and the woman alleged to have been raped, with whom defendant admitted that he had been intimate on two occasions by the woman's consent. Held, that evidence of the past conduct of A. and F. was admissible to aid the jury in determining whether the prosecution was in good faith or to gratify a feeling of malice and revenge on the part of A.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

Statements made to a third person by the person alleged to have been raped are not admissible unless a part of the *res gestae*.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

In a prosecution for assault with intent to commit rape it is essential that the state prove every fact necessary to constitute rape, except penetration.—*State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

In a prosecution for assault with intent to commit rape, evidence is admissible to show that the prosecutrix complained to different persons immediately after the occurrence, where the detailed account of her story is not given.—*State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

In a prosecution for assault with intent to commit rape, the appearance, condition and demeanor of prosecutrix immediately after the assault are proper matters of evidence. *State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

In a prosecution for assault with intent to commit rape, defendant should be permitted to tell the jury what his intention was when seeking intimacy with the prosecutrix. *State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

The fact that the prosecutrix in a rape case received and accepted money from her assailant after the perpetration of the of-

fense, while a circumstance admissible in behalf of defendant, is not sufficient to prove consent and absolve the defendant from guilt.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

Where the offense of rape is charged to have been committed on a female not under legal disability to give consent to the act, the state must show beyond a reasonable doubt not only the sexual act but that it was committed without the consent and against the will of the woman.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

In a prosecution for rape, the state may prove by the prosecutrix and the witnesses to whom she made complaint that she did make complaint, and when, where and to whom it was made, her appearance, demeanor and physical condition at the time of making such complaint, and also the fact that some person was accused of the commission of the offense; but the details of the conversations had and the name of the person accused by her may not be given, unless part of the res gestae.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

Statements and complaint made by a member of prosecutrix's family to third persons as to the commission of the offense are not admissible in evidence on a trial for rape.—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

On a trial for rape where the female was under the age of consent at the time of the commission of the offense, evidence as to the chastity of the prosecutrix, or that she had previously had sexual intercourse with other men, is not admissible.—*State v. Hammock*, 18 Idaho, 424, 110 Pac. 169.

Evidence that the prosecutrix gave birth to a child which might have been begotten at about the date of the offense charged is admissible to corroborate the prosecutrix.—*State v. Henderson*, 19 Idaho, 524, 114 Pac. 30.

Certain evidence offered by the defendant and rejected by the court as to certain physical peculiarities of said child, and offered for the purpose of discrediting the prosecutrix and to show acts of unchastity, held, not admissible.—*State v. Henderson*, 19 Idaho, 524, 114 Pac. 30.

In a prosecution for rape, it was not error to refuse to permit the defendant, upon cross-examination, to prove the color of the child's hair, as that was not a material fact or circumstance in the case, and would not throw any light on the issue as to whether the defendant did commit the crime of rape, as the paternity of the child was not in issue.—*State v. Henderson*, 19 Idaho, 524, 114 Pac. 30.

Where certain evidence is offered by the defendant to show that the prosecutrix had the opportunity of having sexual intercourse with another, and evidence is offered that the child had dark, kinky hair, dark eyes, and dark complexion, thus resembling the one with whom it was claimed she had opportunity to have such intercourse, the rejection of such evidence was not error.—*State v. Henderson*, 19 Idaho, 524, 114 Pac. 30.

Evidence in a prosecution for attempt to commit rape held sufficient to support a conviction.—*State v. Downing*, 23 Idaho, 540, 130 Pac. 461.

Editorial Notes.

Evidence of complaint made by prosecutrix: 38 Am. Rep. 369; 2 Ann. Cas. 234; 11 Ann. Cas. 99.

Necessity and sufficiency of corroboration of prosecutrix in prosecution for rape: Ann. Cas. 1913D, 660; 6 Ann. Cas. 771; 17 Ann. Cas. 413; 26 L. R. A., N. S., 1149.

(C) TRIAL AND REVIEW.

Arguments and conduct of counsel. See *Criminal Law*, XII, (E).

Compelling election between acts. See *Criminal Law*, XII, (C).

Where the evidence shows that defendant forcibly assaulted the prosecutrix, and the question of defendant's intent is fairly presented to the jury, and they find that the assault was made with intent to commit rape, their verdict will not be disturbed.—*State v. Beard*, 6 Idaho, 614, 57 Pac. 867.

In a prosecution for rape, the court instructed the jury that they "should not convict the defendant on the uncorroborated testimony of the prosecutrix alone, but such corroboration may be by facts and circumstances connected with or surrounding the case; in other words, corroboration is not necessarily the testimony of other witnesses." Held, that the giving of such instruction, under the evidence, was prejudicial, since it was virtually saying to the jury that the prosecutrix might be corroborated by her own statements.—*State v. Anderson*, 6 Idaho, 706, 59 Pac. 180.

In a prosecution for rape, it was shown that certain changes had been made in the evidence of the complaining witness before the committing magistrate and that such changes were not made in the presence of defendant. Held, that defendant had a right to cross-examine the witness as to such changes.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

Where, in a prosecution for rape, several witnesses have testified to seeing marks and bruises on the person of the woman alleged to have been raped, counsel for defendant has a right to ask the husband of the woman whether he saw any marks or bruises on her body.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

In a prosecution for rape, the question, "You didn't discover you had been raped until the next day, did you?" was properly excluded, as it was more for the purpose of humiliating the witness than to elicit the facts in the case.—*State v. Harness*, 10 Idaho, 18, 76 Pac. 788.

In a prosecution for assault with intent to commit rape, it is for the jury to determine what the assailant really meant to do and the manner in which he meant to accomplish his purpose, whether by persuasion,

force or fear.—*State v. Neil*, 13 Idaho, 539, 90 Pac. 860.

In a prosecution for rape, where the female was under no legal disability to give consent, it is error to instruct that "the acts of sexual intercourse being admitted, the burden of showing that they were committed with the consent of the woman without force or violence or threat is upon the defendants."—*State v. Fowler*, 13 Idaho, 317, 89 Pac. 757.

(D) SENTENCE AND PUNISHMENT.

On November 9, 1909, defendant was convicted of the crime of rape, committed on January, 1, 1909, and sentenced to imprisonment for a term of five to fifteen years under "the indeterminate sentence law," Laws 1909, page 82, which took effect May 6, 1909. R. C. 6768, which was in force at the time the crime was committed fixed the punishment for rape at a minimum of five years and the maximum extended to life. Held, that the defendant should have been sentenced under R. C. 6768, and that it was error to sentence him under the indeterminate sentence law.—*In re Chase*, 18 Idaho, 561, 110 Pac. 1036.

On November 9, 1909, defendant was convicted of the crime of rape, committed on January 1, 1909, and sentenced to imprisonment for a term of five to fifteen years under "the indeterminate sentence law," Laws 1909, page 82, which took effect May 6, 1909. R. C. 6768, which was in force at the time the crime was committed, fixed the punishment for rape at a minimum of five years and the maximum extended to life. Held, that though defendant should have been sentenced under R. C. 6768, the sentence was valid as to the term of five years.—*In re Chase*, 18 Idaho, 561, 110 Pac. 1036.

III. CIVIL LIABILITY.

(No paragraphs.)

REAL ESTATE AGENT.

See Brokers.

RECEIPT.

Questioning accuracy for first time on appeal. See Appeal and Error, V, (B).

Admissibility of evidence to contradict receipts. See Evidence, XI, (A).

Effect of giving receipt to carrier where goods are damaged. See Carriers, II.

RECEIVERS.

I. NATURE AND GROUNDS FOR RECEIVERSHIP.

II. APPOINTMENT, QUALIFICATION AND TENURE.

III. TITLE TO AND POSSESSION OF PROPERTY.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

VI. ACTIONS.

VII. ACCOUNTING AND COMPENSATION.

VIII. FOREIGN AND ANCILLARY RECEIVERSHIPS.

IX. LIABILITIES ON BONDS OR UNDERTAKINGS.

X. WRONGFUL RECEIVERSHIPS.

In actions or proceedings for particular forms of relief, or affecting particular kinds of property.

See Banks and Banking; Corporations; Mortgages; Chattel Mortgages, IX, (E); Railroads.

Review of decisions relating to receiverships. See Appeal and Error; Certiorari.

Application of creditor attacking appointment, who must be served. See Prohibition, II.

Continuance of receivership pending appeal. See Appeal and Error, VIII.

Failure to object in lower court to order making receiver's certificate prior lien. See Appeal and Error, V, (B).

Liability for costs on taking appeal without leave of court. See Banks and Banking, II.

Of corporations. See Corporations, VIII, XII, (J).

Right of appeal from order confirming receiver's sale. See Appeal and Error, III, (D).

— From order appointing or refusing appointment of receiver. See Appeal and Error, III, (E).

I. NATURE AND GROUNDS FOR RECEIVERSHIP.

Where a party has property in his possession or under his control which he allows to depreciate in value, or wrongfully disposes of, and another person has an interest therein, it is proper for the court to appoint a receiver.—*Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134.

Under R. S. 4329, providing in what cases receivers may be appointed, it is error to appoint a receiver where the equities of plaintiff's complaint have been fully met and denied by a sworn answer on behalf of the defendant.—*Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85.

Plaintiff applied for the appointment of a receiver. Defendants filed their sworn answer denying every equity and every material allegation of the complaint. On the hearing, the pleadings, the affidavits of plaintiff and contradictory affidavits of defendants were considered. No allegation of defendant's insolvency was made or proven and it was shown that defendants owned an undisputed thirteen twenty-fourths interest in the property in dispute. Held, that the court had no jurisdiction to appoint a receiver.—*Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85.

A complaint in an action for the recovery of real property, and affidavits in support thereof, alleged that the property was deteriorating in value and that the plaintiff was losing the rental value thereof. Defendants denied plaintiff's title and alleged that they were abundantly able to respond in damages, both for rents and injury or loss to the property. It appeared from the affidavits that the property was in the same condition it had been in for more than ten years, save age and the action of the elements. Held, that a court of equity would not take charge of real estate through a receiver as against a party in possession claiming title unless it be shown that the property is in imminent dan-

ger of great waste or irreparable injury and that therefore the appointment of a receiver in this case was unauthorized.—*Kelly v. Steele*, 9 Idaho, 141, 72 Pac. 887.

Where all the persons interested in personal property and having control over it are personally present in court, the court may appoint a receiver to take charge of the property in a proper case, though the property is beyond the jurisdiction of the court, and may in that manner reach the property through orders made upon the person of the litigant. *Eureka Min. etc. Co. v. Lewiston Nav. Co.*, 12 Idaho, 472, 86 Pac. 49.

Where a mortgage provides that the mortgagor shall insure the boat mortgaged and he fails to do so for the reason that the risk is so great on a vessel plying on the waters contemplated in the terms of the mortgage that insurance cannot be obtained, the failure of the mortgagor to insure will not of itself be sufficient ground for the appointment of a receiver for the vessel.—*Eureka Min. etc. Co. v. Lewiston Nav. Co.*, 12 Idaho, 472, 86 Pac. 49.

An original application was made in the supreme court in a pending action for the appointment of a receiver pendente lite to collect and receive the proceeds of a judgment rendered by a United States court. Held, that under the facts disclosed by the record the application for appointment of receiver should be denied.—*Chemung Min. Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619.

Editorial Notes.

When and of what property receivers will be appointed: 64 Am. Dec. 482.

Appointment of receivers, when proper: 72 Am. St. Rep. 29.

Power to appoint receivers of corporation when no other relief asked: 20 L. B. A. 210.

II. APPOINTMENT, QUALIFICATION AND TENURE.

Certiorari will lie to review an order appointing a receiver.—*Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85; *Cummings v. Steele*, 6 Idaho, 666, 59 Pac. 15.

A receiver cannot be appointed prior to the commencement of an action.—*Gold Hunter Min. etc. Co. v. Holleman*, 3 Idaho, 99, 27 Pac. 413.

After appearance in an action, the defendant is entitled to notice of motion for the appointment of a receiver, except in case of emergency, when the defendant has absconded and material injury will result to plaintiff unless the order be made forthwith; and an order made by the judge after such appearance without notice and without showing such emergency is void for want of jurisdiction.—*Cummings v. Steele*, 6 Idaho, 666, 59 Pac. 15.

Under Const., article 5, section 9, giving the supreme court jurisdiction to review, upon appeal, any decision of the district court, or the judges thereof, the supreme

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court has the authority to appoint a receiver in the exercise of its appellate jurisdiction.—*Chemung Min. Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619; *Eureka Min. etc. Co. v. Lewiston Nav. Co.*, 12 Idaho, 472, 86 Pac. 49.

In R. C. 4331, providing that the court may require an undertaking from an applicant for a receivership, "may" does not mean "must." *Lee v. Stevens*, 22 Idaho, 670, 127 Pac. 680.

Under R. C. 4331, it is left to the legal discretion of the court whether the applicant for the appointment of a receiver shall give the undertaking there prescribed before a receiver is appointed, and the court may in its discretion, at any time after said appointment, require an undertaking to be given by the applicant.—*Lee v. Stevens*, 22 Idaho, 670, 127 Pac. 680.

Where an action is begun in Kootenai county praying for the appointment of a receiver, and on the following day the papers are presented to the district judge at chambers in Bonner county, both counties being in the same judicial district, and the judge at chambers signs an order appointing a receiver, the fact that it was signed in Bonner county and that it was not filed by the clerk of the district court in Kootenai county until the following day would not affect the order or the power of the court to take possession of the property by the signing of the order.—*Exchange Nat. Bk. v. Northern Idaho Pine Lbr. Co.*, 24 Idaho, 671, 135 Pac. 747.

Editorial Notes.

Right to appointment of receiver before suit is instituted: Ann. Cas. 1912B, 236.

Affidavit or verified bill as essential to appointment of receiver: Ann. Cas. 1913A, 608.

III. TITLE TO AND POSSESSION OF PROPERTY.

Duty to pay taxes. See *Taxation*, III, (A).

Personal property not subject to seizure for taxes. See *Taxation*, VIII, (B).

When a court or judge signs an order appointing a receiver, the order becomes effective and vests title in the receiver immediately, and the property in the hands of the receiver cannot thereafter be attached.—*Exchange Nat. Bk. v. Northern Idaho Pine Lumber Co.*, 24 Idaho, 671, 135 Pac. 747.

Editorial Notes.

Time when right or title of receiver vests: 20 Ann. Cas. 551.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

See, also, *Corporations*, VIII.

Courts of equity have power and authority to appoint receivers of property and direct them to care for, protect and preserve the property and decree the charges and expenses therefor as prior and preferred liens to that of all other liens, mortgages or encumbrances, and to direct the property sold for the pay

ment of the same.—*Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

A court of equity has no authority to direct its receiver in charge of placer mines to carry on a general mining business and charge the expenses of the business and operation as a prior and preferred lien against the property over that of prior recorded mortgages and encumbrances on the same property.—*Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

A receiver in charge of the property of a corporation has no authority to carry on the business of the corporation unless he be so authorized and directed by the court.—*Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

It is not an excess of the jurisdiction of a court of equity, in ordering a sale of property in the hands of the receiver, to order and direct that no bid shall be received or accepted which is under a fixed and definite sum determined by the court as the minimum bid that shall be received or accepted for such property.—*Hewitt v. Walters*, 21 Idaho, 1, Ann. Cas. 1913C, 35, 119 Pac. 705.

The court has no power or authority to order or direct the payment of interest on receiver's certificates in excess of the maximum rate of interest allowed by the statute on contract, or at any rate that would be usurious under the statute; but it is not an excess of jurisdiction for the court to allow ten per cent interest on receiver's certificates.—*Hewitt v. Walters*, 21 Idaho, 1, Ann. Cas. 1913C, 35, 119 Pac. 705.

A trial judge in equity proceedings, exercising authority over a sale of property in the hands of a receiver appointed by such court, has discretionary power to modify all orders affecting such sale by subsequent orders.—*In re Great Western Beet Sugar Co.*, 22 Idaho, 328, 125 Pac. 799.

At a public sale of property by a receiver, the mere failure of a successful bidder to immediately make the payment on his bid required by the terms of the sale does not destroy the right of the receiver to demand or accept such payment later, where the rights of others are not injuriously affected by such delay.—*In re Great Western Beet Sugar Co.*, 22 Idaho, 328, 125 Pac. 799.

Where a public sale has been made by a receiver, in compliance with an order of the court, of property in his hands as such receiver, under notices requiring a cash payment on the day of the sale, and a bid is made within the terms of the sale, but the intending purchaser is unable to secure sufficient funds immediately with which to make such cash payment, it is a reasonable exercise of discretion on the part of the district judge to extend the time within which such payment shall be made, where no injury is done to anyone by failure of the purchaser to pay at once the sum due on his bid.—*In re Great Western Beet Sugar Co.*, 22 Idaho, 328, 125 Pac. 799.

In a receivership action in which a judgment creditor claimed priority of right to a

certain fund as against the receiver, held that the trial court did not err in refusing to pay the money to such creditor and in ordering that it be turned over to the receiver for the benefit of the general creditors.—*Exchange Nat. Bk. v. Northern Idaho Pine Lbr. Co.*, 24 Idaho, 671, 135 Pac. 747.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

See, also, Corporations, VIII.

Equity has power to direct receivers of property to protect the same and decree the expenses thereof as prior liens, superior to other mortgages or encumbrances, and to direct the property sold for the payment of the same.—*Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

An order appointing a receiver for a private corporation and authorizing the continuance of its business provided that receiver's certificates might be issued in the payment of certain indebtedness and that such certificates should take priority over other claims against the corporation. Held, that the court had no jurisdiction to make the order relating to receiver's certificates.—*Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768.

Under R. C. 4329, the court has the power and authority, in a proper case, to appoint a receiver to take charge of property and to care for and protect the same, and decree the charges therefor as a prior claim and lien against the property, paramount to all mortgages or other liens or encumbrances.—*Hewitt v. Great Western etc. Co.*, 20 Idaho, 235, 118 Pac. 296.

A court of equity has the authority and jurisdiction to decree that the charges and expenses of the receiver, incurred in the discharge of his duty, shall become a prior claim and lien against the property paramount to all existing mortgages or other liens or encumbrances thereon.—*Hewitt v. Walters*, 21 Idaho, 1, Ann. Cas. 1913C, 35, 119 Pac. 705.

Editorial Notes.

Application for and proceedings upon receivers' certificates: 128 Am. St. Rep. 102.

Receivers' certificates: Ann. Cas. 1913C, 39.

Priority of claims against property in hands of receiver over recorded liens: 2 L. R. A., N. S., 1013; 41 L. R. A., N. S., 695.

VI. ACTIONS.

A receiver cannot be sued without first obtaining the permission of the court which appointed him.—*Martin v. Atchison*, 2 Idaho, 624, 33 Pac. 47.

Editorial Notes.

Receivers, actions after their appointment, when may be prosecuted without leave of court: 74 Am. St. Rep. 285.

Action by or against receiver after his discharge: Ann. Cas. 1912D, 905.

VII. ACCOUNTING AND COMPENSATION.

Where a receiver has failed to keep correct accounts of the business and transactions of the receivership estate, and has failed to take vouchers for numerous and large sums of expenditure and has made large overcharges and false charges for sums claimed to have been expended by him, and has been generally reckless in his expenditures in connection with the trust and in the employment of servants, and has shown a general disregard for the trust he has assumed, a court of equity will refuse to allow him any salary or compensation for services as receiver.—*Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

A receiver is not entitled to allowance for fees paid attorneys for making his reports, narrating his acts, receipts and expenditures as receiver and prosecuting claims against the estate he represents for his own compensation and for the allowance of such attorney fees.—*Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

Editorial Notes.

Right to compensation of party to action who is appointed receiver: Ann. Cas. 1912A, 1198.

Liability of party at whose instance receiver is appointed for expenses of receivership: Ann. Cas. 1913B, 538; 13 Ann. Cas. 1161.

Liability for cost of receivership where final judgment is against the party who procured the receivership: 25 L. R. A., N. S., 412.

VIII. FOREIGN AND ANCILLARY RECEIVERSHIPS.

Of foreign corporations. See Corporations, XII, (J).

IX. LIABILITIES ON BONDS OR UNDERTAKINGS.

(No paragraphs.)

X. WRONGFUL RECEIVERSHIPS.

(No paragraphs.)

RECOGNIZANCES.

See Bail and Recognizance.

Effect of erasures and interlineations appearing at time of signing. See Alteration of Instruments.

RECORDS.

Records of particular judicial proceedings. See Judgment, and titles of particular proceedings.

Recording particular instruments, and effect of record or of failure to record in general. See Deeds; Mortgages; and titles of particular instruments.

Abstracts of title. See Abstracts.

Record of mortgage as notice to purchaser of mortgaged property putting on inquiry as to running of statute of limitations. See Limitation of Actions.

Operation of record as constructive notice to purchasers, mortgagees, etc. See Vendor and Purchaser, V, (O); Mortgages.

Effect of recording unacknowledged instrument. See Mortgages, III, (B).

Effect of recording unacknowledged contract. See Specific Performance, I.

Effect of recording plats. See Dedication.

Fees of clerk of court, auditor or recorder. See Clerk of Court, Auditor and Recorder.

Necessity of showing loss of records before admitting oral testimony. See Evidence, V.

Record and failure to record. See Chattel Mortgages, III.

Of stock brands. See Animals.

Pleading matters of record and denials thereof. See Pleading, I, III, (O).

Record of homestead declaration not entitled to record, effect as notice. See Homestead, I.

Recording deed as affecting question of delivery. See Deeds, I, (D).

Failure of officer to record as affecting title of subsequent purchaser. See Vendor and Purchaser.

Recorder. See Clerk of Court, Auditor and Recorder.

To record an instrument means to transcribe it, repeat it, or recite it in a book of record kept for the purpose of perpetuating the terms and recitals contained in the instrument or document so recorded.—*Lincoln Co. v. Twin Falls etc. Water Co.*, 23 Idaho, 433, 130 Pac. 788.

Editorial Notes.

Filing of papers, what constitutes: 15 Am. St. Rep. 294.

Delivery of document to officer when not at office as "filing" thereof: 18 Ann. Cas. 250.

REFERENCE.

Exception to order overruling exception to referee's report. See Appeal and Error, V, (O).

In partition proceedings. See Partition.

Stipulation for appointment of referee as waiver of right to trial by jury. See Jury, II.

The powers of a referee are limited by the order of reference duly made and entered of record before he enters upon his duties.—*Taylor v. Peterson*, 1 Idaho, 513.

An order appointing a referee may not be amended against objections, after such referee has acted, so as to make valid acts not authorized by the original order appointing him and prescribing his duties.—*Taylor v. Peterson*, 1 Idaho, 513.

Where a cause has been submitted by agreement of parties and on order of the court to a referee to hear the testimony and report his findings of fact thereon, it is error for the court upon its own motion to set aside such findings, make findings of fact of its own, and enter judgment thereon.—*Walker v. Campbell*, 3 Idaho, 13, 26 Pac. 123.

The court has jurisdiction to compel a referee to perform the duties imposed on him by the order of reference.—*Robinson v. Nelson*, 4 Idaho, 567, 43 Pac. 64.

After agreeing to a reference, a party cannot withdraw his consent thereto after it

has been acted upon by the court, unless the court consents to such withdrawal.—*Robinson v. Nelson*, 4 Idaho, 567, 43 Pac. 64.

Where a referee is appointed under R. S. 4414, subdivision 1, and ordered to examine all evidence theretofore taken and reported in the cause and report all issues, both of law and fact, and report a judgment therein subject to the approval of the court and the referee makes his report and fails to find upon all issues of fact, the court may remand the cause to the referee to bring in amended findings of fact, covering all issues made by the pleadings without any further consent of the parties.—*Robinson v. Nelson*, 4 Idaho, 567, 43 Pac. 64.

Under Laws 1901, page 132, providing that the court or judge may appoint a referee to take testimony in certain cases therein designated, the court is authorized to appoint a referee in actions to determine water rights, and the fact that the order directs the referee to report his conclusions of fact and law does not invalidate the order of appointment. *Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Where the record fails to show when the report of the referee was submitted to the court, but shows that the last testimony was taken by him over eighteen months prior to the filing of his report, and that the attorneys for both parties were present at all the hearings before the referee, and the court makes and files his findings on the same date on which the report is filed, the losing party cannot complain on appeal that he had no time or opportunity to object to the report or to move to purge the testimony as reported by the referee, since he had sufficient time to do so between the taking of the last testimony and the filing of the report.—*Lindstrom v. Hope Lbr. Co.*, 12 Idaho, 714, 88 Pac. 92.

A court has no power to send an ordinary action at law to a referee for trial on its own motion, even though the case involves the examination of a long account, and thus to deprive the objecting party of his right to trial by jury.—*Russell v. Alt*, 12 Idaho, 789, 13 L. R. A., N. S., 146, 88 Pac. 416.

Where a referee has been appointed to take testimony and make "findings of fact as to the book account of defendant and report the same to the court," and on the trial of the case after the referee has reported, defendant offers to prove credits to which he was entitled that were not contained in the books submitted to the referee and not reported on, the rejection of such evidence is error. *Morris v. Lemp*, 13 Idaho, 116, 88 Pac. 761.

Where a cause is referred to a referee to hear the testimony and submit findings for the guidance of the court, such referee is not authorized to enter judgment on the pleadings. *Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

Where a stipulation of reference authorized the referee to hear the testimony and submit findings to the court, the referee had no authority to determine the question as to the burden of proof or upon whom the affirma-

tive rested.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

Where a cause is referred to a referee to hear the testimony and submit findings to the court, and no testimony is offered, the referee has nothing to do but report that fact to the court.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

Editorial Notes.

Power to submit causes to referees: 79 Am. Dec. 207.

Right to order compulsory reference in equitable action independently of statute: Ann. Cas. 1912D, 1136.

Power of referee to overrule previous order or ruling of judge: Ann. Cas. 1913C, 1250.

Effect of failure of referee to file report within time fixed by statute or order of reference: Ann. Cas. 1913D, 603.

Compulsory reference as denial of constitutional right to jury trial: 25 L. R. A. 68; 13 L. R. A., N. S., 146; 39 L. R. A., N. S., 46.

REFORMATION OF INSTRUMENTS.

See, also, Cancellation of Instruments.

Of chattel mortgage in foreclosure action. See Chattel Mortgages.

Of bond as condition precedent to recover thereon. See Bonds.

Reformation or correction of certificate of acknowledgment. See Acknowledgment.

To authorize the reformation of a written contract on the ground of mistake, the party alleging mistake must show exactly in what it consists, and the correction that should be made and the evidence must be such as to leave no reasonable doubt that the mistake was mutual and common to both parties.—*Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37.

Allegations that parties to a mortgage intended that certain land should be conveyed by such mortgage, and that the scrivener omitted, through mistake, the number of the section in which such tract was situated, are sufficient to sustain an action for reformation.—*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

A mortgage may be reformed and foreclosed in the same action.—*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

Courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration or description that has been inserted therein through deception, fraud or mutual mistake, and to make its statements speak the truth as it was intended to insert it in the instrument; but courts of equity have no power or jurisdiction to construct or reconstruct an executory contract for the parties, or to insert therein a new and essential element or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding.—*Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052.

Courts of equity have the power and jurisdiction to so reform executory contracts for the sale of real estate as to require and compel them to speak the truth in a matter of description where it is clearly established that the instrument on its face speaks falsely; but a court of equity has no power or jurisdiction, under the pretense of reformation or otherwise, to so construct or reconstruct such an agreement as to add to the description or make a complete contract out of one which on its face was incomplete or insufficient to meet the requirements of the statute of frauds.—*Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052.

Where the evidence shows that the true and correct description of a tract of land was in "township 37 north of range 5 W. B. M.," and by mutual mistake and clerical error the description was written "township 37 north of range 5 E. B. M.," and the true description of the land intended to be described is known to all the parties affected by the action, it was proper for the trial court to correct the description to conform to the true purpose and intention of the parties.—*Collins v. Brown*, 19 Idaho, 360, 114 Pac. 671.

M. entered into an agreement with E., whereby he agreed to convey certain real estate to E., and in consideration thereof J. agreed to move upon the real estate and take up his residence there and to support and maintain M. during his lifetime, and M. was to have the rents and profits from one building on the premises and to retain a life estate in the property conveyed, and in consequence of such agreement a warranty deed was made from M. to E. with the understanding and agreement that the same should subsequently be so changed as to reserve a life estate in the property and to conform to the stipulations and agreements. Held, that in an action by M. to cancel and set aside the deed of conveyance, and on proof of all the facts and circumstances entering into the agreement and its terms and provisions, a court of equity should so reform the conveyance as to reserve a life estate to M. and to provide the terms and conditions of the agreement so entered into, and that J. should be brought into the case, and that both E. and J. should be bound by the judgment and decree.—*Mangin v. Kellogg*, 22 Idaho, 137, 124 Pac. 651.

The rule that "courts of equity will not relieve parties from the consequences of their own folly, or assist them when their condition is attributable to their failure to exercise ordinary care for their protection," will be administered by courts, in the light of the facts and circumstances of each particular case, with such discretion and flexibility as will accomplish substantial justice in the case then before the court.—*Panhandle Lbr. Co. v. Rancour*, 24 Idaho, 603, 135 Pac. 558.

A party seeking reformation of a contract or specific performance, or pursuing any other civil remedy, is not required to establish his case "beyond a reasonable doubt."—*Panhandle Lbr. Co. v. Rancour*, 24 Idaho, 603, 135 Pac. 558.

Where a party agrees to sell and convey to another party real property, and the purchaser assumes and agrees to pay a mortgage upon said property executed before the contract of sale is entered into, and thereafter a deed is executed conveying the property, and the condition of payment of the mortgage existing before the time the contract and deed are made was omitted from the deed by agreement of the parties, for the reason that it might affect the credit of the party who agrees to pay the mortgage, the deed may be reformed by inserting the omission in the deed.—*Wollan v. McKay*, 24 Idaho, 691, 135 Pac. 832.

Editorial Notes.

Reformation of instruments on the ground of mistake: 30 Am. St. Rep. 621; 117 Am. St. Rep. 227.

Causes and proceedings for reformation of instruments: 65 Am. St. Rep. 481.

REGISTERS OF DEEDS.

See Clerk of Court, Auditor and Recorder.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Payment.

Admissibility of release signed by party without attorney's knowledge or consent. See Evidence, VII.

Payment. See Payment.

Release of particular rights and interests in real property. See Mortgages; Mechanics' Liens; and other specific heads.

Check given pursuant to compromise agreement, when not considered release of such agreement. See Accord and Satisfaction.

Of attached property. See Attachment and Garnishment, VII.

Of husband by giving credit to wife. See Husband and Wife, I.

RELIGIOUS SOCIETIES.

Where opposing factions of a religious society each seek to have the other restrained from using a church for purposes of worship, the trial court has jurisdiction to order an injunction pendente lite, which in effect gives each faction the right to use the church at stated times.—*Wayne v. Alspach*, 20 Idaho, 144, 116 Pac. 1033.

The donor of real estate for church purposes conveys the property to a grantee, which he designates as the "Apostolic Holiness Church of Post Falls, Idaho, subject to the International Apostolic Holiness Union," and it subsequently appears that there was no "Apostolic Holiness Church" organization at such place at the time of the execution of the deed, but that, on the contrary, there was an "Apostolic Holiness Union" at such place, "subject to the International Apostolic Holiness Union," and that such Union was commonly referred to by the members as a "church." Held, that the members of the society or organization composing the Union took the title to the property in trust for such religious society or organization.—

Apostolic Holiness Union v. Knudson, 21 Idaho, 589, 123 Pac. 473.

Where property had been conveyed to a religious organization, and the grantee was named in the conveyance as "the Apostolic Holiness Church of Post Falls, Idaho, subject to the International Apostolic Holiness Union," a deed thereafter executed by "Reverend C. D. Erb, Pastor, C. M. Venters, Secretary," without being first authorized by the organization or society, is an act *ultra vires*, and does not pass the title to such property.—*Apostolic Holiness Union v. Knudson*, 21 Idaho, 589, 123 Pac. 473.

Where there is a division among the members of a church organization or religious society, those who remain with the organization and adhere to its tenets and doctrines as originally taught by the organization or congregation to which the property was conveyed or dedicated, whether they be in the majority or minority in the membership, are entitled to retain the property, and to enjoy its use and benefit.—*Apostolic Holiness Union v. Knudson*, 21 Idaho, 589, 123 Pac. 473.

Editorial Notes.

Jurisdiction of courts over religious societies: 68 Am. St. Rep. 864; 100 Am. St. Rep. 734.

Religious societies, liability of members of for debts of: 109 Am. St. Rep. 372.

Allotment of property between factions of religious society: 20 Ann. Cas. 410.

Litigation growing out of schism or divisions in religious society: 24 L. R. A., N. S., 692.

RELINQUISHMENT.

Relinquishment by heir prior to patent to heirs of deceased entryman. See *Descent and Distribution*.

REMAINDERS.

Action by remainderman to protect contingent remainder. See *Quieting Title*, II.

Duty of life tenant to pay taxes. See *Life Estates*.

Adverse possession as against remaindermen. See *Tenancy in Common*, II.

REMOVAL OF CAUSES.

Removal of causes from one court to another court of a state. See *Courts*.

Change of venue or of place of trial. See *Venue*; *Criminal Law*.

Commencement of action in federal court by non-resident alien does not suspend statute of limitations in state court. See *Aliens*.

Does not extend time to answer. See *Pleading*, III, (A).

Act of Congress, August 13, 1888 (25 Stats. 432), amending act of March 3, 1887, provides, in section 2 thereof, that "whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the case was improperly removed, and order the same to be remanded to the state court from which it came, such remand shall be immediately carried into execution, and no

appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." Held, that an order of the circuit court of the United States remanding a case back to the state court after removal therefrom, is binding on the parties and should be respected by the state court.—*Coeur d'Alene Ry. etc. Co. v. Spalding*, 6 Idaho, 97, 53 Pac. 107.

After more than six years from the making of an order by the United States circuit court, to which a case had been removed, remanding such case back to the state court, and after an appeal from the judgment rendered therein on a record which raised no question as to the jurisdiction of the state courts and an affirmance of the judgment by the supreme court, the defendant filed a petition for a writ of review on the ground that the state court had no jurisdiction. Held, that defendant was estopped to question such jurisdiction and therefore that the writ demanded should be denied.—*Coeur d'Alene Ry. etc. Co. v. Spalding*, 6 Idaho, 97, 53 Pac. 107.

Where a party undertakes to remove a case from the state court to the federal court, and the cause is remanded on the ground that the federal court acquired no jurisdiction thereof, and such party thereafter takes up his case where he left off in the state court, the bar of the statute and rules of court limiting the time in which to pursue his remedy on appeal will run against him as though no attempted removal had been made.—*Finney v. American Bonding Co.*, 13 Idaho, 534, 90 Pac. 859; *Mills v. American Bonding Co.*, 13 Idaho, 556, 91 Pac. 381.

A petition for removal of a case to the federal court presents to the state court a question of law as to whether, admitting the facts stated in the petition to be true, it appears on the face of the record which includes the petition, pleading and proceedings down to that time, that petitioner has complied with the statute and is entitled to removal of the suit.—*Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89.

Where a petition for removal of a case to the federal court and the files in the case constituting the record up to the time of filing the petition show upon their face that the federal statute has been complied with, and that the case is one that should be removed, the jurisdiction is at once transferred to the federal court.—*Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89.

Where a defendant has been sued in the state court and summons has been served upon him, and prior to the expiration of the time within which he is required to answer under the statute, and without appearing or answering, he files a petition for a removal to the federal court, and an order of removal is made by the judge of the state court, and the record is thereafter transferred to the federal court, and on motion made in the latter court the cause is remanded to the state court for want of jurisdiction in the federal court, and upon receipt of the certificate from the federal court remanding the cause, and in the absence of any appear-

ance on the part of the defendants within the time prescribed by statute, the clerk of the district court enters the default of the defendants for failure to appear or answer, the action of the clerk in entering the default of the defendants is authorized by R. C. 4140 and 4360, and is not void for want of jurisdiction.—*Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89.

Editorial Notes.

Removal of causes, effect of petition and bond: 23 Am. Rep. 143.

Right of state court to determine question of fact on petition for removal of cause to federal court: Ann. Cas. 1912A, 236.

Validity of statute providing against removal of action by foreign corporation into federal court: Ann. Cas. 1912C, 1160; 6 Ann. Cas. 325.

Waiver of right to remove cause from state to federal court: Ann. Cas. 1913A, 1337.

Removal of causes because of separable controversy: 5 L. R. A., N. S., 50.

REPLEVIN.

See Claim and Delivery.

REPORTERS.

Court reporters. See Courts, II, (A).

REPUTATION.

For peace and quietude. See Assault and Battery. Common report as to existence of partnership. See Partnership, I.

Evidence of general repute in prosecution for bigamy. See Bigamy.

Reputation of house of ill-fame. See Disorderly House.

RES GESTAE.

In criminal prosecution. See Criminal Law.

In civil actions. See Evidence, IV, (E).

REVIEW.

Proceedings to review or correct judgment. See Judgment.

Appeal or writ of error. See Appeal and Error.

Certiorari or statutory writ of review. See Certiorari.

Writ of. See Certiorari.

Bill of. See Equity, VIII.

ROADS AND ROAD DISTRICTS.

See Highways.

ROBBERY.

Larceny from the person, without force or intimidation. See Larceny.

Scope of cross-examination. See Criminal Law, XII, (C).

Following language of statute in information. See Indictment and Information, V.

In an indictment for robbery, the words "felonious" and "rob" carry with them the intent, and are sufficient.—*People v. Butler*, 1 Idaho, 231.

An instruction to the jury "that if they believe from the evidence that the defendants feloniously took possession of the United States mail, or any part thereof, by force or intimidation of or from a carrier of the mail, then the offense of robbery is complete," is not erroneous.—*United States v. Mays*, 1 Idaho, 763.

In a prosecution for robbery, it is reversible error to instruct the jury that "if a man stealthily flied from the pocket of another, the force necessary to remove the property is all the force that the statute requires," since such instruction incorrectly states the law and virtually abolishes the distinction between robbery and larceny from the person as defined by R. S. 7048, subdivision 2.—*Territory v. McKern*, 3 Idaho, 15, 26 Pac. 123.

Evidence on trial for robbery held to leave serious doubts as to guilt of defendants.—*State v. Waln*, 14 Idaho, 1, 80 Pac. 221.

An information charging robbery, in that the defendant "did then and there, and by means of said fear inspired in the said Efton Carr, as aforesaid, willfully, unlawfully and feloniously take, steal and carry away from the person of said Efton Carr, and against the will of him, the said Efton Carr, certain personal property then and there being in the possession of and on the person of said Efton Carr, to wit, eight dollars in silver coin, lawful money of the United States of America, and of the value of eight dollars," is sufficient, and negatives the idea that said silver coin was the property of the defendant.—*State v. Brill*, 21 Idaho, 269, 121 Pac. 79.

On a prosecution for robbery, the fact that the money taken was in the possession of the prosecuting witness was sufficient evidence of ownership to sustain a conviction, where there was no evidence tending to show it belonged to the defendant, and no claim was made by the defendant that the property was his.—*State v. Brill*, 21 Idaho, 269, 121 Pac. 79.

Editorial Notes.

Nature and elements of crime of robbery: 70 Am. Dec. 178; 135 Am. St. Rep. 474.

Sufficiency of indictment for robbery with respect to description of property taken: Ann. Cas. 1912B, 402.

What force sufficient to constitute robbery: 57 L. R. A. 432.

RULE IN SHELLEY'S CASE.

See Deeds, III, (C).

SALES.

- I. REQUISITES AND VALIDITY OF CONTRACT.
- II. CONSTRUCTION OF CONTRACT.
- III. MODIFICATION OR RESCISSION OF CONTRACT.
- IV. PERFORMANCE OF CONTRACT.
- V. OPERATION AND EFFECT.
- VI. WARRANTIES.
- VII. REMEDIES OF SELLER.
- VIII. REMEDIES OF BUYER.
- IX. CONDITIONAL SALES.

See, also, Chattel Mortgages; Pledges; Receivers; Judicial Sales.

Sales of real property. See Vendor and Purchaser. Bills of sale as securities for payment of debts. See Chattel Mortgages.

Transfers of rights in action. See Assignments.

Sales by or to particular classes of persons. See Infants, and other specific heads.

Regulation of sales of particular articles. See Intoxicating Liquors, and other specific heads.

Sales under judgments, decrees, and orders of courts. See Judicial Sales; Attachment and Garnishment; Execution; Sheriffs and Constables.

Sales for taxes. See Taxation.

Requirements of statute of frauds. See Frauds, Statute of, VI.

Fraudulent conveyances. See Fraudulent Conveyances.

Sale under execution. See Execution, VII.

Seller as bailee prior to delivery. See Bailment; Specific Performance.

Sale of attached property. See Attachment and Garnishment, V.

Sales of abstracts of title, liability of abstract company. See Abstracts of Title.

I. REQUISITES AND VALIDITY OF CONTRACT.

In an action for the balance of the purchase price of certain apples, held, that there is substantial evidence to support the findings and judgment in favor of defendant.—*Miller v. Blunck*, 24 Idaho, 234, 133 Pac. 383.

II. CONSTRUCTION OF CONTRACT.

One state is not bound by the law of comity to accept the transfer laws of another state affecting property located within its borders.—*Barnett v. Kinney*, 2 Idaho, 740, 23 Pac. 922, 24 Pac. 624.

Where, under all the evidence, different minds might honestly reach different conclusions as to whether a sale of personal property was completed or was merely an executory agreement to sell, the question is for the jury.—*Idaho Implement Co. v. Lambach*, 16 Idaho, 497, 101 Pac. 951.

The distinction between an actual sale or a mere executory agreement to sell personal property is, that in the former the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded and without regard to the fact whether the goods be actually delivered to the buyer or remain in the possession of the seller; while in the latter the goods

remain the property of the seller till the contract is executed.—*Idaho Implement Co. v. Lambach*, 16 Idaho, 497, 101 Pac. 951.

Where a contract was made for the sale of three hundred tons of "good merchantable" hay to be baled and shipped, the words "good merchantable" is descriptive of the quality of the hay required by the contract, and means such hay as is vendible on the market, or salable on the market at the ordinary price on such market.—*Trego v. Arave*, 20 Idaho, 38, 116 Pac. 119.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(No paragraphs.)

IV. PERFORMANCE OF CONTRACT.

Seller as bailee prior to delivery. See Bailment.

Where a vendor furnishes samples of the goods with which he is to supply the vendee, and the vendee subsequently finds that the government for which he is constructing a building wherein he proposes to use the property furnished will not accept material of the kind or finish of the sample, and he thereafter furnishes another sample which has not been agreed to by the vendor or of which the vendor had no knowledge, the vendor will not be held to have warranted the goods to be other than as represented by the original sample furnished.—*Brown v. Scheurman*, 22 Idaho, 724, 128 Pac. 83.

Editorial Notes.

Sales of chattels by sample: 7 Am. Dec. 125.

V. OPERATION AND EFFECT.

Sufficiency of delivery as against attaching creditors. See Fraudulent Conveyances, I.

Where property is delivered to the buyer on trial or approval the title thereto passes to him on the expiration of the time limited for trial.—*Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.

In determining the question as to whether the title to personal property has passed by a contract of sale, the primary and first consideration is the intention and understanding of the parties as gathered from the contract and the circumstances surrounding the sale. *Idaho Implement Co. v. Lambach*, 16 Idaho, 497, 101 Pac. 951.

Where the evidence shows that the property sold by defendant to plaintiff was hay, that the same was segregated and set apart, and part actually delivered, and the remainder offered and tendered to the plaintiff, who neglected and failed to make provision for receiving the same, it is error for the court to instruct the jury that the title to such property sold remained in the defendant until the same was actually delivered to the plaintiff or upon its order.—*Idaho Implement Co. v. Lambach*, 16 Idaho, 497, 101 Pac. 951.

Where C. made a contract with defendant company to sell to the company all cotton-

wood saw-logs cut on a certain described tract of land, and delivered on the bank of the Kootenai river within a certain time, and the company agreed to pay for the same at the rate of \$4 per thousand, board measure, and to scale the same when notified of the delivery of the logs on the bank of the river, and C. cut and banked the logs in accordance with the contract, the delivery was complete upon his banking the logs as provided in the contract.—*Carlson v. Crescent etc. Box Mfg. Co.*, 20 Idaho, 794, 120 Pac. 460.

The question of when the title to personal property passes on sale thereof will be governed by the intention of the parties, and is a question for the jury, under proper instructions.—*Carlson v. Crescent etc. Box Mfg. Co.*, 20 Idaho, 794, 120 Pac. 460.

Editorial Notes.

Title to article to be built or manufactured, when passes by sale: 62 Am. Dec. 65.

Sale of articles to be manufactured, title, when does not pass though payment has been made: 40 Am. Rep. 173.

Sale of personalty delivery of, when does not pass title: 120 Am. St. Rep. 868.

VI. WARRANTIES.

A contract of sale and warranty provided that "continued possession or use of the machinery for six days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned purchaser, who agrees thereafter to make no further claim under the warranty." The contract also provided that written notice of defects must be given to the seller. Held, that continued possession of the machine for six days by the seller without serving any written notice of defects was a waiver of any claim for damages under the warranty.—*Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.

A provision in a contract of sale that no promises of the company's agent, in respect to payments, security or the working of the machinery sold, will be considered binding "unless made in writing, ratified by the home or branch office," does not prevent the company's agent waiving written notice by going to the place where the machinery is being operated, and taking charge of the machinery and working on it so as to put it in a condition which will comply with the warranty.—*Harrison v. Russell & Co.*, 12 Idaho, 624, 87 Pac. 784.

Where a contract of sale of machinery requires written notice from the purchaser of defects, the purpose of such notice is to enable the seller to examine the machinery and remedy such defects, and when the seller's agents have taken charge of and examined and worked on the machinery, it becomes immaterial whether any notice at all has been given.—*Harrison v. Russell & Co.*, 12 Idaho, 624, 87 Pac. 784.

Where the contract of sale of a threshing-machine contains a warranty limited and con-

ditioned as follows, "continued possession or use of machinery for six days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim against the sellers under warranty," the "possession" therein mentioned means a possession coupled with the possibility or opportunity of using or testing the property for the uses and purposes to which it is to be applied.—*Harrison v. Russell & Co.*, 12 Idaho, 624, 87 Pac. 784.

Where buyers agree to purchase a "No. 8 F. & B. Victor safe," and the seller, in describing the safe, told the buyers that it was burglar and fire proof, there was an implied warranty that the safe purchased was burglar and fire proof, as the term is usually applied, and that the safe was suitable for the purpose for which it was purchased.—*Barnett v. Hagan*, 18 Idaho, 104, 108 Pac. 743.

Where O. and others purchased a stallion and at the same time received from the vendor a contract of warranty, and thereafter and before using him sold the animal without assigning the contract of warranty to the purchaser, but at the same time made the same warranties to the purchasers as they had received from the original vendor, O. and such others may sue on the contract of warranty as the real parties in interest.—*Olson Bros. v. Hurd*, 20 Idaho, 47, 116 Pac. 358.

Where a contract of warranty given on the sale of a stallion provides that, in the event the animal fails to come up to the requirements of the warranty as a foal-getter, the purchaser shall give notice to the vendor on or before the 1st day of January following at a specified place, a personal notice given by word of mouth at some other place, prior to the date limit fixed in the contract, is a sufficient and substantial compliance with the contract as to notice, the essence of such a stipulation being notice to the vendor, and the place and manner of giving the notice being a mere incident to the notice itself.—*Olson Bros. v. Hurd*, 20 Idaho, 47, 116 Pac. 358.

Where a nurseryman grows fruit trees for the purpose of selling to persons desiring to cultivate a commercial fruit orchard with a view of raising fruit for commercial purposes, he is presumed to have produced such young fruit trees for the purpose of developing into commercial trees—that is, trees that will produce fruit suitable for commercial purposes—and in selling such trees for that purpose the nurseryman intends and represents that they shall be suitable and adapted to the purpose for which they are sold, and be of the kind and quality which will produce the purpose for which they were originally planted, and in such a physical condition that they will grow after being transplanted, if ordinary care and attention is given them in their planting and cultivation.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

An implied warranty arises out of a state of facts which show the intention of the par-

ties to be that the article ordered is of the kind and quality ordered, and fit and suitable for the purpose for which it is ordered.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

Where fruit trees are received under an implied warranty as to their condition and likelihood to grow, and the purchaser cannot definitely determine whether they are in such condition at the time of delivery, the purchaser has the right to receive them and ascertain whether they are in a good or bad condition or will grow if given proper care, and by so receiving such trees the purchaser is not precluded from recovering upon such warranty.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

Where a person desiring to plant a commercial apple orchard orders fruit trees from a nurseryman, and gives direction as to the kind and number, and the nurseryman fills the order and ships the trees to the place of delivery, the fact that the purchaser accepts the trees upon their delivery does not waive the warranty, but the warranty survives the acceptance; and, where the trees upon their arrival at the place of delivery are found to be in bad condition, unfit for planting, and not likely to grow, in whole or in part, the purchaser may reject them, or receive them and rely upon the warranty.—*Grisinger v. Hubbard*, 21 Idaho, 469, 122 Pac. 854.

The instructions contained in the record as to implied warranties in the sale of personal property in this case examined, and held to be a correct statement of the law, as applicable to the facts of this case.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

Where a contractor purchases brick by sample and receives shipments from time to time, and accepts the same, and uses them in the construction of the building for which they were purchased and makes no complaint of the kind or quality of the brick furnished, and continues to order more, he cannot, upon action to recover the purchase price, successfully maintain the defense that under R. C. 3325, the vendor having sold by sample warranted the bulk to be equal to the sample.—*Brown v. Scheurman*, 22 Idaho, 724, 128 Pac. 83.

Editorial Notes.

Quality, warranty of, what amounts to: 1 Am. Dec. 84.

Warranties implied on a sale of chattels: 24 Am. Rep. 181; 6 Am. Dec. 113; 33 L. R. A., N. S., 502.

Warranty of quality, when implied: 2 Am. Dec. 220; 55 Am. Dec. 328; 102 Am. St. Rep. 607; 35 L. R. A., N. S., 258.

Warranty of soundness, when implied: 43 Am. Dec. 680.

Warranty of soundness, what defects constitute breaches of: 53 Am. Dec. 173.

Implied warranty on sale of nursery stock: Ann. Cas. 1913E, 93.

Implied warranty by seller that animal is fit for breeding purposes: 19 Ann. Cas. 874.

Warranty on sale of goods by sample: 70 L. R. A. 654.

VII. REMEDIES OF SELLER.

In a suit on a contract for refusal of a purchaser to receive cattle contracted for, the vendor must prove that he was able and willing to deliver, at the time and place agreed upon, the number of cattle agreed on; that they were the kind and quality required by the contract; the price agreed upon and the difference, if any, in the market value and the price agreed on, at the time and place of delivery.—*Sweetser v. Mellick*, 4 Idaho, 201, 38 Pac. 403.

Where materials are sold under a general sale without any reference to the mine, building or structure on which they were to be used, the vendor will have no lien therefor. *Colorado Iron Works v. Riekenberg*, 4 Idaho, 705, 43 Pac. 681.

A complaint for breach of contract to purchase boards to be cut and delivered by plaintiff must allege damages by reason of the breach, an allegation of the value of the labor expended on the boards by plaintiff being insufficient for that purpose.—*Morrison v. American etc. Co.*, 5 Idaho, 77, 47 Pac. 94.

In an action to recover for goods sold, an allegation that plaintiff "sold and delivered" the goods alleges but one act, so that a denial that the goods were "sold and delivered" is not evasive, as being in the conjunctive.—*Feldmann v. Shea*, 6 Idaho, 717, 59 Pac. 537.

The value of goods alleged to have been sold and delivered may be established by oral as well as by written evidence.—*Idaho Mercantile Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

Where defendant sold hay purchased from plaintiff and accepted by defendant and the hay was carried away or destroyed, no complaint being made as to the quality or condition of the hay, and no payment but the first made on the purchase price, defendant cannot resist payment on the ground that the hay was not good and merchantable.—*Henry v. Herschey*, 9 Idaho, 548, 75 Pac. 266.

In an action for the price of goods sold, where defendant desires to show illegality of a contract or failure of consideration, but fails to plead the same, such failure will only be excused where the illegality or failure of consideration appears from the complaint itself.—*Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608.

Where plaintiff alleges the sale and delivery of property and failure and refusal by defendants to pay the price, and defendants deny such purchase or receiving the property, evidence is inadmissible under such denial to show the illegality of the contract or failure of title in the property alleged to have been sold.—*Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608.

Defendant, who desires to show illegality of a contract of sale as in violation of a statute or of public policy, or failure of consideration, must plead such defenses.—*Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608.

Where a prospective purchaser of goods submits a list of the goods he proposes to purchase, and asks the price for which the owner will sell such articles, and the vendor submits a bid in the aggregate for the entire list of goods without setting out the price of each article, and the purchaser accepts the proposition and orders the goods shipped, and thereafter receives and accepts the goods, the vendor will not be allowed to recover a greater sum than that called for by his bid on the grounds that he made an error or mistake in computing the various items, and for that reason submitted his bid greatly below the price for which the goods should have sold.—*Tatum v. Coast Lumber Co.*, 16 Idaho, 471, 23 L. R. A., N. S., 1109, 101 Pac. 957.

In an action for the price of fruit trees, letters written by a salesman to his principal and by the principal to plaintiff, which letters led to the sale in question, were admissible in evidence.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

Where the complaint shows a sale and the proof shows a tortious taking, the right of recovery arises under the rule of law that the owner of the goods may sue to recover the reasonable value thereof on the rightful assumption that the taker proposed, not to take the same without compensation to the owner, but to pay him the reasonable value thereof.—*Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929.

In an action for the purchase price of goods where the proof showed a tortious conversion thereof instead of a purchase, evidence held to support a verdict for plaintiff.—*Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929.

VIII. REMEDIES OF BUYER.

Action by purchaser against vendor for fraud. See Fraud.

Where the issue in a case is the contract of purchase of machinery and a warranty given therewith, it is error to exclude evidence tending to show such contract and the character of the work done by the machinery sold, and the efforts on the part of the seller to make the machinery work in accordance with a warranty, and the acts of the parties with reference to a return and exchange of such machinery, and the final cancellation and rescission of the contract of sale.—*Harrison v. Russell*, 17 Idaho, 196, 105 Pac. 48.

Where breach of warranty is pleaded as a defense, evidence should not be admitted which goes outside and beyond the terms of the warranty, and which tends to show that the article warranted does not possess certain other characteristics or qualities which were not covered by the warranty.—*Barnett v. Hagan*, 18 Idaho, 104, 108 Pac. 743.

Where a safe is purchased, and an implied warranty arises out of the transaction to the effect that such safe is fireproof, and is a new safe, and in good condition, in an action based upon the contract of purchase, where breach of warranty is pleaded as a defense, it is error to admit evidence tending to show that the safe was not made in the same way or upon the same plan or theory as other standard fireproof safes.—*Barnett v. Hagan*, 18 Idaho, 104, 108 Pac. 743.

In determining whether a safe warranted to be fireproof is in fact fireproof, evidence may be received showing that safes made by the same company, of like kind and material and method of construction, had passed through fires and withstood the effects of heat without any material injury to the contents of such safes, but comparison cannot be made with safes made by other manufacturers of different kind and materials and constructed upon different plans and theories.—*Barnett v. Hagan*, 18 Idaho, 104, 108 Pac. 743.

If a purchaser of hay makes a contract for the resale of such hay, and discloses that fact to his vendor, who undertakes to furnish the hay and deliver it at a specified time and place, and his vendor fails to deliver the hay, he will be liable for damages on the basis of the reasonable profits the buyer would have realized from a resale of the hay.—*Trego v. Arave*, 20 Idaho, 38, 116 Pac. 119.

Where hay is purchased to be sold on open market, and the purchaser had contracted to sell the same for a certain price on said market, and the person from whom he purchased it failed to comply with his part of the contract in regard to the quality of the hay, it was error for the court to reject evidence tending to prove the reasonable profits that would have been made by the purchaser had the seller delivered the hay in accordance with the contract, as such profit is an element of damage that may be recovered in an action brought for that purpose.—*Trego v. Arave*, 20 Idaho, 38, 116 Pac. 119.

Where a complaint alleges that "the plaintiffs purchased of the defendant" an animal "for the sum of \$1,600," the complaint is not open to demurrer on the ground that such an allegation is not equivalent to alleging that the plaintiff paid \$1,600 for the animal so purchased.—*Olson Bros. v. Hurd*, 20 Idaho, 47, 116 Pac. 358.

Editorial Notes.

Remedies of vendee for breach of warranty of quality: 54 Am. Dec. 146.

IX. CONDITIONAL SALES.

Reservation of title as affecting right of attachment. See Attachment and Garnishment, I.

Title retaining note non-negotiable. See Bills and Notes, IV.

Where the language of a note given for the purchase price of goods creates a lien thereon, a description of the goods is not essential to preserve the lien.—*Mark Means Transfer Co. v. Mackenzie*, 9 Idaho, 165, 73 Pac. 135.

Where a vendor on a conditional sale has delivered possession to the vendee, and thereafter assigns the contract from the purchaser to a third party, the assignee has all the rights of the assignor, and cannot, therefore, have an attachment on failure of the purchaser to make a payment.—*Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623.

The security retained by the seller in a conditional sale contract is not a vendor's lien but is a reservation of title and right to pursue the property in specie.—*Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623.

Plaintiff claimed title to certain personal property used in connection with a mine by virtue of conditional sales notes and also by purchase thereof under a sale on foreclosure of a chattel mortgage covering the property. The evidence failed to show that plaintiff ever consented to the attaching or affixing of the property to the realty so as to make it a fixture or that he ever waived his right to reclaim the property or vested the title in the conditional vendee. Held, that a sale under a judgment rendered prior to the giving of the chattel mortgage would be enjoined.—*Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974.

Where conditional sales notes contain a description of the property sold and provide that the title and ownership and right of possession thereof shall remain and be in the payee until the notes are fully paid, the title remains in the payee.—*Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974.

Where a conditional sale contract accompanied by a delivery of the possession of the property to the vendee provides that a failure to make payment at the times and in the manner specified in the agreement shall work a forfeiture of all rights under the contract and entitle the seller to immediately take possession of the property sold, the mere fact of a failure to make any payment at the time or in the manner specified does not per se work a forfeiture of the contract, but, in order to effect the forfeiture, it is necessary for the vendor to demand or reclaim the property.—*Peasley v. Noble*, 17 Idaho, 686, 134 Am. St. Rep. 270, 27 L. R. A., N. S., 216, 107 Pac. 402.

N. delivered possession of a band of sheep to N. & Co. under a conditional sale agreement providing that title should remain in N., and authorizing N. & Co. to make sales from time to time of any part or all of such property, and providing, further, that, upon failure to make any payment at the time and in the manner specified in the agreement, N. & Co. should forfeit all rights under the contract, and that N. might thereupon take possession of the property. Held, that notwithstanding a failure of N. & Co. to make payments as stipulated, if N. fails to demand or take possession of the property, the contract is still in force and the agency to sell still exists, and that N. & Co. can transfer a good title to a bona fide purchaser until such time as N. either demands or takes possession of the property.—*Peasley v. Noble*, 17 Idaho, 686, 134 Am. St. Rep. 270, 27 L. R. A., N. S., 216, 107 Pac. 402.

A conditional sale and delivery of the property to the vendee, reserving title in the

vendor, and conferring power and authority on the vendee to sell such property, has the effect of passing title to one who makes a bona fide purchase from such conditional sale vendee, and upon such sale the original vendor's title is divested and at once transferred to the purchaser.—*Peasley v. Noble*, 17 Idaho, 686, 134 Am. St. Rep. 270, 27 L. R. A., N. S., 216, 107 Pac. 402.

Where the vendee of property under conditional sale is vested with the power to sell such property and deliver the proceeds to the vendor, a purchaser in good faith is under no obligation to follow the purchase price, and see that it is delivered by the agent to the original vendor.—*Peasley v. Noble*, 17 Idaho, 686, 134 Am. St. Rep. 270, 27 L. R. A., N. S., 216, 107 Pac. 402.

A contract signed by the seller and purchaser of a printing press, in which it is provided that the purchaser will pay for the same in installments at fixed dates, and such payments are evidenced by promissory notes, and in which contract it is also agreed that should default be made in payment of any of the rent at the times or in the amounts, the seller has the right to retake the property, and that all money paid is to be retained, and that the title to the property sold does not pass until the entire payment has been made, is a conditional sale, wherein the title of the property is reserved in the seller until final payment is made.—*Pease v. Teller Corporation*, 22 Idaho, 807, 128 Pac. 981.

In a conditional sale contract, where title is reserved in the seller until payment is made by the purchaser, the sale can only be completed and title passed upon payment of the purchase price of said property.—*Pease v. Teller Corporation*, 22 Idaho, 807, 128 Pac. 981.

Under a conditional sale contract, where payments are to be made in installments at certain dates, and the title to the property is reserved in the seller until such payments are made, and all the payments are made except the last payment, which is a small proportion of the entire purchase price and upon default in such payment the seller makes no effort to retake the property for a period of six months, and no steps are taken to collect the purchase price, and the facts show no intention to rescind the contract or declare a forfeiture because of nonpayment, and thereafter attempts are made to collect by demand the balance of the purchase price, and the seller then demands possession of the property, and the purchaser tenders the amount due on the purchase price with interest, the seller cannot maintain an action in replevin against the purchaser, where such tender is made good by depositing the same in the court where said action is pending for the use and benefit of the seller.—*Pease v. Teller Corporation*, 22 Idaho, 807, 128 Pac. 981.

Where a conditional sale contract provides that the purchase price is to be made in installments at certain dates, and the purchase price is not paid at the times stated in the contract, and the contract provides that the seller may retake the property, the seller has two remedies—first, the collection of the re-

mainder of the purchase price; second, the retaking of the property—but the seller cannot resort to both remedies.—*Pease v. Teller Corporation*, 22 Idaho, 807, 128 Pac. 981.

Editorial Notes.

Sales, conditional upon the final payment of the purchase price: 37 Am. Rep. 664; 40 Am. Rep. 21.

Conditional sales, purchaser of property held under: 42 Am. Rep. 105.

Conditional sales, effect of as against third parties: 57 Am. Rep. 572.

Conditional sales, what constitute: 46 Am. St. Rep. 295; 94 Am. St. Rep. 234.

Conditional sales, rights and remedies of seller when buyer defaults in payment of purchase price: 133 Am. St. Rep. 563; 32 L. R. A. 455.

Sales, conditional, when a person holding property under a conditional sale may transfer a perfect title: 134 Am. St. Rep. 277.

SCHOOLS AND SCHOOL DISTRICTS.

I. PRIVATE SCHOOLS AND ACADEMIES.

II. PUBLIC SCHOOLS.

- (A) Establishment, School Lands and Funds and Regulation in General.
- (B) Creation, Alteration, Existence and Dissolution of Districts.
- (C) Government, Officers and District Meetings.
- (D) District Property, Contracts and Liabilities.
- (E) District Debt, Securities and Taxation.
- (F) Claims Against District and Actions.
- (G) Teachers.
- (H) Pupils and Conduct and Discipline of Schools.

See Colleges and Universities.

Constitutional provisions, self-executing. See Constitutional Law, II.

I. PRIVATE SCHOOLS AND ACADEMIES.

(No paragraphs.)

II. PUBLIC SCHOOLS.

Subject and title of acts. See Statutes, III.

(A) ESTABLISHMENT, SCHOOL LANDS AND FUNDS AND REGULATION IN GENERAL.

Laws 1890-91, page 131, an act to establish and maintain a system of free schools, did not repeal Political Code, chapter II, title 3, so far as it re-enacted the provisions of said chapter, but merely continued the re-enacted provisions in force.—*Barton v. Moscow etc. School Dist.*, 3 Idaho, 270, 29 Pac. 43.

Laws 1890-91, page 131, an act to establish and maintain a system of free schools, and Laws 1890-91, page 129, authorizing independent school districts to issue bonds to redeem, fund or refund their indebtedness, and to provide and improve school-houses and

grounds and furniture and fixtures, became laws on the same day and are contemporaneous legislation not in conflict and should be construed together.—*Barton v. Moscow etc. School Dist.*, 3 Idaho, 270, 29 Pac. 43.

Under Const., article 9, section 3, providing that the permanent school fund shall forever remain inviolate and intact, and all interest thereon shall be expended in the maintenance of the schools of the state, the legislature is prohibited from enacting any law that would directly or indirectly divert either principal or interest thereof to any other purpose.—*State v. Fitzpatrick*, 5 Idaho, 499, 51 Pac. 112.

The state board of land commissioners, in making contracts for the loan of moneys from the school fund, cannot bind the state by any contract beyond the scope of the authority granted to such board by Laws 1890-91, page 109.—*State v. Fitzpatrick*, 5 Idaho, 499, 51 Pac. 112.

On the foreclosure of a mortgage given to secure a loan from the permanent school fund of the state, the state is not entitled to a judgment for attorney's fees, since it is the duty of the district attorney to prosecute such action and his salary is fixed by law.—*State v. Fitzpatrick*, 5 Idaho, 499, 51 Pac. 112.

R. S. 2231, as amended by Laws 1891, page 159, and re-enacted by Laws 1899, page 106, section 5, provides that one-half of all the moneys collected for liquor or other licenses or from fines or penalties under an ordinance of such city, town or village must be paid into the treasury of such city, town or village, and one-half to the trustees of the several school districts of said city, town or village. Laws 1893, page 97, section 24, as re-enacted by Laws 1899, page 192, section 24, was amended by Laws 1903, page 432, so as to provide the same disposition of license moneys and fines required by R. S. 2231 as above amended. Held, that the fact that a school district comprises a larger territory than that embraced within the city or village is no excuse or reason for a failure of the village authorities to pay over such money to the proper school district.—*School District No. 27 v. Twin Falls*, 13 Idaho, 471, 90 Pac. 735.

An independent school district, created and organized under special charter from the territorial legislature, is as fully an "educational corporation" under the control of the state, within the purview of Const., article 11, section 2, prohibiting the granting of special charters of incorporation, except for educational, etc., corporations, as is any other educational corporation within the state.—*Howard v. Independent School Dist. No. 1*, 17 Idaho, 537, 106 Pac. 692.

Under Const., article 11, section 2, the legislature has the right to extend, change or amend by special law the charter of any "educational corporation" which existed in the state at the time of the adoption of the constitution, and which is under the control of the state.—

Howard v. Independent School Dist. No. 1, 17 Idaho, 537, 106 Pac. 692.

The words "school lands," as used in Const., article 9, section 8, wherein it is provided "that not to exceed twenty-five sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed one hundred and sixty acres to any one individual, company or corporation," has reference only to sections 16 and 36 in each township, and does not include or embrace lands granted by Congress to the state for specific educational purposes such as university, normal school, agricultural college, and scientific and other institutions of higher learning.—Pike v. State Board of Land Comms., 19 Idaho, 268, Ann. Cas. 1912B, 1344, 113 Pac. 447; State v. Hoover, 19 Idaho, 299, 113 Pac. 455.

The word "school," as used in Const., article 9, sections 5, 8, has reference to the public, free common schools, and clearly means the free school system which has been generally adopted in this country, and has specific reference to the district schools throughout the state established for the training and instruction of the youth of the state in the primary and elementary branches of learning below the grade or rank of "academy, seminary, college, university, or other literary or scientific institution."—Pike v. State Board of Land Comms., 19 Idaho, 268, Ann. Cas. 1912B, 1344, 113 Pac. 447; State v. Hoover, 19 Idaho, 299, 113 Pac. 455.

(B) CREATION, ALTERATION, EXISTENCE AND DISSOLUTION OF DISTRICTS.

Under Laws 1911, page 483, the board of county commissioners has no power to grant a petition to create a common school district out of territory previously included in part within a regularly organized independent school district.—Wood v. Independent School Dist., 21 Idaho, 734, 124 Pac. 780.

Laws 1911, page 483, is a complete code and system for the government and regulation of the common schools of Idaho, and such act classifies school districts as "school districts," as provided in article 5, and "independent school districts," as provided in article 13, and it was the intention of the legislature to provide separately and distinctly for each in the respective articles.—Wood v. Independent School Dist., 21 Idaho, 734, 124 Pac. 780.

Laws 1911, page 483, article 5, in no way applies to or governs the provisions of article 13 of said act, governing the organization of independent school districts.—Wood v. Independent School Dist. No. 2, 21 Idaho, 734, 124 Pac. 780.

After a rural high school district has exercised the functions of such district for a period of nearly two years, its legal organization will be presumed, whatever may have been the defects and irregularities in the formation or organization of such district.—Pickett v. Board of County Comms., 24 Idaho, 200, 133 Pac. 112.

Under Laws 1909, page 73, providing the procedure for and authorizing the creation of rural high school districts, the several steps required of the trustees and other officers after a majority vote in favor of the organization of such a district, are simply ministerial and not vital to the creation of the district, and if not done in strict accordance with the statute, the existence of the district will not thereby be invalidated.—Pickett v. Board of County Comms., 24 Idaho, 200, 133 Pac. 112.

Where there was an actual user of the corporate powers of a rural high school district for nearly two years without objection, and after such time the board of county commissioners made an order confirming the acts done creating such district, such order was not necessary for the organization of said district, and on appeal from such order, the organization of such district could not be attacked.—Pickett v. Board of County Comms., 24 Idaho, 200, 133 Pac. 112.

Laws 1909, page 73, vested the power in the electors to determine whether or not a rural high school district should be organized.—Pickett v. Board of County Comms., 24 Idaho, 200, 133 Pac. 112.

Under Laws 1909, page 73, the two jurisdictional requisites for the creation of rural high school districts are, first, filing with the board of county commissioners the requisite petition, and, second, the submission of the question to a vote of the electors; and, if a majority of the votes cast at such election are in favor of creating the district, the district is thereby created.—Pickett v. Board of County Comms., 24 Idaho, 200, 133 Pac. 112.

(C) GOVERNMENT, OFFICERS AND DISTRICT MEETINGS.

Eligibility to hold office of county superintendent.

See Officers, I, (C).

Validity of contract with wife of trustee. See post, II, (G).

Laws 1905, page 71, section 82, prohibiting a school trustee from making a contract with his district in which he is pecuniarily interested, prohibiting action or recovery thereon, and declaring such contracts void, is a penal statute and should not be extended by construction beyond its natural meaning.—Independent School District v. Collins, 15 Idaho, 535, 128 Am. St. Rep. 76, 98 Pac. 857.

Laws 1905, page 71, section 82, prohibiting a school trustee from making a contract with his district in which he is pecuniarily interested, prohibiting action or recovery thereon, and declaring such contracts void, is founded on public policy and to prevent abuses by trustees.—Independent School District v. Collins, 15 Idaho, 535, 128 Am. St. Rep. 76, 98 Pac. 857.

Const., article 18, section 6, providing that "the salary and qualifications of the county superintendent shall be fixed by law," clearly authorizes the legislature to fix and determine the fitness, capacity or qualification of a person to be elected to the office of county super-

intendent of schools or to hold such office after election.—Bradfield v. Avery, 16 Idaho, 769, 23 L. R. A., N. S., 1228, 102 Pac. 687

(D) DISTRICT PROPERTY, CONTRACTS AND LIABILITIES.

Validity of contract made with school trustee. See ante, II, (C).

— Contract with wife of trustee. See post, II, (G).

Public school lands. See Public Lands, II, (E).

(E) DISTRICT DEBT, SECURITIES AND TAXATION.

Duty of district attorney to prosecute foreclosure of mortgage securing loan from school fund. See District and Prosecuting Attorneys.

A taxpayer of the county and school district may bring an action to enjoin the payment of salary earned under a void contract entered into by the board.—Nuckols v. Lyle, 8 Idaho, 589, 70 Pac. 401.

Under Const., article 8, section 33 and section 33 of the 1909 amendments to the charter of Independent School District No. 1 of Nez Perce County, organized under Sp. & Loc. Laws 1880, page 166, the purpose of raising money to purchase three separate and independent school sites, and the building of three separate buildings and purchasing fixtures and furniture therefor, is one "purpose," and is properly submitted as one proposition. Howard v. Independent School Dist. No. 1, 17 Idaho, 537, 106 Pac. 692.

A school district is not a "municipal corporation," within the meaning of Const., article 7, section 6, providing that the legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation.—Fenton v. Board of Comms., 20 Idaho, 392, 119 Pac. 41; Dart v. Board of Comms., 20 Idaho, 445, 119 Pac. 52; Independent School Dist. v. Board of Comms., 20 Idaho, 448, 119 Pac. 52.

Laws 1911, page 483, section 65, requiring the board of county commissioners to levy a tax of not less than five (5) mills nor more than ten (10) mills for school purposes is mandatory and constitutional.—Fenton v. Board of Comms., 20 Idaho, 392, 119 Pac. 41; Dart v. Board of Comms., 20 Idaho, 445, 119 Pac. 52; Independent School Dist. v. Board of Comms., 20 Idaho, 448, 119 Pac. 52.

Where it is made the duty of the treasurer of the school district to make the sale of land for delinquent school taxes, it is sufficient if the clerk of the school board attends and makes the sale at the instance and request of the treasurer.—Wilson v. Locke, 18 Idaho, 582, 111 Pac. 247.

(F) CLAIMS AGAINST DISTRICT AND ACTIONS.

Where an action is brought under Laws 1905, page 71, section 82, to recover money paid on a void contract of a school trustee, the complaint must allege that such contract was made with the defendant during the time that defendant was a member of the board

of trustees of such district, the mere fact that he was a member at the time his bill was allowed being insufficient.—Independent School District v. Collins, 15 Idaho, 535, 128 Am. St. Rep. 76, 98 Pac. 857.

(G) TEACHERS.

Action by teacher against school board for libel. See Libel and Slander.

Under Laws 1899, page 96, providing that no trustee shall be pecuniarily interested in any contract made by the board of trustees of which he is a member and that contracts made in violation of this section shall be null and void, a contract to teach school made by the wife of a member of the board of school trustees is void, since the earnings of the wife are community property.—Nuckols v. Lyle, 8 Idaho, 589, 70 Pac. 401.

Under Laws 1899, page 92, providing that "each regularly organized school district in the state is hereby declared to be a body corporate by the name and style of School District No. —, in the county of —, in the state of Idaho, and in that name the trustees may . . . make contracts the same as municipal corporations in this state," a contract with a school teacher signed by the individual members of the board of trustees followed by the words "The Board of Trustees of School District No. 8," etc., is sufficient to bind the school district.—Ewin v. Independent School District No. 8, 10 Idaho, 102, 77 Pac. 222.

Under Laws 1899, page 92, section 45, authorizing the board of school trustees to discharge a teacher "for neglect of duty," etc., and providing that "no teacher shall be discharged before the end of his term without a reasonable hearing," the board of trustees of an ordinary school district, which is not an independent school district, cannot discharge a teacher before the end of his term, without a reasonable hearing.—Ewin v. Independent School District No. 8, 10 Idaho, 102, 77 Pac. 222.

Under Laws 1899, page 92, section 84, authorizing the board of trustees of an independent school district "to employ or discharge teachers," such board may dismiss a teacher with or without notice, and in its action in that regard is not subject to review by the courts.—Ewin v. Independent School Dist. No. 8, 10 Idaho, 102, 77 Pac. 222.

When application for a teacher's certificate is made to the state board of education under R. C. 593, and the necessary credentials and proof are furnished the board and the board admits such proof is sufficient, and subsequently issues a certificate thereon and by reason thereof, then the applicant is entitled to have such certificate issue as of the date such application and proof is made; and a certificate issued upon such proof will relate back to the date such applicant showed she was entitled to such certificate.—Bradfield v. Avery, 16 Idaho, 769, 23 L. R. A., N. S., 1228, 102 Pac. 687.

Under Laws 1899, page 105, section 84, which was in force at the time of the election of the plaintiff as a teacher and the issu-

ing of notice of such election, the board of trustees had discretion to discharge the plaintiff at any time without notice and without investigation or consideration or any request of the plaintiff, where no services had been performed, even though a contract of employment had been entered into between the district and the teacher.—*Hermann v. Independent School Dist. etc.*, 24 Idaho, 554, 135 Pac. 1159.

The superintendent of schools, or the clerk of an independent school district, has no authority to employ teachers or excuse or waive the terms of a contract proposed by the board to a teacher for signature as a contract between the district and the teacher, without express authority from the board of trustees; this power is vested entirely with the board of trustees.—*Hermann v. Independent School Dist., etc.*, 24 Idaho, 554, 135 Pac. 1159.

Where the board of trustees of an independent school district, organized under the laws of the state, elects a teacher for the district, for a certain time, at a fixed salary, and fixes the time for beginning and ending the school year, and issues a notice of such election to the applicant and attaches to and makes a part of the notice of election the following condition:

"A failure to sign and return this notice of election within ten days from receipt thereof will be considered a declination and the position declared vacant.

"No further contract will be required.

"Notice received and election accepted.

"R. H. DOE,

"Secretary of Board of Directors.

"Date _____ Teacher."

—and such notice was delivered and received by the teacher and such teacher declines and refuses and fails to sign such acceptance and does not return the same to the board within ten days thereafter, there was no contract made between the board and the teacher.—*Hermann v. Independent School District etc.*, 24 Idaho, 554, 135 Pac. 1159.

The meaning and intent of the legislature is the same in Laws 1899, section 84, paragraph 2, authorizing the board to employ and discharge teachers, etc., as it is in Laws 1911, chapter 159, section 129, paragraph 2, dealing with the same subject.—*Hermann v. Independent School Dist. etc.*, 24 Idaho, 554, 135 Pac. 1159.

Editorial Notes.

Right of school teacher to compensation as dependent on validity of contract or appointment: *Ann. Cas.* 1913C, 372.

(H) PUPILS AND CONDUCT AND DISCIPLINE OF SCHOOLS.

(No paragraphs.)

SEALS.

Omission on summons. See *Process*, I.

Effect of seal on contract where not required. See *Contracts*, I, (C).

SEARCHES AND SEIZURES.

See *Intoxicating Liquors*, IX.

SEDUCTION.

(No paragraphs.)

SELF-DEFENSE.

See *Assault and Battery*; *Homicide*.

SELF-PRESERVATION.

Presumption as to instinct of self-preservation. See *Death*.

SERVICE.

Of undertaking on appeal by mail. See *Appeal and Error*, VII, (C), 4.

Constructive service or service by mail of notice of appeal. See *Appeal and Error*, VII, (D), 2.

Of pleading. See *Pleading*.

Of process. See *Process*.

By publication. See *Process*.

SETOFF AND COUNTERCLAIM.

Abatement of cause of action in favor of defendant for failure to plead same as counterclaim. See *Abatement and Revival*.

Pleading. See *Pleading*, III, (E).

Right to set off assigned claims against assignor of plaintiff. See *Assignments*.

Setoff pro tanto of former judgment for costs. See *Costs*, VIII.

An action for trespass to property cannot be a subject for counterclaim against an action arising upon a contract, express or implied.—*City of Lewiston v. Booth*, 3 Idaho, 602, 34 Pac. 809.

In an action against husband and wife for the foreclosure of a mortgage, defendant set up a counterclaim in his favor against the mortgagee for money due on a contract for the sale of land. Plaintiff contended that the liability of defendants was joint and that for that reason the counterclaim, which ran to the husband alone, could not be pleaded. Held, that the presumption was that the mortgage debt was a community debt and not for the benefit of the separate estate of the wife, and hence that the counterclaim was proper.—*Miller v. Hunt*, 6 Idaho, 523, 57 Pac. 315.

Under R. S. 4184, subdivision 2, providing that in an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action may be pleaded as a counterclaim, an answer in a mortgage foreclosure suit setting forth a counterclaim for purchase money due defendant mortgagor from the mortgagee on bargain and sale of realty is not demurrable.—*Miller v. Hunt*, 6 Idaho, 523, 57 Pac. 315.

Though R. S. 4187 permits defendant to set forth as many defenses or counterclaims as he may have, such defenses must not be so inconsistent that the proof of one defense would necessarily disprove the other.—*Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.

A claim for unliquidated damages arising out of a breach of a covenant on the part of

the lessor is neither a proper matter for counterclaim nor cross-complaint as authorized by R. S. 4184, 4188.—*Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

The statute of this state clearly authorizes that a counterclaim may embrace a cause of action arising out of the transaction set forth in the complaint or connected with the subject of the action, or, in an action upon contract, any other cause of action arising also upon contract is all-inclusive, and it is immaterial that the cause of action may be for an unliquidated debt.—*Wollan v. McKay*, 24 Idaho, 691, 135 Pac. 832.

Editorial Notes.

Setoff and counterclaim, demands which will support claims for: 12 Am. Dec. 152.

Scope and office of counterclaim under the code: 89 Am. Dec. 482.

Necessity that defendant designate counterclaim as such in pleading: Ann. Cas. 1913A, 1079.

Right to interpose counterclaim or setoff exceeding jurisdiction of court: Ann. Cas. 1913D, 159.

SHEEP.

Liability for herding within two miles of inhabited dwelling. See *Animals*.

SHERIFFS AND CONSTABLES.

I. APPOINTMENT, QUALIFICATION AND TENURE.

(A) Sheriffs.

(B) Constables.

(C) Deputies and Assistants, Substitutes and Special Officers.

II. COMPENSATION.

III. POWERS, DUTIES AND LIABILITIES.

(A) Authority, Duty and Liability in General.

(B) Indemnity to Officer.

(C) Protection from Liability.

(D) Liability for Acts or Omissions of Deputies.

(E) Actions Against Officers and Indemnitors.

IV. LIABILITIES ON OFFICIAL BONDS.

Marshals and police officers of incorporated cities, towns, etc. See *Municipal Corporations*.

Election of sheriffs or constables. See *Elections*.

Return of particular writs, warrants, etc., and performance of other specific duties and functions. See *Process*; *Arrest*; *Attachment*; *Execution*; and other specific heads.

Embezzlement by. See *Embezzlement*.

Quo warranto to determine rights of persons claiming office of sheriff. See *Quo Warranto*.

I. APPOINTMENT, QUALIFICATION AND TENURE.

Removal of public officer. See *Officers, I, (G)*.

(A) SHERIFFS.

(No paragraphs.)

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(B) CONSTABLES.

(No paragraphs.)

(C) DEPUTIES AND ASSISTANTS, SUBSTITUTES AND SPECIAL OFFICERS.

Custodian has no lien for keeping attached property. See *Attachment and Garnishment, V*.

R. S. 1815 provides that every county officer, except probate judge, commissioner, school superintendent and coroner, may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office. Const., article 18, section 6, provides that the sheriff, etc., shall be empowered to appoint such deputies and clerical assistants as the business of their office may require at such compensation as may be fixed by the county commissioners. Held, that the sheriff has no authority to appoint a deputy unless he is so authorized by the board of county commissioners after a determination of the necessity therefor by such board.—*Campbell v. Board of Commrs.*, 5 Idaho, 53, 46 Pac. 1022.

The order of the board of county commissioners authorizing or refusing to authorize the appointment of a deputy sheriff may be reviewed on appeal by the district court.—*Campbell v. Board of Commrs.*, 5 Idaho, 53, 46 Pac. 1022.

On an appeal by the sheriff from an order of the county commissioners refusing to authorize the appointment of a deputy sheriff, the district attorney has no authority to stipulate that the assistance of such deputy is necessary for the proper transaction of the public business, and that the reasonable compensation for such deputy is a certain sum per month, since this is, in effect, stipulating away the discretion of the county commissioners in such matters.—*Campbell v. Board of Commrs.*, 5 Idaho, 53, 46 Pac. 1022.

An appeal from the order of the board of county commissioners refusing to authorize the appointment of a deputy sheriff should be tried de novo in the district court.—*Campbell v. Board of Commrs.*, 5 Idaho, 53, 46 Pac. 1022.

In an action by a sheriff against a county to recover the salary of a deputy, the complaint alleged that the board of county commissioners examined the books of the sheriff to ascertain the volume of business transacted by him, that the sheriff testified before them, and that "being fully advised in the premises," the board made an order empowering plaintiff to appoint a deputy. Held, not a sufficient allegation that the county commissioners found that the business of the sheriff's office required the appointment of a deputy, such finding being a prerequisite to the appointment under Const., article 18, section 6.—*Taylor v. Canyon Co.*, 6 Idaho, 466, 56 Pac. 168.

Under Const., article 18, section 6, providing that the sheriff, etc., shall be empowered to appoint such deputies and clerical assistants as the business of their office may require,

the compensation of such deputies and assistants to be fixed by the county commissioners, it is necessary that the commissioners should find that the business of the sheriff's office necessitates the appointment of a deputy, before they can legally authorize such appointment.—*Taylor v. Canyon County*, 6 Idaho, 466, 56 Pac. 168.

Const., article 18, section 6, regulating the election and tenure of county officers, was not intended to repeal R. S. 1815, which provided that every county officer, except four named officers, might appoint as many deputies as might be necessary, so far as the latter section authorizes certain county officers to appoint deputies, but only to prohibit the salaries of such deputies from becoming a charge against the county.—*Taylor v. Canyon County*, 7 Idaho, 171, 61 Pac. 521.

Under Const., article 18, section 6, as it existed before amendment, authorizing the county commissioners to provide for the appointment of deputies by a sheriff, where the board of county commissioners, upon proper application and proof, empowered the sheriff to appoint a deputy, and fixed such deputy's salary, the salary is a charge against the county.—*Taylor v. Canyon County*, 7 Idaho, 171, 61 Pac. 521.

R. S. 2085 provides that the coroner must perform the duties of sheriff in all cases where the sheriff is interested, or otherwise incapacitated from serving, and in cases of vacancy in the office of sheriff, the coroner must perform the duties of such office until a sheriff is appointed or elected and qualified. Held, that where the sheriff of a county was detained in custody by the military authorities, martial law having been declared to exist, the court properly directed the coroner to perform the duties of the sheriff.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

R. C. 8538 which authorizes the sheriff, when necessary, with the assent in writing of the probate judge, or in a city, of the mayor, to employ a temporary guard for the protection of the county jail, or for the safekeeping of the prisoners, the expense of which is a county charge, has reference to temporary and emergency cases where it is necessary to employ assistants or guards for the immediate protection of the jail or the safekeeping of the prisoners therein, such as where assaults are made upon the county jail or efforts are made to release prisoners therefrom, or a riot or outbreak occurs in the jail, or in case of fire or an epidemic; but this section has no application to cases where it is necessary for the sheriff to employ assistants to aid in the execution of the processes of law.—*Lansdon v. Washington County*, 16 Idaho, 618, 102 Pac. 344.

One who has been appointed as a deputy sheriff without authority of the board of county commissioners, and who presents a bill to the board for his services as such officer, must show the facts and circumstances of his appointment and employment, and the emergency existing which required and demanded immediate action on the part of the sheriff, and also show that the sheriff was so necessarily engaged that he could not

perform the service, and that he had no other assistant or deputy who could perform such service.—*Roberts v. Board of Commrs.*, 17 Idaho, 379, 105 Pac. 797.

Editorial Notes.

Deputy sheriffs as public officers: 17 L. R. A. 245.

II. COMPENSATION.

Compensation of deputy, necessity of employment, sufficiency of allegations. See ante, I, (C).

Sheriffs are not entitled to a per diem compensation for attendance upon the district courts.—*Eakin v. Nez Perce County*, 4 Idaho, 131, 36 Pac. 702; *Campbell v. Board of Commrs.*, 4 Idaho, 181, 37 Pac. 329.

Under Laws 1891, page 176, section 1, subdivision 11, allowing the sheriff commissions for receiving and paying over money on execution or other process, a sheriff who has sold property under an execution and collected his percentage cannot, on the redemption of the property, charge any further commission.—*Coeur d'Alene Hwd. Co. v. Cameron*, 4 Idaho, 494, 42 Pac. 509.

Under Laws 1891, page 174, section 2, subdivision 18, the sheriff is entitled to mileage for taking a prisoner from the place of arrest to prison or before a court or magistrate, whether such prisoner is arrested with or without a warrant.—*Warner v. Fremont County*, 4 Idaho, 591, 43 Pac. 327.

Under Laws 1891, page 174, section 2, subdivision 18, the sheriff is entitled to mileage for taking a prisoner from the place of arrest before a court or magistrate, though he has already been allowed mileage for going to the place where the arrest was made.—*Warner v. Fremont County*, 4 Idaho, 591, 43 Pac. 327.

The sheriff is only entitled to such keeper's fees as may be allowed by order of court, and if none has been allowed, it is improper to include an item therefor in a cost bill.—*Berry v. G. V. B. Mining Co.*, 5 Idaho, 691, 51 Pac. 746.

R. S. 2137 provides that sheriffs are not to perform any official services unless upon prepayment of fees. R. S. 2140 provides that for services rendered in any suit or proceeding, a sheriff may have execution in his own name against the party from whom they are due. Held, to entitle a sheriff to recover for services already rendered.—*Naylor v. Vermont L. & T. Co.*, 6 Idaho, 251, 55 Pac. 297.

In an action by a sheriff against the county to recover the salary of a deputy, the complaint must allege that the county commissioners found that the business of the sheriff's office required the appointment of a deputy.—*Taylor v. Canyon County*, 6 Idaho, 466, 56 Pac. 168.

A sheriff has no right to serve a subpoena out of the state and therefore cannot collect from the county expenses incurred in such service.—*Clyne v. Bingham County*, 7 Idaho, 75, 60 Pac. 76.

An item in a constable's claim for serving warrants of arrest should specify the names of the defendants arrested, and show in what court the action was pending, and specify in general terms the charge in the warrant against the parties arrested.—*Ellis v. Bingham County*, 7 Idaho, 86, 60 Pac. 79.

R. S. 2126, subsection 23, fixed the mileage of sheriffs in civil and criminal cases at twenty cents per mile. R. S. 2136, passed at the same time, provides that constables shall receive the same mileage in criminal cases as sheriffs are allowed. Laws 1891, page 177, amended R. S. 2126 so as to increase the mileage of sheriffs to thirty-five cents a mile. Held, that the fees and mileage of constables in criminal cases are twenty cents per mile. *Ellis v. Bingham County*, 7 Idaho, 86, 60 Pac. 79.

Where a county has made no provision for a woman's ward in the county jail, and a woman charged with crime is arrested, and at the time of such arrest such prisoner is confined in a hospital and so ill that it would be dangerous and serious to remove such prisoner from such hospital, and the sheriff appoints guards to look after such prisoner during the time she is confined in such hospital, and such appointment is made because the services of the sheriff and the deputy allowed him by the board of county commissioners are required for the general duties of the office, in such case, such expense becomes a county charge, and in an action by the sheriff he may recover the same from the county.—*Lansdon v. Washington County*, 16 Idaho, 618, 102 Pac. 344.

Where the sheriff of a county receives a warrant for arrest and makes such arrest, but because of the illness and physical condition of the prisoner and the fact that such prisoner is a woman, and no provision is made in the county jail whereby such prisoner in her condition can be cared for, the sheriff may appoint guards to guard such prisoner until her condition is such that she may be confined in the jail.—*Lansdon v. Washington County*, 16 Idaho, 618, 102 Pac. 344.

A deputy sheriff in this state has no power or authority to pursue a fugitive from justice in another state and claim his pay or compensation therefor from the county in which he is deputy.—*Roberts v. Board of Commrs.*, 17 Idaho, 379, 105 Pac. 797.

Editorial Notes.

Validity of statute allowing sheriff or similar officer percentage of amount collected for selling property: *Ann. Cas.* 1913B, 1299.

III. POWERS, DUTIES AND LIABILITIES.

Liability of second attaching creditor to sheriff. See Attachment and Garnishment, XI.

County not liable for board furnished prisoners by third person. See Counties, III, (C).

(A) AUTHORITY, DUTY AND LIABILITY IN GENERAL.

A sheriff cannot refuse to serve process regularly issued to him because in his opinion

it is defective or irregular.—*Roth v. Duvall*, 1 Idaho, 149.

Every intendment of the law is in favor of the regularity of the proceedings of a sheriff under an attachment or execution and nothing but a willful disregard of the rights of others will subject him to liability.—*Roth v. Duvall*, 1 Idaho, 149.

Where a sheriff executes a writ of execution on property and does not in his return affix such a value as will charge him with less than the plaintiff's claim, he is presumed to have satisfied himself that he has sufficient and is chargeable on that basis.—*Roth v. Duvall*, 1 Idaho, 149.

On receipt of an affidavit and notice for the foreclosure of a chattel mortgage under R. S. 3390 et seq., the sheriff must proceed to execute the same, and, having levied on the goods, he must give notice and sell the same, notwithstanding the fact that an attachment or execution of a judgment creditor may be placed in his hands after he has levied on the goods under said affidavit and notice.—*Blumaur-Frank Drug Co. v. Branstetter*, 4 Idaho, 557, 95 Am. St. Rep. 151, 43 Pac. 575.

In an action against a sheriff and the sureties on his bond by an attaching creditor, it appeared that the sheriff attached about \$6,000 worth of property of the debtor, disposed of the property attached, made no return upon his process and failed to account to the creditor for any of the proceeds of the sale of the property. Held, that plaintiffs were entitled to judgment for the amount of their claim, which was some \$1,600.—*Work v. Kinney*, 5 Idaho, 716, 51 Pac. 745.

A sheriff of a county has not only the authority expressly given him by statute, but also such implied authority as is necessary to efficiently execute the express authority given.—*Lansdon v. Washington County*, 16 Idaho, 618, 102 Pac. 344.

Where there is a conditional payment made to the sheriff by the purchaser at sheriff's sale, with the understanding that if the wood purchased when measured did not measure six hundred cords that the sheriff would return to him the price paid per cord for the shortage, said agreement was legal and valid, and it was the duty of the sheriff to hold said money until the wood was measured, provided such measurement was made and the demand made on him for the money before he was required under the law to make return of his execution.—*Works v. Byrom*, 22 Idaho, 794, 128 Pac. 551.

Editorial Notes.

Diligence required in serving execution and other process and their liability resulting from losses for want of such diligence: 95 Am. Dec. 423.

(B) INDEMNITY TO OFFICER.

Where the sheriff doubts the legality of a levy, he may refuse to execute the writ unless indemnified; but if he does attach and returns the writ, he places all question as to its

validity before the court.—*Roth v. Duvall*, 1 Idaho, 149.

In accordance with the opinion of the supreme court, the trial court issued a writ of restitution of certain mining premises. The sheriff made return to the writ "that he found parties in possession of the premises that were not parties to the suit and who were claiming the premises by location under the laws of the United States." The sheriff was cited to show cause why he did not execute the writ of restitution, to which he made answer that the plaintiffs refused to indemnify him, he having made demand therefor. Held, that the sheriff was not entitled to indemnity.—*Ah Kle v. Gregory*, 3 Idaho, 674, 34 Pac. 812.

Editorial Notes.

Indemnity, right of sheriffs and constables to: 16 Am. Dec. 551.

Indemnity, right to exact and when enforceable: 86 Am. St. Rep. 554.

Indemnity, right of to while engaged in executing civil process: 89 Am. St. Rep. 413.

(C) PROTECTION FROM LIABILITY.

The affidavit and notice for the foreclosure of a chattel mortgage under R. S. 3390 et seq. are process, and as such will protect the sheriff in the execution thereof, the same as he is protected in the service of other process.—*Blumaur-Frank Drug Co. v. Branstetter*, 4 Idaho, 557, 95 Am. St. Rep. 151, 43 Pac. 575.

Where a sheriff is sued for wrongful conversion of chattels, sold by him under an execution, he can protect himself only by proving the judgment in the action on which the execution was issued, by producing the judgment-roll therein or a duly authenticated copy thereof.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

R. S. 1882 provides that a ministerial officer may justify in the execution of process regular on its face and issued by competent authority. R. S. 2090 provides that constables must execute, serve and return process, and are governed by the same laws as the sheriff. R. S. 4742 authorizes the probate court to issue executions addressed to a constable. Held, that in cases in which justices of the peace and probate courts have concurrent jurisdiction, a constable has full authority to execute process from the probate court and may justify under an execution issued therefrom.—*Coombs v. Collins*, 6 Idaho, 536, 57 Pac. 310.

(D) LIABILITY FOR ACTS OR OMISSIONS OF DEPUTIES.

Where a deputy sheriff employs one as a keeper of attached property, and the sheriff acquiesces for a period of fourteen months, he cannot thereafter, and after the death of the deputy, repudiate such employment.—*Chenowith v. Cameron*, 4 Idaho, 515, 42 Pac. 503.

A demand for return of property made on a deputy sheriff who conducted the same under a chattel mortgage foreclosure is sufficient to bind the sheriff.—*Dobbins v. Mounce*, 5 Idaho, 325, 48 Pac. 1070.

A sheriff is liable for the acts of his deputy in the conduct of an execution sale.—*Works v. Byrom*, 22 Idaho, 794, 128 Pac. 551.

(E) ACTIONS AGAINST OFFICERS AND INDEMNITORS.

To justify the seizure of chattels under a writ of attachment against a stranger to such writ, the officer must show the existence of all the jurisdictional facts necessary to authorize the issue of such writ, such showing being made by the record in the attachment suit or by a duly authenticated copy thereof.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122; *Beckstead v. Griffith*, 11 Idaho, 738, 83 Pac. 764; *Hardwick v. Griffith*, 11 Idaho, 751, 83 Pac. 768.

Where a constable was sued for the value of goods seized by him, it was error to exclude the execution from evidence in his defense.—*Pecotte v. Oliver*, 2 Idaho, 251, 10 Pac. 302.

A complaint against defendant sheriff alleged that he refused to sell certain property pursuant to plaintiff's notice, affidavit for foreclosure and chattel mortgage by reason of the levy of a writ of attachment thereon prior to the levy under said foreclosure proceedings. Defendant denied the validity and sufficiency of the mortgage, affidavit and notice of foreclosure and the identity of the grain levied on with that described in the mortgage. Held, that such denials raised material issues and that a demurrer thereto was improperly sustained.—*McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 403.

An officer who, under a writ valid on its face, seizes property recently owned by defendant, and who introduces evidence tending to show want of an actual and continued change of possession of said property between the defendant in the attachment suit and a third party claiming to have purchased such property, is not liable for exemplary damages. *Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

In an action against a sheriff for the alleged wrongful taking of goods under a writ of attachment, the court refused to permit plaintiff to answer questions showing that plaintiff and his brother, under whom plaintiff claimed the goods in question, had transferred their property to evade payment of their debts. Held, that such evidence was proper, since if such transfer was made with such intent on the part of plaintiff's brother, and such intent was known to plaintiff, the transfer was void under R. S. 3020, though the brother may have been indebted to plaintiff and plaintiff may have desired to secure himself.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

An officer who, under a writ valid on its face, seizes property recently owned by the defendant to such writ may show such fact; and he may also prove any facts tending to

show want of an actual and continued change of possession of said property between the defendant in the attachment and a third party claiming to have purchased such property, for the purpose of showing his good faith and in mitigation of damages.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

In an action against a sheriff for the conversion of property, it was error to refuse permission to the jury to take with them a certified copy of the writ of attachment under which the sheriff seized the property, as the jury had a right to take with them such paper under R. S. 4388, and for the further reason that it was an exhibit attached to defendant's answer, and a part of that pleading, and was evidence of the good faith with which he made said levy.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

IV. LIABILITIES ON OFFICIAL BONDS.

Rights of surety on bond of sheriff. See *Principal and Surety*.

The penalties against a sheriff provided for in R. S. 1874 and 1876 are not recoverable from the sureties on the official bond of the sheriff.—*Robinson v. Kinney*, 3 Idaho, 479, 31 Pac. 815.

Where a sheriff received payment of the amount called for by an execution issued upon a judgment, and neglected to pay over the same, the sureties of the sheriff are responsible therefor in an action on his bond.—*Robinson v. Kinney*, 3 Idaho, 479, 31 Pac. 815.

Where the bond of a sheriff was conditioned on the faithful performance of all duties required of him by law, the failure of the sheriff to pay over county and state licenses collected was a breach of the bond, since R. S. 2157 makes it the duty of the sheriff to collect and pay over such licenses.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

In a suit on the official bond of a sheriff it is not necessary to state in the complaint the various items of defalcation separately.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

The omission of a sheriff to sign his official bond does not release him from any liability arising under the conditions of the bond, nor does such omission release the sureties.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

Where the official bond of a sheriff was a joint and several bond, the failure of the sheriff to sign it did not invalidate the bond.—*State v. McDonald*, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312.

In an action against a sheriff and his sureties, the evidence showed that the sheriff seized goods of the attachment defendant of the value of three times the amount of plaintiffs' debt; that plaintiffs had a first lien on merchandise of the value of over \$6,000 to secure about \$1,600; that the sheriff refused to account for such goods and sold them and refused to pay any part of plaintiffs' debt. Defendants introduced no evidence. Held, that a verdict should have been directed for plain-

tiffs.—*Work Bros. v. Kinney*, 5 Idaho, 716, 51 Pac. 745; 7 Idaho, 460, 63 Pac. 596.

The sureties on the official bond of a sheriff are not liable for a conversion of goods made by him during a prior term of office not covered by a bond.—*Work Bros. v. Kinney*, 8 Idaho, 771, 71 Pac. 477.

Attaching creditors obtained judgment against a sheriff and the sureties on his official bond for wrongful conversion of the goods attached. The sheriff was re-elected and gave a new official bond. Held, that such creditors were estopped to sue for the same conversion on the new bond.—*Work Bros. v. Kinney*, 8 Idaho, 771, 71 Pac. 477.

Where a person pays a liquor license tax to the sheriff, taking his receipt therefor, and thereafter begins the business without making application to the board of county commissioners for a license and presenting them the proper bond, the money so paid to the sheriff belongs to the county from the very moment the persons paying it commenced the liquor business, and the obligation of the sheriff to pay it to the county likewise dates from such time.—*Bingham County v. Fidelity etc. Co.*, 13 Idaho, 34, 88 Pac. 829.

Where a person pays a liquor license tax to the sheriff and begins business, and thereafter the portion of such county wherein the business is carried on is annexed to another county, the license tax so paid to the sheriff belongs to his county, and his surety is liable to such county therefor.—*Bingham County v. Fidelity etc. Co.*, 13 Idaho, 34, 88 Pac. 829.

A deputy sheriff sold wood on an execution sale with the understanding that the wood should be measured, and, if it fell short of six hundred cords, the purchase price of such shortage would be returned to the bidder. Held, that the sheriff and his bondsmen were liable, provided the wood was measured, and the demand made for a return of the money before he was required by law to make a return of the sale.—*Works v. Byron*, 22 Idaho, 794, 128 Pac. 551.

Editorial Notes.

Sureties of sheriffs and constables, for what acts liable: 91 Am. St. Rep. 534.

SHIPPING.

Collisions of boats. See *Collision*.

SIGNATURES.

Validity of unsigned contract. See *Contracts*, I, (C).

Evidence as to genuineness. See *Evidence*.

Effect of failure of sheriff to sign official bond. See *Sheriffs and Constables*.

Necessity, sufficiency, and effect of signatures by particular classes of persons or officers, or of signatures to particular classes of instruments. See *specific heads*.

Effect of absence. See *Attachment and Garnishment*, III, (B).

Right of one maker of note to defend on ground of fraud in procuring signature of comaker. See *Bills and Notes*, VIII.

To contract without mention of signer's name as creating liability of surety. See Principal and Surety.

To bail bond or recognizance, absence from body or end of instrument. See Bail and Recognizance.

Absence of on official bond. See Sheriffs and Constables, IV.

To county seat removal petition. See Counties, II, (B).

Sufficiency of by board of school trustees. See Schools and School Districts, II, (G).

Where a married woman signs an instrument by mark and acknowledges the same, the officer's certificate of acknowledgment is a sufficient witnessing of the same under R. S. 16.—First Nat. Bk. v. Glenn, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

SODOMY.

Under R. S. 6810, the minimum punishment of one found guilty of the infamous crime against nature is imprisonment in the state penitentiary for not less than five years, and the length of imprisonment in excess of five years is left to the discretion of the court.—Ex parte Miller, 23 Idaho, 403, 129 Pac. 1075.

As R. S. 6810 prescribes the punishment for said offense, R. S. 6312 has no application and does not fix the maximum punishment for said crime.—Ex parte Miller, 23 Idaho, 403, 129 Pac. 1075.

SOLDIERS' HOME.

Soldiers' Home, right of inmates to vote. See Elections, IV.

SPECIFIC PERFORMANCE.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

II. CONTRACTS ENFORCEABLE.

III. GOOD FAITH AND DILIGENCE.

IV. PROCEEDINGS AND RELIEF.

Requisites, validity and construction of contracts in general. See Contracts.

— Of particular classes of contracts. See Sales; Vendor and Purchaser; and other specific heads.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

Specific performance of a contract is not a matter of right, but rests in the sound and reasonable discretion of the court.—Vincent v. Larson, 1 Idaho, 241.

To settle pending litigation, three claimants to certain water rights agreed to an equal division thereof and that each would be bound in a certain penal sum for the faithful performance of the contract. The contract was not acknowledged so as to be entitled to record, but was recorded. The land and appurtenant water rights of each of the parties to the agreement passed to other persons and the purchaser of the interest of one of the parties appropriated the water rights to the exclusion of the other claimants. Held, that such other claimants were not entitled to a decree of specific performance against such third purchaser, since he had

not assumed the obligation of the contract.—Daly v. Josslyn, 7 Idaho, 657, 65 Pac. 442.

Where a railroad right of way contract requires the railway company to build its fence on the edge of the pit ground, and in fencing to fence no more of said right of way than is absolutely necessary to protect the road, banks and ditches, a decree for specific performance will not be denied on the ground that the contract does not definitely fix the location of the fence but leaves it to the pleasure of the railway company, since the evidence will show where the fence ought to be put.—Lane v. Pacific etc. Ry. Co., 8 Idaho, 230, 67 Pac. 656.

Where a railroad company obtains a right of way under a contract requiring it to place its fences at the edge of the pit ground on both sides of the track, and also requiring it to construct a switch or sidetrack on the land granted for the right of way, the damages for a breach thereof by the railway company cannot be ascertained with certainty, and specific performance will be decreed.—Lane v. Pacific etc. Ry. Co., 8 Idaho, 230, 67 Pac. 656.

A court of equity will not enforce specific performance where plaintiff has not parted with any consideration or property, and no irreparable damage is suffered and no fraud is inflicted on him and where he is in statu quo when he begins action.—Howes v. Barmon, 11 Idaho, 64, 114 Am. St. Rep. 255, 69 L. R. A. 568, 81 Pac. 48.

Editorial Notes.

Specific performance of contracts: 23 Am. Dec. 423.

Specific performance, certainty in contract requisite for: 26 Am. Dec. 661.

Part performance, enforcement of contracts because of: 32 Am. Dec. 129.

Part performance, what acts amount to and what do not: 53 Am. Dec. 539.

II. CONTRACTS ENFORCEABLE.

Requisites and sufficiency of writing to comply with statute of frauds. See, also, Frauds, Statute of, VIII.

To entitle a defendant in an action of ejectment to relief by way of specific performance, his answer or cross-complaint must show such a contract or agreement as would sustain a bill in equity for specific performance.—Stockton v. Herron, 3 Idaho, 581, 32 Pac. 257.

An averment in an answer in an ejectment suit seeking affirmative relief by specific performance, and alleging a contract entirely unilateral, without time, terms or consideration, or conditions, is bad on demurrer.—Stockton v. Herron, 3 Idaho, 581, 32 Pac. 257.

A contract by which the owner of a half interest in a mining claim agrees to convey such interest to M., solely in consideration of M.'s doing certain development work on the claim, is neither fair, mutual, reasonable nor based upon an adequate consideration, and therefore specific performance thereof will not be decreed.—Bear Track Mining Co. v. Clark, 6 Idaho, 196, 54 Pac. 1007.

Equity will decree the specific performance of a contract for the sale of a newspaper business, printing plant, and material used in said business, which contract contemplates a continuance of the business, where damages at law would not afford as complete and adequate a remedy, and such performance will be decreed notwithstanding the general rule that equity will not decree the specific performance of a contract relating to chattels.—*Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542.

Defendants purchased land and an interest in a ditch conveying water thereto, both the land and the ditch being subject to a mortgage in favor of plaintiffs. They also purchased land along the same ditch above the mortgaged property. Defendants being unable to pay the mortgage, plaintiffs' attorney orally agreed to give them the right to enlarge the ditch so as to carry more water for irrigating their other land if they would deed the mortgaged lands to plaintiffs, which they did. Held, that defendants were entitled to enlarge the ditch and use the water therefrom under R. S. 6008, which provides that the statute requiring estates in real property to be created by writing shall not abridge the power of the court to compel specific performance where there has been part performance.—*Male v. Leflang*, 7 Idaho, 348, 63 Pac. 108.

Where it is verbally agreed to convey the right to use water for irrigation purposes and there has been a part performance of the contract by the transfer and use of the water, equity will enforce the contract under R. S. 6008, which provides that the statute requiring conveyances of interests in realty to be in writing shall not abridge the power of the court to compel the specific performance of a contract in case of part performance thereof.—*Francis v. Green*, 7 Idaho, 668, 65 Pac. 362.

Under R. S. 6008, an oral agreement to purchase land may be enforced by one who has placed valuable improvements on the land in pursuance of such agreement.—*Barton v. Dunlap*, 8 Idaho, 821, 66 Pac. 832.

The alteration of a contract will not affect the right of an innocent party to specifically enforce the contract as it existed before alteration.—*Lane v. Pacific etc. R. Co.*, 8 Idaho, 230, 67 Pac. 656.

Where a railroad company obtains a right of way under a contract requiring it to build a sidetrack on the land granted, it cannot avoid specific performance of the contract on the ground that the length of the sidetrack is not stated, since the law implies a promise on its part to build the sidetrack in the usual manner and that it shall be effectual for the use to which sidetracks are generally applied. *Lane v. Pacific etc. R. Co.*, 8 Idaho, 230, 67 Pac. 656.

Where a railroad company has acted under a contract granting it a right of way and obtained benefits thereunder, it cannot defeat an action to compel specific performance thereof, by claiming that the contract was not signed by an agent or officer for it.—*Lane v. Pacific etc. R. Co.*, 8 Idaho, 230, 67 Pac. 656.

Where the evidence shows a part performance by all the parties to an agreement for a lease, the bar of the statute of frauds, R. S. 6808, 6809, is removed, and specific performance of the agreement may be enforced.—*Deeds v. Stephens*, 8 Idaho, 514, 69 Pac. 534.

Where both parties to a contract to convey real estate have violated the provisions thereof, a court of equity will not decree specific performance of the contract, but will place the parties as nearly in statu quo as possible.—*Smith v. Krall*, 9 Idaho, 535, 75 Pac. 263.

R. S. 6007 provides that no estate or interest in real property, etc., can be created, granted or declared otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party, etc. R. S. 2921 provides that no estate in the homestead of a married person, or any part of the community property occupied as a residence by a married person, can be conveyed or encumbered by act of the party, unless husband and wife join in the execution of the instrument, and the wife separately acknowledge it. R. S. 6009, subdivision 5 provides that an agreement for the sale of real estate must be in writing subscribed by the party sought to be charged. Held, that a memorandum dated and signed by the parties to be charged reading as follows, "Received from S. C. Kurdy one hundred and ninety dollars (\$190.00) on land sec. 25, T. 32, R. 2 E., 160 acres," did not sufficiently comply with the statutes to enable the court to enforce specific performance thereof.—*Kurdy v. Rogers*, 10 Idaho, 416, 79 Pac. 195.

A "grubstake" agreement to establish a trust in mining claims located on the public domain may be enforced in a court of equity. *Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196.

R. S. 2921 requires the husband and wife to join in the execution of a conveyance of the homestead or of community property occupied as a residence and that the wife shall separately acknowledge the instrument of conveyance. R. S. 2922 requires the same in case of conveyance of the real property of a married woman. R. S. 3040 provides that the homestead of a married person cannot be conveyed or encumbered unless the instrument of conveyance be executed and acknowledged by both husband and wife. R. S. 3041 provides that a homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof, executed and acknowledged by the husband and wife if the claimant is married. R. S. 6007, 6008, the statute of frauds, provides inter alia that no estate or interest in real property can be created, etc., otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party, etc., but that such provision shall not be construed to abridge the power of the court to compel the specific performance of an agreement in case of part performance thereof. Held, that on a verbal agreement for the transfer of a homestead, assented to by the husband and wife and performed on the part of the purchaser.

the wife would be equitably estopped from interposing these statutes as a defense to an action by the purchaser to compel specific performance.—*Grice v. Woodworth*, 10 Idaho, 459, 109 Am. St. Rep. 214, 69 L. R. A. 584, 80 Pac. 912.

Where a verbal agreement for the transfer of a homestead is assented to by both husband and wife, and is followed by change of possession and permanent improvement placed thereon by the purchaser and a payment of the purchase price, such acts operate to transfer the equitable title to the purchaser and entitle him to a decree compelling the transfer of the legal title.—*Grice v. Woodworth*, 10 Idaho, 459, 109 Am. St. Rep. 214, 69 L. R. A. 584, 80 Pac. 912.

Defendant's intestate agreed to furnish plaintiff a certain quantity of wood, plaintiff to furnish all money necessary to get out and deliver the wood. On the death of her intestate, defendant both personally and as administratrix agreed to carry out the contract. Plaintiff furnished money from time to time as required and after part of the wood was delivered, defendant refused to further comply with the contract unless plaintiff would release five hundred cords from delivery. Plaintiff sued for specific performance alleging the insolvency of defendant and of the estate of which she was administratrix and stating facts to show that he had no adequate remedy at law. Held, sufficient to entitle plaintiff to a decree for specific performance notwithstanding the rule that equity will not ordinarily grant relief for the specific performance of a contract for the sale of chattels.—*Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229.

A contract to convey real estate will be enforced where it is shown that a deed was executed and left in the hands of the grantor's attorney for inspection by the grantee, and after such inspection the grantee was willing to accept the deed and had already paid the purchase price.—*Robbins v. Porter*, 12 Idaho, 738, 88 Pac. 86.

An agreement recited that whereas first parties have this day agreed to sell and convey certain lands, describing them, and in consideration of the sum of \$150 cash to them in hand paid by K., as part of the purchase price of said lands, have executed a warranty deed therefor, and it is agreed that the warranty deed shall be left in escrow with the F. bank to be delivered to K. upon the payment of the specified balance of the purchase price before March 1, 1906, and that on failure of such payment on or before said date, the bank should deliver the deed to first parties. The agreement further provided that first parties should furnish to the second party upon the payment of the balance of the purchase price aforesaid, an abstract of title, showing a clear title. The first parties thereafter extended the time of final payment to March 15, 1906. Held, that time was not of the essence of the contract, and that the vendee was entitled to have the contract regarded as still in force, and to have it specifically enforced any time within the period of the statute of limitations until vendors

tendered abstract showing a clear title and the vendee then defaulted in payment.—*Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965.

Where a contract for the sale of real property fixes the time within which payment must be made and makes time of the essence of the contract, the failure of the vendee to make the payments within the time fixed will prevent him from obtaining specific performance, even though such failure was because of his inability to raise the money on account of repeated crop failures.—*Machold v. Farnan*, 14 Idaho, 258, 94 Pac. 170.

A paper purporting to be a contract, as follows: "Robin, June 16, 1902. We, the undersigned citizens of Robin, Bannock county, Idaho, voluntarily agree to deed and redeed to the old lines as they stand at present," is incomplete, indefinite and uncertain and cannot be enforced in an action for specific performance.—*Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361.

Editorial Notes.

Mutuality of contract: 7 Am. Dec. 492.

Mutuality of remedy, necessity of, and what is: 27 Am. St. Rep. 173; 6 L. R. A., N. S., 391; 38 L. R. A., N. S., 452.

Specific performance of personal property contracts: 5 Ann. Cas. 269; 10 Ann. Cas. 934; 50 L. R. A. 501; 31 L. R. A., N. S., 491.

III. GOOD FAITH AND DILIGENCE.

A lease of a mine provided that one-half the gross receipts therefrom should be paid as rent, and also provided that, in case a certain amount was paid by a certain time, the lessor would convey the mine to the lessee, the amount paid as rent being credited on such amount. By a subsequent agreement the time of payment was extended one month. The lessees made valuable improvements on the mine, and paid over one-half the amount stipulated for, and, six months after the specified time, tendered the balance. The lessor demanded possession soon after the default, and brought ejectment before the tender was made. Held, that specific performance of the agreement to convey would not be enforced, as time was of the essence of the contract.—*Settle v. Winters*, 2 Idaho, 199, 10 Pac. 216.

Where specific performance is demanded on the ground that time was not of the essence of the contract, the plaintiff must make out a case free from doubt and show that the relief asked for is under all the circumstances of the case equitable, and must account in a reasonable manner for any delay or apparent omission to comply with the terms thereof.—*Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425.

Though time may be expressly made of the essence of a contract, or may appear to be so from the circumstances of the case, and laches a bar to a specific performance, yet, generally, time is not so treated by a court of equity, in the absence of negligent delay or delay unaccounted for.—*Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425.

Where time is made of the essence of the contract, an extension of time granted on con-

dition that payment must be made within the time so extended is not a waiver of the condition making time of the essence of the contract, and will not preclude the vendor from insisting on payment within the time so extended.—*Machold v. Farnan*, 14 Idaho, 258, 94 Pac. 170.

Where H. and C. enter into a written contract, whereby H. agrees to purchase, and C. agrees to sell, certain real estate, and time is made the essence of the contract, and H. enters into possession of the land and erects valuable improvements thereon which exceed in value the purchase price of the land, and remains in possession thereof and fails to make payment on the date of maturity as stipulated in the agreement, and it appears to the satisfaction of the court that the failure to make payment within the time stipulated was caused either by the mistake and inadvertence of H. as to the date payment came due or by misleading statements as to the date of maturity made by C., or both, a court of equity should relieve the purchaser from the forfeiture and grant a specific performance in a case where payment was tendered within a few days after the maturity thereof and as soon as the purchaser learned of his mistake.—*Haas v. Coburn*, 22 Idaho, 47, 124 Pac. 476.

Editorial Notes.

Laches as a bar to suits for specific performance: 54 Am. Dec. 132.

IV. PROCEEDINGS AND RELIEF.

Evidence to vary or add to terms of written instruments. See Evidence, XI, (A).

Where one seeks to enforce specific performance of a contract, such contract and the terms thereof should be established by clear and satisfactory evidence.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616; *Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

A decree for specific performance, in a suit brought to enforce a vendor's lien, cannot be upheld.—*Hawkins v. Thurman*, 1 Idaho, 598.

In a suit to establish a resulting trust in mining claims and to obtain specific performance of an alleged "grubstake and information contract," the contract sought to be enforced must be fully and clearly proved, a mere preponderance of the evidence being insufficient.—*Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290.

Where, in an injunction suit, defendant files a cross-complaint seeking specific performance of an agreement to lease, but fails to allege definitely the damages sustained by reason of plaintiff's failure to lease, there is no error in the court's refusing to ascertain the amount of such damage.—*Deeds v. Stephens*, 8 Idaho, 514, 69 Pac. 534.

Specific performance of a parol contract to lease real estate will not be decreed unless the existence of the contract and the terms thereof are clearly and satisfactorily established.—*Deeds v. Stephens*, 10 Idaho, 332, 79 Pac. 77.

Courts will not refuse to enforce a "grubstake" agreement simply because a complainant cannot produce that great preponderance of evidence which produces a moral certainty beyond a reasonable doubt.—*Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196.

A complaint fully setting out a verbal contract for the sale of real estate which was afterward merged into a different contract evidenced by a deed left in the hands of the grantor's attorney for inspection by the grantee, the purchase price of the land having been paid, is sufficient to support a judgment for specific performance.—*Robbins v. Porter*, 12 Idaho, 738, 88 Pac. 86.

Where in an action for specific performance the evidence is conflicting and there is evidence to support the judgment, the judgment will be affirmed.—*Robbins v. Porter*, 12 Idaho, 738, 88 Pac. 86.

In a suit for the specific performance of a contract to convey real estate, the purchase price of which has been paid and the deed executed but not delivered, the contract will be enforced without regard to the rule that requires a plaintiff seeking to establish a trust in real property to make out his case "clearly and satisfactorily beyond a reasonable doubt."—*Robbins v. Porter*, 12 Idaho, 738, 88 Pac. 86.

Where the decree in an action for specific performance fails to require the performance of the conditions precedent therein specified, the decree will be set aside.—*Olympia Min. Co. v. Kerns*, 13 Idaho, 514, 91 Pac. 92.

In an action for specific performance of a contract, the rule that a case will not be reversed where there is a substantial conflict of evidence must be taken and considered with that other rule that, to enforce specific performance, the evidence must establish such contract and the terms thereof clearly and satisfactorily.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

A substantial conflict of evidence does not necessarily arise out of the fact that there is some evidence to support a contract in an action for specific performance, for in such action the contract and its terms must be established by clear and satisfactory evidence, and the conflict must be substantial in the light of this rule.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

Where the specific performance of a contract is decreed, the contract is merged into the decree, and the decree must not be so entered as to leave it optional with the plaintiff whether he performs his part or not.—*Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

Evidence in an action to compel the specific performance of a land contract held to show that the minds of the parties never met and that no definite and certain contract for the sale of land was ever entered into between them.—*Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

Evidence in an action to recover a one-seventh interest in certain mining claims held to show a full performance of his part of the

contract so as to entitle him to specific performance thereof in accordance with R. C. 6008.—*Coughanour v. Grayson*, 19 Idaho, 255, 113 Pac. 724.

In an action for specific performance of a contract to convey real estate, where the vendor claims that the purchaser has forfeited the contract, and the purchaser sets up facts which would tend to excuse his failure to make payment within the stipulated time, and such facts are disputed by the vendor and his witnesses, and the equities of the case are strongly with the purchaser, the court is justified in finding with the purchaser and ordering specific performance.—*Haas v. Coburn*, 22 Idaho, 47, 124 Pac. 476.

Where the entire facts are presented to the court in an action to enforce the specific performance of a contract, the rights of the parties to the contract should not be adjudged upon technical or narrow questions or considerations so as to do injustice to the parties to the contract, but the court should give full consideration to all the facts and the intention and action of the parties, and give such judgment as will be just and equitable to the parties thereto.—*Pease v. Teller Corporation*, 22 Idaho, 807, 128 Pac. 981.

STARE DECISIS.

Stare decisis. See Courts, II, (D).

Decision of appellate court as law of the case in lower court or on subsequent appeal. See Appeal and Error, XVI, (E); Criminal Law, XV, (G), 7.

STATES.

I. POLITICAL STATUS AND RELATIONS.

II. GOVERNMENT AND OFFICERS.

- (A) Appointment or Election of Officers.
- (B) Legislature.
- (C) Compensation of Officers and Fees.
- (D) Duties of Officers and Agents and Performance Thereof.

III. PROPERTY, CONTRACTS AND LIABILITIES.

IV. FISCAL MANAGEMENT, PUBLIC DEBT AND SECURITIES.

V. CLAIMS AGAINST STATE.

VI. ACTIONS.

Right of appeal from state land board. See Appeal and Error, III, (A).

Regulations and control of navigable streams. See Navigable Waters, I, (B).

Right to condemn state lands for public use. See Eminent Domain, I.

I. POLITICAL STATUS AND RELATIONS.

(No paragraphs.)

II. GOVERNMENT AND OFFICERS.

Prison board. See Prisons.

State land board. See Public Lands.

State wagon road commission. See Highways, II.

Appointment by governor of agent in requisition proceeding. See Extradition.

(A) APPOINTMENT OR ELECTION OF OFFICERS.

County officers. See Counties.

Elections in general. See Elections.

Judges. See Judges.

Act of March 3, 1899, authorizing the governor to appoint a board of medical examiners, is not in violation of Const., article 4, section 6, providing that the governor shall nominate, by and with the consent of the senate, all officers whose offices are created by law.—*In re Inman*, 8 Idaho, 398, 69 Pac. 120.

(B) LEGISLATURE.

Under Const., article 3, sections 8, 23, the aggregate per diem allowances for the first session of the legislature is not limited to \$300 as for other sessions, and a writ of mandate will issue to compel the state auditor to issue his warrant to pay the per diem of each member for each day's attendance at said first session, regardless of whether or not he has already received \$300 in the aggregate therefor.—*Goodnight v. Moody*, 3 Idaho, 7, 26 Pac. 121.

Laws 1893, page 170, creating Bannock county, does not deprive said county of representation in the legislature, since said act neither grants nor refuses representation to said county, which remains a part of Bingham county representative district and a part of the district composed of Bingham, Logan, and Alturas counties, and its electors are entitled to vote for the same number of representatives as they were prior to the creation of Bannock county.—*Sabin v. Curtis*, 3 Idaho, 662, 32 Pac. 1130; *Allen v. Curtis*, 3 Idaho, 671, 32 Pac. 1133.

Laws 1890-91, page 195, dividing the state into senatorial and representative districts and declaring the representation which each district is entitled to, failed to provide representation for the counties of Alturas and Logan, out of which the counties of Alta and Lincoln had been created. The act creating the latter counties was declared unconstitutional. Held, that Laws 1890-91, page 195, was unconstitutional.—*Ballentine v. Willey*, 3 Idaho, 496, 31 Pac. 994.

The legislature is prohibited by the constitution from passing an apportionment act which does not give substantially just and equal representation to the people of each county, based upon either the voting or entire population, or upon some other fair basis.—*Ballentine v. Willey*, 3 Idaho, 496, 31 Pac. 994.

Laws 1893, page 170, creating Bannock county, does not segregate the eleventh senatorial district, nor take away any of the rights of the electors of Bannock county in the election of senators in that district.—*Sabin v. Curtis*, 3 Idaho, 662, 32 Pac. 1130.

Laws 1905, page 76, creating the counties of Lewis and Clark out of the territory of the county of Kootenai, was declared unconstitutional. Laws 1905, page 76, apportioned to each of said new counties one senator and two representatives. Held, that said apportionment act was constitutional, except as to

the number of senators, the legislative intent being to give each county one senator and representatives according to the number of votes cast at the last preceding election, and therefore that Kootenai county was entitled to one senator and four representatives. *Heitman v. Gooding*, 12 Idaho, 581, 86 Pac. 785.

Editorial Notes.

Apportionment laws, constitutionality of: 35 Am. St. Rep. 64.

(C) COMPENSATION OF OFFICERS AND FEES.

Compensation and fees of court reporters. See Courts, II, (A).

Of members of legislature. See ante, II.

Const., article 4, section 19, provides, *inter alia*, that the salary of the Secretary of State shall be in full for all services rendered during his term of office, and that "no officer named in this section shall receive for the performance of any official duty any fee for his own use; but all fees fixed by law for the performance of any official duty by any of them shall be collected in advance, and deposited with the state treasurer quarterly to the credit of the state." Held, that where the Secretary of State made a contract with a printing company for printing and binding the state journals and session laws, and retained a portion of the contract price for his labor in preparing and copying said laws and journals, the money so retained by him should be paid into the treasury of the state.—*Anderson v. Lewis*, 6 Idaho, 51, 52 Pac. 163.

Where plaintiff performed services as superintendent of the state capitol grounds for and on behalf of the state under the employment of the capitol building board, and the state board of examiners disallowed his claim for services, a recommendatory decision in his favor will be made under Const., article 5, section 10.—*Daniels v. State*, 15 Idaho, 640, 98 Pac. 853.

Upon the issuance of a certificate by the state engineer certifying to the completion of the works necessary to apply the water to a beneficial use, he may exact a fee to cover the expense of the examination of such works from the person or persons, on submitting the proof of completion, as follows: For ditches and canals or other works having a capacity of ten cubic feet per second of time, or less, a fee of five dollars; and where the capacity is more than ten cubic feet per second, thirty cents for each second-foot of the capacity of such works.—*Idaho etc. Transp. Co. v. Stephenson*, 16 Idaho, 418, 101 Pac. 821.

Laws 1913, page 573, section 1340E, provides that the salary of each deputy bee inspector shall be paid out of the general fund of the state upon warrants duly drawn, etc., provided that no more than \$2,500 shall be paid out of the general fund during any one year. Held, that the maximum amount to be expended on behalf of the bee inspection branch of the horticultural department is limited to \$2,500, and that an appropriation is made for that branch of said department by

the general appropriation act, Laws 1913, page 637.—*McPherson v. Huston*, 24 Idaho, 21, 132 Pac. 107.

Under the general appropriation bill (Laws 1913, p. 637, sec. 1), the amounts specifically appropriated for the purposes stated in said act constitute the whole amount appropriated and to be used for any such purposes during the years 1913 and 1914.—*McPherson v. Huston*, 24 Idaho, 21, 132 Pac. 107.

Const., article 13, section 1, creates the office of immigration commissioner. R. C. 1418, as amended by Laws 1911, page 564, chapter 168, prescribes the salary of immigration commissioner. R. C. 276 provides that the salary of a state officer shall be paid "out of any money in the treasury not otherwise appropriated." Held, that these provisions of law constitute an "appropriation," within the purview and meaning of Const., article 7, section 13, which provides that "no money shall be drawn from the treasury but in pursuance of the appropriations made by law," and that under the foregoing provisions of law it was not necessary for the last session of the legislature to make a specific appropriation in the general appropriation bill for the office of commissioner of immigration, labor, and statistics, in order to enable the commissioner to draw his salary as provided by law.—*Reed v. Huston*, 24 Idaho, 26, 132 Pac. 109; *Rich v. Huston*, 24 Idaho, 34, 132 Pac. 112.

(D) DUTIES OF OFFICERS AND AGENTS AND PERFORMANCES THEREOF.

Validity of contract made by Secretary of State, in which he is interested. See Contracts, I, (F).

It is the duty of the Secretary of State to prepare the copies of the state laws and journals for the printer.—*Anderson v. Lewis*, 6 Idaho, 51, 52 Pac. 163.

R. S. 452 requires the Secretary of State to keep his office open for the transaction of business from 10 A. M. to 4 P. M. each day, except on holidays. Held, that if the Secretary of State does keep his office open after 4 o'clock and is transacting business for the public there after that hour, it is his duty to receive such business as is presented to him. *Grant v. Lansdon*, 15 Idaho, 342, 97 Pac. 960.

III. PROPERTY, CONTRACTS AND LIABILITIES.

Authority of board of regents of State University to incur indebtedness. See Colleges and Universities. Contract of state wagon road commission. See Highways, III.

Deposit of public money in banks. See Depositaries. Disposal of public lands. See Public Lands.

Finality of determination in proceeding by state claiming preferred lien on funds of insolvent bank. See Appeal and Error, III, (D).

Liability for expenses of extradition proceedings. See Extradition.

Liens on state buildings. See Mechanics' Liens, I. Right to condemn state lands for public use. See Eminent Domain, I.

Right of state to withhold payments due to contractor and pay the same to laborers and materialmen. See Contracts, II, (B).

State land board exceeding authority in contract for loan of school money. See *Schools and School Districts*, II.

Sale of state land, effect of prior sale of timber. See *Logs and Logging*.

A contract for the publication of the laws and journals, made by the Secretary of State, by the terms of which he is to receive a certain portion of the price for the preparation of the work for the printer is within R. S. 365, forbidding public officials to have any interest in contracts of the state made by them.—*Anderson v. Lewis*, 6 Idaho, 51, 52 Pac. 163.

The state board of examiners is given power, under Const., article 4, section 18, to examine all claims against the state except salaries or compensation of officers fixed by law; and such power cannot be exercised by a district court in entering judgment against the state, and thereby bind or control the action of the state board of examiners.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761.

IV. FISCAL MANAGEMENT, PUBLIC DEBT AND SECURITIES.

Appropriation bill for salaries. See, also, ante, II. (O).

Const., article 7, section 13, provides that no money shall be drawn from the treasury but in pursuance of appropriations made by law. R. S. 1685 provides that the controller or attorney general may employ other counsel than the district attorney and the expenses must be paid out of the territorial treasury. R. S. 214 prohibits the auditor from drawing warrants on the treasury for any purpose or under any appropriation for any sum exceeding the amount appropriated. Held, that in absence of an appropriation the auditor properly refused to issue a state warrant in payment for legal services of counsel employed by the state auditor under R. S. 1685.—*Kingsbury v. Anderson*, 5 Idaho, 771, 51 Pac. 744.

Special and Local Laws, page 14, creating the capitol building fund, was intended to provide for the payment of bonds authorized to be issued by said act for the erection of the capitol, and was not intended to provide a permanent capitol building fund.—*Steunenberg v. Storer*, 6 Idaho, 44, 52 Pac. 14.

R. S. 232, provides that the general fund of the state shall consist of moneys received into the treasury and not specially appropriated to any other fund. R. S. 1640 requires one-tenth of all receipts from licenses to be paid into the state treasury. Special and Local Laws, page 14, the act creating the capitol building fund, provides that the treasurer shall set apart all moneys received by him on account of licenses of every kind and description, collected under the revenue laws of the territory, and that the same, with rents derived from the capitol building, shall constitute the capitol building fund. Laws 1891, page 14, authorizes and requires the state treasurer to invest the surplus moneys of the capitol building fund in state warrants until the bonds and interest therein referred to are paid or become redeemable. Held, that

any money remaining in the capitol building fund after the payment of the bonds and interest could not be invested in state warrants but should be turned into the general fund of the state.—*Steunenberg v. Storer*, 6 Idaho, 44, 52 Pac. 14.

Under Const., article 4, section 18, giving the state board of examiners power to examine all claims against the state, except salaries, etc., and Const., article 7, section 13, providing that no money shall be drawn from the treasury but in pursuance of appropriations made by law, the board should allow claims found to be correct, though the same cannot be paid without legislative appropriation therefor.—*Kroutinger v. Board of Examiners*, 8 Idaho, 463, 69 Pac. 279.

Const., article 7, section 11, prohibits legislative appropriations, whereby the expenditure of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation, unless a levy be made for such purpose at rates not exceeding those specified in Const., article 7, section 9. Const., article 7, section 2, provides for a property tax, a license tax and a per capita tax. Const., article 4, section 19, secures to the state treasury the fees collected by certain state officers. Held, that in the absence of a showing as to how much revenue the state would derive from all sources, the court will presume that the legislature kept within the constitutional limitation in making its biennial appropriation.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

Const., article 7, fixes the method for raising revenue to meet the current expenses of the state, provides for uniformity of taxation, fixes a maximum rate of taxation and provides for appropriations for current expenses for a board of equalization and for a system of county finances. Const., article 8, contemplates the contracting of indebtedness, the issuance of state bonds, prohibits the loaning of the state's credit to individuals and corporations, etc., and prohibits the creation of debts or liabilities exceeding one and one-half per cent upon the assessed value of the taxable property of the state except in case of war, etc. Held, that legislative appropriations for current expenses and the levy of a tax therefor are not debts or liabilities prohibited by Const., article 8, though there be no funds in the treasury to meet such appropriations at the time they are made.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

Laws 1909, page 407, providing for the issuance and sale of state bonds for the University of Idaho, is unconstitutional and void in so far as it authorizes the issuance of bonds in excess of the limitations fixed by Const., article 8, section 1.—*Lewis v. Brady*, 17 Idaho, 251, 104 Pac. 900.

The words "debt" and "liability," as used in Const., article 8, section 1, are not employed in a technical sense, but have special reference to the basic warrant and legislative authority on which a state contract must rest, and on which alone a public debt must find its sanction in order to obligate the state to pay. *Lewis v. Brady*, 17 Idaho, 251, 104 Pac. 900.

Under Const., article 8, section 1, the basis for computation by the legislature in creating public indebtedness is "the assessed value of the taxable property of the state," and this is a present standard for the guidance of the legislature, and has reference to existing facts and conditions at the time the legislature acts on such legislation.—*Lewis v. Brady*, 17 Idaho, 251, 104 Pac. 900.

Under Const., article 8, section 1, the legislature in the passage of an act creating public indebtedness must be governed by the assessed value of the taxable property of the state as the same has been ascertained and then exists, and such legislation cannot anticipate the future and leave the ascertainment of the assessed valuation to the future acts of ministerial and executive officers.—*Lewis v. Brady*, 17 Idaho, 251, 104 Pac. 900.

Const., article 7, section 13, limits the power of any officer created under the constitution and laws of the state in paying out of the state treasury money, except upon appropriation made by law.—*Jeffreys v. Huston*, 23 Idaho, 372, 129 Pac. 1065.

Where an act of the legislature provides for all expenses relating to the National Guard of Idaho and the Idaho reserve militia, including the salaries of officers and subordinates, and makes a continuing appropriation of \$25,000 per annum, and that such appropriation shall not be limited to any particular year, and a subsequent general appropriation act is passed by the same legislature four days thereafter, and in said general appropriation bill it was provided for all expenses relating to the National Guard of Idaho and the Idaho reserve militia, including the salaries of officers and subordinates, the later act suspends the first act during the period of time such later appropriation covered.—*Jeffreys v. Huston*, 23 Idaho, 372, 129 Pac. 1065.

Laws 1911, chapter 86, page 319, is a general appropriation bill, and provides for the payment of the salaries and compensation of officers and employees of the state and the general expenses of state government, and that the following sums of money, or so much thereof as may be necessary, are hereby appropriated for the payment of the salaries and compensation of state officers and employees of the state of Idaho and the general expenses of state government and the maintenance of the several state institutions for the period commencing on the first Monday of January, 1911, and ending on the first Monday of January, 1913; and provides "for all expenses relating to the National Guard of Idaho and the reserve militia, including the salaries of officers and subordinates as per House Bill No. 156, \$45,000."—*Jeffreys v. Huston*, 23 Idaho, 372, 129 Pac. 1065.

Editorial Notes.

Construction of constitutional provision against giving or loaning of money or credit of state or municipality: Ann. Cas. 1913C, 1230.

V. CLAIMS AGAINST STATE.

See, also, ante, III.

Limitation on claim against state. See Limitation of Actions, I, (B).

It is the duty of the controller to carefully examine all claims against the territory presented to him for allowance, and if he is not satisfied that such claim is correct, or if it be not presented within two years from the time it accrued, he may reject it, notwithstanding the certificate of the prison commissioner stating that it was correct.—*Crutcher v. Cram*, 1 Idaho, 372.

The certificate of the prison commissioner to a claim against the territory, that the account is correct, and is due from the territory, is merely the evidence in support of such claim.—*Crutcher v. Cram*, 1 Idaho, 372.

Const., article 4, section 18, provides that "the governor, Secretary of State and attorney general shall constitute . . . a board of examiners, with power to examine all claims against the state, except salaries and compensation of officers fixed by law." Laws 1890-91, page 45, section 3, makes it the duty of the state board of examiners to examine all claims against the state, except salaries and compensation of officers fixed by law; and section 4 makes the auditor liable on his official bond for loss to the state, if he shall pay any part of a claim, disapproved by the board. Held, that all claims of an unliquidated character must be submitted to the board before the auditor shall draw his warrant therefor.—*Winters v. Ramsey*, 4 Idaho, 303, 39 Pac. 193.

Plaintiffs, as contractors, built two sections of state wagon road under the supervision of the state engineer. Portions of the road were washed out prior to acceptance of the road by the state. At the direction of the state road commission, plaintiffs rebuilt the portion of the road so destroyed. The original contract price consumed the funds available for the sections built. Held, sufficient to support a recommendatory decision under Const., article 5, section 10, that the legislature pay plaintiffs for the extra work done.—*Winters v. State*, 5 Idaho, 198, 47 Pac. 855.

Plaintiff's assignor sold and delivered to the state certain hardware and furnishings for the use of the state at the Chicago World's Fair, which were thereafter sold by the state and the proceeds turned into the state treasury. Held, that the supreme court, under Const., article 5, section 10, would recommend payment of the claim.—*Wisconsin Marine & Fire Ins. Co. v. State*, 5 Idaho, 785, 51 Pac. 983.

In an action under Const., article 5, section 10, to obtain a recommendatory decision of the supreme court on a claim against the state, the evidence showed that plaintiff, at the request of the executive department of the state, furnished furniture for the legislative halls, which was thereafter accepted and used by the legislature, that the legislature had appropriated money, sufficient to

pay the account in part, leaving a balance still due. Held, that payment of plaintiff's claim would be recommended.—*Geo. H. Fuller Desk Co. v. State*, 6 Idaho, 315, 55 Pac. 857.

Where the state board of examiners unjustly disallows a claim against the state, the claimant has a remedy under Const., article 5, section 10, by applying to the supreme court to hear the claim and securing a recommendatory judgment to be presented to the next legislature for action.—*Bragaw v. Gooding*, 14 Idaho, 288, 94 Pac. 438.

The courts have no power or authority to set aside or reverse the action of the state board of examiners in disallowing, in whole or in part, any claim presented against the state.—*Bragaw v. Gooding*, 14 Idaho, 288, 94 Pac. 438.

Evidence in an action on a building contract to obtain a recommendatory judgment against the state held insufficient to support a claim for extras.—*Rathbun v. State*, 15 Idaho, 273, 97 Pac. 335.

Editorial Notes.

What claims are valid demands against state: 42 L. R. A. 33.

VI. ACTIONS.

See, also, Colleges and Universities.

Recommendatory decision of supreme court. See ante, V.

The state cannot be sued without its express consent, and this consent must be found either in the constitution of the state or legislative enactment.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761; *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.

Under act of February 25, 1899, section 13, authority is granted to sue the state for the condemnation of state lands for a public use. *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.

An action against the board of trustees of the Albion State Normal School to recover a money judgment is in fact an action against the state, as the board of trustees are the mere agents of the state in the administration of the affairs of such school.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761.

Where the statute gives consent that the state may sue and be sued and prescribes the court in which actions, involving claims against the state, must be brought, then such court is the only court having jurisdiction of such actions.—*Thomas v. State*, 16 Idaho, 81, 100 Pac. 761.

Editorial Notes.

States, actions against: 12 Am. Dec. 517.

STATUTES.

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Constitutional restrictions on passage of ex post facto and retrospective laws, and laws impairing vested rights, obligation of contracts, etc. See Constitutional Law.

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Validity of act creating or altering county. See Counties, I, (A), (C).

I. ENACTMENT, REQUISITES AND VALIDITY IN GENERAL.

Pleading and evidence. See post, VII.

(A) ENACTMENT.

A bill which passes one house of the legislature, and is materially changed by amendment by the other house, and then sent back to the house where it first originated, must go through the same procedure as to reading and final vote as if it was an original bill.—*Cohn v. Kingsley*, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

Const., article 3, section 15, requiring the printing of legislative bills, the reading thereof on three several days unless dispensed with on yeas and nays vote, and a yeas and nays vote on each bill separately to be entered on the journal is mandatory.—*Cohn v. Kingsley*, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

To suspend the provision of Const., article 3, section 15, requiring a reading of all bills

on three several days in each house, an urgency must exist, and the suspension must be by an aye and nay vote, and by two-thirds of the house, voting with reference to a bill which is then pending and before the house for consideration at the time of the suspension.—Cohn v. Kingsley, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

The journal of both houses of the legislature must affirmatively show that the provisions of Const., article 3, section 15, have been substantially complied with in the passage of an act whose validity is questioned, and the failure of the journal to show such compliance will render the act void.—Cohn v. Kingsley, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

Where the mandatory provisions of the constitution require certain things to be done by the legislature in the enactment of laws, and the legislature passes a law without complying with such provisions, the law is unconstitutional.—Cohn v. Kingsley, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

Where the journal of the legislature shows that the act of March 12, 1897, creating a state board of medical examiners was not read section by section on its final passage as required by the constitution, such act is void.—Brown v. Collister, 5 Idaho, 589, 51 Pac. 417.

Laws 1895, page 19, amending R. S. 6765, which defines rape, was regularly passed by the legislature.—State v. McGraw, 6 Idaho, 635, 59 Pac. 178.

Where the journal record of a bill shows that it was read the first and second time on different days, and after the second reading amendments were adopted, the first and second reading of which on different days was dispensed with under the constitution, and the amendments were read a first and second time on the same day, and printed, and the bill as amended was thereafter read at length section by section and the yea and nay vote taken thereon and entered upon the journal, it is a compliance with the provisions of Const., article 3, section 15.—Tarr v. Western Loan etc. Co. (on rehearing), 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

Const., article 3, section 15, providing that a bill shall not become a law unless the same shall have been read on three several days in each house previous to the final vote thereon and that in case of urgency, two-thirds of the house, where such bill is pending, may, upon a vote of the ayes and nays, dispense with this provision, applies alike to amendments as to the original bill, and the reading of amendments on three several days may be dispensed with in like manner.—Tarr v. Western Loan etc. Co. (on rehearing), 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

Though Const., article 3, section 15, requires that a bill on its final passage shall be "read at length, section by section," yet if the rec-

ord shows that the bill was read "in full," it shows a substantial compliance with said constitutional provision.—Tarr v. Western Loan etc. Co. (on rehearing), 15 Idaho, 741, 21 L. R. A., N. S., 707, 99 Pac. 1049.

(B) VALIDITY AND SUFFICIENCY OF PROVISIONS.

An act is not repugnant to Const., article 3, section 17, in that it is not plainly worded, where a word is used therein evidently without any intention on the part of the lawmakers to use the same, and without said word having any fixed or distinct meaning in the connection in which the same is used.—Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho, 504, 94 Pac. 829.

Laws 1909, page 194, creating the eighth judicial district, provides in section 2 thereof that a special election shall be held in said district, at which election all persons registered as voters at the last general election, and such other qualified voters as may offer themselves for registration prior to the day specified for election, shall be qualified to vote; that the several precincts, polling places, judges and clerks of the last general election shall be used and in other respects the election shall be conducted and the votes counted the same as at general elections. Held, that such section is void for indefiniteness, uncertainty and incompleteness, in that the procedure for holding such special election is not designated, and that in the particulars in which the law is indefinite and uncertain the general election laws are inapplicable without substantial and material alteration, such as political and ministerial officers could not make.—Knight v. Trigg, 16 Idaho, 256, 100 Pac. 1060.

Where the legislature has provided certain and fixed days upon which registration may be had for a special election under the local option statute, the fact that the statute also authorizes the registrars of the different precincts to fix other and additional days does not render such statute indefinite or uncertain.—Gillesby v. Board of Commrs., 17 Idaho, 586, 107 Pac. 71.

Laws 1909, page 9, known as "the local option law," is not void or unconstitutional for uncertainty or ambiguity in not providing, first, the period for the registration of voters at such election; second, in failing to fix the time when registrars must register voters; third, in failing to fix the time when registrars shall begin or cease to register voters; fourth, in failing to point out to the voters when they may register; and, fifth, in failing to provide any procedure for registration.—Gillesby v. Board of Commrs., 17 Idaho, 586, 107 Pac. 71.

(C) DETERMINATION OF VALIDITY.

Persons entitled to raise question of unconstitutionality, necessity of determining constitutionality and presumption and construction to avoid unconstitutionality. See Constitutional Law, II.

(D) TOTAL OR PARTIAL INVALIDITY.

Effect of partial invalidity of law relating to peddlers. See Hawkers and Peddlers.

Where an act having but one object is in part valid and in part invalid, and the parts are so mutually connected with and dependent upon each other as to conditions, considerations, or compensations for each other as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not have passed the residue independently, the act must be held void.—*Ballentine v. Willey*, 3 Idaho, 496, 95 Am. St. Rep. 17, 31 Pac. 994.

Laws 1909, page 194, freed from the void provisions of section 2 thereof, remains a substantial and complete legislative act.—*Knight v. Trigg*, 16 Idaho, 256, 100 Pac. 1060.

The court will not hold an entire act void or unconstitutional by reason of the fact that a section may be unconstitutional and void, where the latter is distinct and separable from the remaining provisions of the act, and could be omitted and leave the act complete within itself and capable of being carried into effect, so as to accomplish the object of the law as intended by the legislature.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

Where the provisions of an act are connected in subject matter, dependent on each other, and designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other, then, if one part falls, the entire act must fall.—*Cunningham v. Thompson*, 18 Idaho, 149, 108 Pac. 898.

If the different sections and provisions of a legislative act are connected in subject matter dependent upon each other and designated to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other, then if one part falls the entire act must fall.—*Ferbrache v. Drainage Dist. No. 5*, 23 Idaho, 85, 128 Pac. 553.

Where a general appropriation bill in no way specifically repeals a former act, which makes an appropriation for the same purpose for which the general appropriation bill applies, and is continuous from year to year, and applies to no particular year, and the provisions of the two statutes when considered together can be harmonized and applied, this court will follow the rule, and give effect to both acts, in order to carry out the intent of the legislature, and will not invoke the rule of repeal by implication.—*Jeffreys v. Huston*, 23 Idaho, 372, 129 Pac. 1065.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

Class legislation as repugnant to constitution. See Constitutional Law, IX.

Good roads law not a local or special law. See Highways, II.

Laws 1899, page 405, fixing the maximum and minimum salaries of all county officers and leaving the amount thereof to be fixed by the county commissioners of each county, is not a local or special law, being general in its nature and terms and applying equally to every county in the state.—*Stookey v. Board of Commrs.*, 6 Idaho, 542, 57 Pac. 312; *Reynolds v. Board of Commrs.*, 6 Idaho, 787, 59 Pac. 730.

Lewiston city charter, section 20, as amended by act of March 6, 1899, provides that the city shall have power to borrow money and issue bonds therefor not to exceed fifteen per cent of the value of all taxable property in the city as shown by the last preceding assessment-roll. Held, that though such law is a local or special law, it is authorized by Const., article 11, sections 2, 3, and hence does not contravene Const., article 3, section 19, prohibiting the legislature from passing local or special laws, inter alia "providing for and conducting elections or designating the place of voting."—*Wiggin v. Lewiston*, 8 Idaho, 527, 69 Pac. 286.

Laws 1903, page 223, section 34, authorizing constructive service of summons in actions brought by the water commissioner against all persons claiming water rights whose rights have not been adjudicated and allotted, violates Const., article 5, section 26, which provides that all laws relating to courts shall be general and of uniform operation throughout the state and the organized judicial powers, proceedings and practices of all the courts of the same class or grade shall be uniform and also Const., article 3, section 19, paragraph 3, which prohibits special or local legislation regulating practice of courts of justice.—*Bear Lake County v. Budge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

Laws 1903, page 223, regulating the appropriation and diversion of public waters, is not unconstitutional as antagonistic to Const., article 3, section 19, subdivision 3, and article 5, sections 2, 26, providing that all laws shall be general and of uniform operation; the act relating to all of a class, namely, the appropriators and owners of water rights.—*Boise Irrigation etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

The legislature may enact a law relative to one class of insurance, so long as it is general in its terms as to that particular business, without rendering it objectionable as a local act.—*Idaho Mut. Co-op. Ins. Co. v. Myer*, 10 Idaho, 294, 77 Pac. 628.

Const., article 3, section 19, prohibits the legislature from passing local or special laws "creating offices or prescribing the powers and duties of officers in counties, cities, townships, election districts or school districts, except as in this constitution otherwise provided." Const., article 2, section 11, provides that no charter of incorporation shall be granted, extended, changed or amended by special law, except for certain corporations under control of the state; but the legislature shall provide by general law for the organization of corporations hereafter to be created;

provided, that any such general law may be thereafter repealed or altered by the legislature. Const., article 12, section 1, provides that the legislature shall provide by general laws for the incorporation, organization and classification of cities and towns in proportion to population, which laws may be altered, amended or repealed by general laws. Held, that, under said constitutional provisions, the legislature was authorized to amend the special act granting a charter to the city of Lewiston by amendments germane to the object and purposes of such charter.—*Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234.

The corporate existence of the city of Lewiston under special charter from Washington Territory antedates the creation of the territory of Idaho. Const., article 21, section 2, provides that all laws now in force in the territory of Idaho, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation or be altered or repealed by the legislature. Const., article 3, section 19, prohibits local or special legislation on the several subjects therein enumerated. Held, that the act granting a special charter to the city of Lewiston is not repugnant to any of the provisions of the state constitution.—*Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234.

The special charters of the cities of this state cannot be amended by general laws.—*Boise City Nat. Bk. v. Boise City*, 15 Idaho, 792, 100 Pac. 93.

The act of Congress organizing Idaho as a territory did not prohibit the territorial legislature enacting special or local laws for the organization of school districts.—*Howard v. Independent School etc.*, 17 Idaho, 537, 106 Pac. 692.

The act of December 30, 1880 (11 Terr. Sess. Laws, p. 408), and the subsequent territorial amendments thereto were not repugnant to or in conflict with the constitution of the state of Idaho subsequently adopted and approved by the people, and were not abrogated or repealed by the constitution.—*Howard v. Independent School etc.*, 17 Idaho, 537, 106 Pac. 692.

The mere fact of the existence of an independent school district, under special charter granted by the territorial legislature, does not render the special act or charter under which it exists obnoxious to the uniformity requirement of the state constitution.—*Howard v. Independent School etc.*, 17 Idaho, 537, 106 Pac. 692.

Where the legislature has provided certain and fixed days upon which registration may be had for a special election under the local option statute, the fact that the statute also authorizes the registrars of the different precincts to fix other and additional days does not render such statute local or special legislation.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

The law known as the "Local Option Law," Laws 1909, page 9, is a general law declarative of the policy of the state in regard to traffic

in intoxicating liquors.—*Mix v. Board of Commrs.*, 18 Idaho, 695, 112 Pac. 215.

R. C. 2401, 2402, 2403, which prescribes a procedure whereby the board of directors of an irrigation district may, by petition, obtain a judgment of the district court approving and confirming the organization of such district and all the proceedings relating thereto, are not in conflict with that part of Const., article 3, section 19, which provides that "the legislature shall not pass local or special laws . . . regulating the practice of the courts of justice."—*Emmett Irr. Dist. v. Shane*, 19 Idaho, 332, 113 Pac. 444.

Under Laws 1911, page 280, section 3, whenever a change of form of government is made from that under a special charter or from an organization under the general laws to the commission form of government provided by said act, the provisions of the act are made to apply alike to all such cities making such change, under the classification made by the act.—*Kessler v. Fritchman*, 21 Idaho, 30, 119 Pac. 692.

The Black law or commission government act (Laws 1911, c. 82) is a general and not a special law, and applies equally to all cities of the state having the required population that see fit to adopt its provisions by a popular vote.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

Laws 1911, page 343, authorizing the construction of dams and booms in the north fork of the Clearwater river and tributaries, is not in conflict with Const., article 3, section 19, prohibiting special or local laws authorizing the laying out, etc., of "highways," as the word "highway" is used in the constitution in its ordinary and popular sense.—*Grice v. Clearwater Timber Co.*, 20 Idaho, 70, 117 Pac. 112.

Editorial Notes.

Local or private statutes, what are: 23 Am. Dec. 543; 1 Am. St. Rep. 903; 4 Ann. Cas. 659; 2 L. R. A. 577; 7 L. R. A. 194; 11 L. R. A. 492.

General statutes, what are: 21 Am. St. Rep. 780.

Special legislation forbidden by constitutional law, what is: 21 Am. St. Rep. 780.

Special or local legislation where general laws can be made applicable: 93 Am. St. Rep. 106.

III. SUBJECT AND TITLES OF ACTS.

Of ordinances. See *Municipal Corporations*.

Requirements as to title inapplicable to amendments to constitution. See *Constitutional Law*, I.

Laws 1890-91, page 34, entitled "An act to regulate the sale of intoxicating liquors," is comprehensive enough to include the provisions contained in said act in regard to a license tax and therefore does not contravene Const., article 3, section 16, requiring the subject matter of each act to be stated in the title.—*State v. Doherty*, 3 Idaho, 384, 29 Pac. 855.

Const., article 3, section 16, provides that every act shall embrace but one subject and

matters properly connected therewith, which subject must be expressed in the title. *R. S. 3604*, authorizing the construction of bridges and other public improvements and the issue of bonds therefor, is entitled "An act providing for the issuance of negotiable coupon bonds for the funding and refunding of county indebtedness, amending chapter 6, title 3, Rev. Stats., and the subsequent amendment thereto, approved March 14, 1899." Held, that such title does not express the subject of the legislation contained in the act, and such act is therefore void.—*Andrews v. Board of Commrs.*, 7 Idaho, 453, 63 Pac. 592.

That the title to an act is general is no objection if it is not made to cover legislation incongruous in itself.—*Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295.

Where all the provisions of an act can be considered as falling within the same subject matter legislated upon in such act, the act is not unconstitutional, however numerous the provisions may be.—*Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295.

Laws 1901, page 191, entitled "An act to amend sections 2, 11, 22 and 26 of an act entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes, and for other and similar purposes, approved March 6, 1899,' and to amend section 9 of chapter 1, and section 16 of chapter 2 of an act entitled 'An act to provide for a state engineer, defining his duties, and regulating his compensation, and to provide for the acceptance by the state of Idaho from the United States of certain lands, and to provide for the reclamation, occupation, and disposal of the same, approved March 2, 1899,' and to provide for the acquisition of right of way for the construction of canals or reservoirs or other irrigation works over or upon the lands of the state of Idaho," is constitutional, as expressing the subject in the title.—*Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295.

Act of March 4, 1903 (Laws 1903, p. 375), entitled "An act to provide for the care of money in the custody of the state treasurer," and prescribing penalties, is insufficient to authorize legislation thereunder providing for the depositing of public funds in banks designated as state depositaries, and the collection of interest thereon, and the removal of such funds beyond the custody and control of the state.—*Turner v. Coffin*, 9 Idaho, 338, 74 Pac. 962.

Title of act of March 4, 1903 (Laws 1903, p. 375), providing for the keeping of state moneys in the custody of the state treasurer, does not authorize a provision in the act for the care and keeping of the money out of the custody of the state treasurer.—*Turner v. Coffin*, 9 Idaho, 338, 74 Pac. 962.

Under Const., article 3, section 16, providing that every act shall embrace but one

subject, which shall be embraced in the title, the courts must liberally construe the language used by the legislature in framing the title to any given act which it may pass.—*Turner v. Coffin*, 9 Idaho, 338, 74 Pac. 962.

Laws 1903, page 375, entitled "An act to provide for the care and keeping of moneys in the custody of the treasurer of the state of Idaho, and prescribing penalties," provides that the public fund shall be deposited in banks designated as state depositaries and that interest shall be collected thereon. Held, that the body of the act was not in harmony with the title and that the act was therefore unconstitutional under Const., article 3, section 16, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be embraced in the title.—*Turner v. Coffin*, 9 Idaho, 338, 74 Pac. 962.

An act entitled "An act to amend section 1645 of the Revised Statutes of Idaho, as amended by act approved February 16, 1899," sufficiently complies with Const., article 3, section 16, requiring the subject of the act to be expressed in the title.—*State v. Jones*, 9 Idaho, 693, 75 Pac. 819.

Laws 1903, page 223, entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of said waters," is sufficiently broad to include provisions regulating all the waters of the state while running in their natural channels, and is not limited, by the term "public waters," to waters, the use of which is declared to be a public use by the constitution, and is not repugnant to Const., article 3, section 16, requiring every act to embrace but one subject, to be expressed in the title.—*Boise Irrigation etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

The title to Laws 1903, page 223, "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of said waters and the priority of such rights," is sufficient to include provisions for the regulation of the appropriation, diversion and use of such waters and to provide for the settlement of the priorities of appropriators.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

The title of act of March 9, 1903 (Laws 1903, p. 105), to wit, "An act to amend an act entitled an act to amend the charter of the city of Lewiston," is sufficiently comprehensive to include all provisions germane to the city charter.—*Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234.

Laws 1903, page 105, entitled "An act to amend an act entitled an act to amend the charter of the city of Lewiston and establishing a new and complete charter for said city," is not in conflict with Const., article 3, section 16, providing that every act shall embrace but one subject which shall be expressed in the title.—*Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234.

Laws 1903, page 150, entitled "An act relating to irrigation districts, and to provide for the organization thereof, and to provide

for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," is not repugnant to Const., article 3, section 16, as embracing more than one subject and matters properly connected therewith.—*Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 474, 83 Pac. 499.

Laws of 1905, page 36, entitled "An act relating to foreign corporations doing business in the state of Idaho," and providing that all foreign corporations which had complied, or in good faith attempted to comply, with the constitution and laws of this state prior to the passage of this act, should be relieved from the penalties, forfeitures and obligations imposed by prior legislation, is a retrospective and retroactive law, and is, in that respect, out of the usual and ordinary scope of legislation, and hence the title should indicate in some manner the retroactive intent and operation of the statute so as to avoid the prohibitions of Const., article 3, section 16, requiring that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.—*Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873.

Laws 1903, page 346, entitled "An act to prohibit the sale of spirituous, malt or vinous liquors near public works and grading camps of canals and railroads and other kindred enterprises," undertakes to regulate such sale, instead of to prohibit, and hence violates Const., article 3, section 16, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.—*Gerdling v. Board of County Commrs.*, 13 Idaho, 444, 90 Pac. 357.

The title of Laws 1903, page 432, "An act to amend section twenty-four of an act entitled 'An act to provide for the organization, government and powers of cities and villages,' approved February 10, 1899," does not violate Const., article 3, section 16, since the title gives notice of the general subject of the legislation and also of the specific portion of the act to be amended.—*School District No. 27 v. Twin Falls*, 13 Idaho, 471, 90 Pac. 735.

Laws 1907, page 223, entitled "An act to set apart Sunday as a day of rest; to provide for the closing of saloons and other places of business on Sunday; to prohibit the selling, giving away or disposing of any spirituous, vinous, malt or intoxicating liquors on Sunday; to provide for the closing of places of amusement and prohibiting horseracing on Sunday; and to provide for the punishment of those guilty of violating the provisions of this act, and the disposal of all fines collected under the terms of this act," does not violate Const., article 3, section 16, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in its title. *State v. Dolan*, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; *In re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

The title of Laws 1903, page 150, having been held sufficient and not in conflict with

Const., article 3, section 16, as embracing more than one subject, the title of Laws 197, page 484, amending said act, is sufficient and does not conflict with said Const., article 3, section 16, since it clearly specifies the particular sections to be amended and repealed. *Settlers' Irr. Dist. v. Settlers' Canal Co.*, 14 Idaho, 504, 94 Pac. 829.

Where the title of an original act is sufficient to embrace the matters covered by the provisions of an amendatory act, it is unnecessary to inquire whether the title to the amendatory act is, of itself, sufficiently broad and comprehensive to embrace all the matters contained in the amendatory act.—*Vineyard v. City Council*, 15 Idaho, 436, 98 Pac. 422.

Laws 1903, page 187, entitled "An act to provide for the election and appointment of officers, and to provide for the election and compensation of police judges in cities of the second class, amending sections 6 and 8 of 'An act to provide for the organization, government and powers of cities and villages,' approved February 10, 1899," does not conflict with Const., article 3, section 16, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in its title.—*Vineyard v. City Council*, 15 Idaho, 436, 98 Pac. 422.

Where the title to an amendatory act refers to an educational corporation as "Independent School District No. 1 of Nez Perce county, Idaho," and the body of the act itself designates and creates the corporation as "Independent District No. 1 of Nez Perce county, Idaho," the omission of the word "school" in the name of the corporation in the body of the act is an immaterial variance, and does not defeat the purpose and object of the statute.—*Howard v. Independent School*, 17 Idaho, 537, 106 Pac. 692.

The title of Laws 1899, page 332 (repealed by Laws 1905, p. 30), authorizing the improvement of the navigation of rivers for logging purposes, held broad enough to cover the collection of tolls on "booms" and "bails." *St. Joe Improv. Co. v. Laumierster*, 19 Idaho, 66, 112 Pac. 683.

The title of Laws 1911, page 280, authorizing a commission form of government, is broad enough to embrace the subject matter contained in the body of the act, and hence not violative of Const., article 16, section 3. *Kessler v. Fritchman*, 21 Idaho, 30, 119 Pac. 692.

The title of Laws 1911, page 121, chapter 55, embraces but one subject, to wit, organization and government of highway districts, and matters germane, connected with, and relating to, the general subject of organization and government of highway districts, and in no way contravenes the provisions of Const., article 3, section 16.—*Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 219.

Laws 1911, page 121, chapter 55, relating to highway districts, is not invalid as containing subjects not expressed in the title.—*Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 220.

Editorial Notes.

Statutes, effect of provisions requiring to embrace but one subject which shall be expressed in the title: 61 Am. Dec. 337.

Statutes, sufficiency of title of: 64 Am. St. Rep. 70.

Title of statutes, when embraces but one subject, and what may be included thereunder: 79 Am. St. Rep. 456.

Validity of statute having title more comprehensive than act itself: Ann. Cas. 1912A, 102.

Validity of statute providing for penalty or punishment not mentioned in title: Ann. Cas. 1912D, 157.

IV. AMENDMENT, REVISION, AND CODIFICATION.

Amendment by one branch of legislature, procedure on sending back to other branch. See ante, I.

Amendment of constitution. See Constitutional Law, I.

Laws 1890-91, page 20, entitled "An act to change the words 'territory' and 'territorial' to the word 'state,' and the word 'controller' to the word 'auditor,'" does not conflict with Const., article 3, section 18, which provides that no act shall be revised or amended by mere reference to its title.—Gilbert v. Moody, 3 Idaho, 3, 25 Pac. 1092.

"An act to regulate the sale of intoxicating liquors in less quantities than one quart" was passed by the House of Representatives and amended by the Senate by striking out all parts thereof as to "quantities less than one quart," in which amendment the House concurred. The House amended the title by striking out the words "In less quantities than one quart." After said title was so amended, the bill was enrolled and approved, without the Senate's concurrence in the amendment of the title. Held, that the amendment of the title as made by the House was not one of substance, and did not invalidate the act.—State v. Doherty, 3 Idaho, 384, 29 Pac. 855.

R. S. 623 prohibited assessors and collectors from charging fees or commissions for collecting public school moneys. R. S. 2156 allowed them commissions on all taxes collected by them. Held, that the Revised Statutes having been adopted as a whole and at the same time and taking effect at the same time, the latter section did not repeal the former, and therefore that the tax collector was not entitled to commissions on public school moneys collected by him.—Fremont County v. Brandon, 6 Idaho, 482, 56 Pac. 264.

Separate laws on the same general subject may be amended by one bill with a proper title, without violating Const., article 3, section 16, requiring each act to embrace but one subject.—Pioneer Irr. Dist. v. Bradley, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295.

Laws 1903, page 104, entitled "An act to amend section 1645 of the Revised Statutes of Idaho, as amended by act approved February 16, 1899," when read in connection with the section of the Revised Statutes to

which it clearly belongs, shows the purpose and intent of the legislature in enacting it, and the law will not therefore be held invalid on the ground that it fails to conform to Const., article 3, section 18, providing that no act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length.—State v. Jones, 9 Idaho, 693, 75 Pac. 819.

Under Const., article 21, section 2, providing that all laws not repugnant to the constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature, the legislature is authorized to amend all laws, special or general, continued in force after the adoption of the state constitution.—Butler v. City of Lewiston, 11 Idaho, 393, 83 Pac. 234.

Two or more laws relating to the same subject, or different parts of the same subject are not necessarily amendatory to each other, within the meaning of the provisions of Const., article 3, section 18, although they may be construed in *pari materia*.—Noble v. Bragaw, 12 Idaho, 265, 85 Pac. 903.

Const., article 3, section 18, prohibiting the legislature from revising or amending any act by mere reference to the title, and providing that the section as amended shall be set forth and published at full length, does not require that the whole act containing the section amended should be republished in full, but only requires the republication of the section amended.—Noble v. Bragaw, 12 Idaho, 265, 85 Pac. 903.

An amended section of an act takes the place of the original section in the act amended, and the failure of the legislature in amending the same section of the original act a second time, to specifically refer to it as having been amended by the first amendatory act, does not affect the validity or constitutionality of the second amendment of the amended section.—I. A. West & Co. v. Board of Commrs., 14 Idaho, 353, 94 Pac. 445.

Where the title to an act provides for amending another act and adding thereto a section, and the body of the act provides for the amendment but makes no addition of the section, the omission does not render such amendatory act unconstitutional or void.—I. A. West & Co. v. Board of Commrs., 14 Idaho, 353, 94 Pac. 445.

An act may be amended by changing the language of a section, or by adding thereto a new section, provided that the subject matter be germane and relates to the subject matter embraced in the title of the act proposed to be amended.—Settlers' Inv. Dist. v. Settlers' Canal Co., 14 Idaho, 504, 94 Pac. 829.

A section of an act may be amended by reference to the section and giving the title of the act amended, provided the title of the original act is broad and comprehensive enough to embrace the subject of the amendatory act.—Vineyard v. City Council, 15 Idaho, 436, 98 Pac. 422.

Under Laws 1903, page 187, entitled "An act to provide for the election and appointment of officers, and to provide for the election and compensation of police judges in cities of the second class, amending sections 6 and 8 of "An act to provide for the organization, government and powers of cities and villages, approved February 10, 1899, the amended section is set forth in full in the amendatory act. Held, not to contravene Const., article 3, section 18, providing that no act shall be amended or revised by mere reference to its title, but the section as amended shall be set forth and published at full length.—*Vineyard v. City Council*, 15 Idaho, 436, 98 Pac. 422.

Const., article 3, section 18, which provides that "no act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length," is intended to prohibit the amendment of a section of the statute by reference and requires that the amended statute be set out at full length, but does not prohibit an amendment by implication; that is, it does not prohibit or forbid the section as amended in accordance with the foregoing provision of the constitution having the effect of repealing or amending some other section of the statute with which the amended section is in irreconcilable conflict.—*Stanrod v. Case*, 24 Idaho, 365, 133 Pac. 651.

Editorial Notes.

Code amendment or revision, constitutionality of: 86 Am. St. Rep. 267; 55 L. R. A. 836.

V. REPEAL, SUSPENSION, EXPIRATION AND REVIVAL.

A general statute without negative words will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent.—*People v. Lytle*, 1 Idaho, 143.

A statute clearly repugnant to a prior one necessarily repeals the former, though it does not do so in terms.—*People v. Lytle*, 1 Idaho, 143.

Though a subsequent statute be not repugnant in all its provisions to a prior statute, yet if the latter is clearly intended to provide the only rule that should govern in the case provided for, it repeals the original act. *People v. Lytle*, 1 Idaho, 143.

Act of January 11, 1887, swept out of existence all former legislation and laws of Idaho, and enacted a complete revision thereof; and all laws that formerly existed, and were not included in such revision, were repealed.—*Territory v. Nelson*, 2 Idaho, 651, 23 Pac. 116; *Territory v. Evans*, 2 Idaho, 651, 23 Pac. 232.

R. S. 8500, providing for the sentence of hard labor of persons convicted of crimes punishable by imprisonment in the state penitentiary, was not repealed or modified by the amendment of March 9, 1899, which refers merely to the control, government, and management of the penitentiary.—*In re Corcoran*, 6 Idaho, 657, 59 Pac. 18.

R. S., section 3952, provided that not less than fifteen nor more than thirty days before the commencement of any term of the district court, the judge, if a jury will be required, must make and file with the clerk an order that one be drawn, to contain, if a grand jury, twenty, and if a trial jury, such a number as the trial judge may direct. Laws 1899, page 335, amending the former act, eliminated the provision as to the time within which the order for a jury must be made, and provided "that all acts and parts of acts in conflict with this act are hereby repealed." Held, that the amended act does not repeal section 3961, providing that whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, the court may, in its discretion, order a sufficient number to be drawn and summoned to attend such court, or it may, by order entered on its minutes, direct the sheriff of the county to summon as many jurors as the case may require.—*In re Corcoran*, 6 Idaho, 657, 59 Pac. 18.

Under Const., article 3, section 18, prohibiting the legislature from revising or amending any act by mere reference to its title, in requiring the section as amended to be set forth and published in full, a section or an entire act may be repealed without republishing the whole of the same, as the constitutional provision does not apply to repeals but only to revisions and amendments.—*Noble v. Bragaw*, 12 Idaho, 265, 85 Pac. 903.

Neither express nor implied repeals come within the constitutional inhibition contained in said section 18, article 3, of the constitution.—*Noble v. Bragaw*, 12 Idaho, 265, 85 Pac. 903.

Laws 1901, page 87, provided that a claim in writing for damages, signed by the owner or his agent, must be made upon the railroad company within three months after the killing or maiming of the claimant's animal and that the killing or maiming was prima facie evidence of negligence when such written notice was served. Prior to the repeal of such law by Laws 1907, page 323, section 5, plaintiff recovered judgment in the probate court against defendant for the killing of his colt. Prior to the trial of the case on appeal in the district court, said repealing statute was passed. Held, that the repealing statute did not destroy the effect of the written claim as prima facie evidence of the negligent killing by the railroad company.—*Wallace v. Oregon Short Line R. R. Co.*, 16 Idaho, 103, 100 Pac. 904.

Where an act of the legislature attempts to amend certain sections of the statute, and to repeal the old sections, or other sections of the statute supposed to be in conflict therewith, and the amendatory act is held unconstitutional and void, such act does not work a repeal of the sections amended or sought to be repealed.—*Bissett v. Pioneer Irr. Dist.*, 21 Idaho, 98, 120 Pac. 461.

Editorial Notes.

Repeal of statutes, effect of: 12 Am. Dec. 480; 94 Am. Dec. 217.

Repeal of statutes by implication: 14 Am. Dec. 209; 88 Am. St. Rep. 271.

Effect of repeal of civil statute after final judgment in action based on such statute: Ann. Cas. 1912B, 1157.

Effect of simultaneous repeal and re-enactment of statute: Ann. Cas. 1912D, 539; 11 Ann. Cas. 472.

Effect on contract made void by statutory or constitutional provision of subsequent repeal of such provision: Ann. Cas. 1913C, 1398.

VI. CONSTRUCTION AND OPERATION.

Liberal construction. See Exemptions.

Liberal construction of homestead laws. See Homestead, I.

(A) GENERAL RULES OF CONSTRUCTION.

Persons entitled to raise question of constitutionality, necessity of determining constitutionality, and construction to avoid unconstitutionality. See Constitutional Law, II.

1. In General.

It is the duty of the courts to so construe statutes as to make them effect their evident purpose and harmonize their various provisions with one another, and when the application of these rules still leaves a question of doubt, the principles of justice and reason must determine the doubt.—*Lamki v. Sterling*, 1 Idaho, 92.

Statutes should be so construed as to give effect to each and every part thereof if possible.—*People v. Hunt*, 1 Idaho, 433.

If, in construing a statute, the manifest intention of the act, as gathered from its general scope and the circumstances connected with its passage, will be defeated by giving effect to such proviso; or if the meaning of the proviso be such as to leave the court in doubt respecting its aim, then there is no alternative but to reject it as of no validity. *Greathouse v. Heed*, 1 Idaho, 494.

Act of March 8, 1895, providing for the issuance of negotiable coupon bonds for the funding and refunding of county indebtedness was re-enacted with a sufficient title by Laws 1899, page 136. Laws 1899, page 368, provides that all bonds theretofore issued under act of March 8, 1895, are valid. Held, that such re-enacting and validating statutes render it immaterial whether the act of March 8, 1895, was originally valid or not, and for that reason the court will decline to pass on its constitutionality or the sufficiency of its title.—*Crocheron v. Shea*, 6 Idaho, 593, 57 Pac. 707.

In cases of doubt as to the constitutionality of the statute, the statute must be sustained.—*Grice v. Clearwater Timber Co.*, 20 Idaho, 70, 117 Pac. 112.

The failure of public officials to collect a revenue license, where such is required by law, for a number of years, is not sufficient evidence of the intent of the legislature in

passing such law to exclude from its operation persons and corporations from whom such officers have failed to collect such revenue license.—*Ada County v. Boise Commercial Club*, 20 Idaho, 421, 118 Pac. 1086.

When there is a doubt in the mind of the court in regard to the proper construction of a statute, the court may resort to the title of the act, in order to construe the statute and determine the intent of the legislature. But, where there is no doubt in the mind of the court, the words and phrases of a statute must be construed according to the context and the approved usage of the language, as directed by R. C. 15.—*State v. Paulsen*, 21 Idaho, 686, 123 Pac. 588.

It is the rule of law in this state that all statutes must be liberally construed, with a view to accomplishing their aims and purposes and attaining substantial justice.—*Parsons v. Wrble*, 21 Idaho, 695, 123 Pac. 638.

In construing legislative acts, it is not the business of the court to deal in any subtle refinements, but it is rather its duty to ascertain, if possible, from a reading of the whole act the purpose and intent of the legislature and give force and effect thereto.—*Swain v. Fritchman*, 21 Idaho, 783, 125 Pac. 319.

Statutes are intended to apply and be confined in their operation to persons, properties, and rights which are within the territorial jurisdiction of the law-making power; and one who claims the benefit of such laws for either person or property beyond the territorial jurisdiction of the law-making power must rest such claim upon a statute granting such extraterritorial right.—*Wallbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 812.

2. Intention of Legislature.

In submitting proposed constitutional amendment. See Constitutional Law, I.

It is not the province of the court to inquire, through the medium of the journals or otherwise, into the motive which prompted the legislature, or any member thereof, in the enacting of a law.—*Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565; *Blaine Co. v. Heard*, 5 Idaho, 6, 45 Pac. 890.

The courts will not call in question the motive of the legislature in enacting a statute, unless such statute infringes upon some constitutional provision.—*State v. Dolan*, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; *In re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

While courts, in order to carry out the will of the legislature, which has been expressed in an imperfect way, will interpolate punctuation or words evidently intended to be used into a statute, yet, when the matter to be interpolated comprises the real substance of the act, the court is not authorized to make such interpolation.—*Holmberg v. Jones*, 7 Idaho, 752, 65 Pac. 563.

In construing a legislative act, the court must give effect to the intent of the legislature where that appears clearly from the words of the act.—*Empire Copper Co. v. Henderson*, 15 Idaho, 635, 99 Pac. 127.

It is a general rule of law that in construing a statute the court should take into consideration the reason of the law; that is, the object and purpose of the same, and the object and contemplation of the legislative body in enacting the same.—Wood v. Independent School Dist., 21 Idaho, 734, 124 Pac. 780.

The legislative intent that controls in the construction of statutes has reference to the legislature which passed a given act, and that intent is indicated by the action of the legislature, and not by their failure to act. Legislative intent is not gathered from the failure of a legislature to pass any particular act or legislation; the intent is gathered from the things they do.—Reed v. Huston, 24 Idaho, 26, 132 Pac. 109; Rich v. Huston, 24 Idaho, 34, 132 Pac. 112.

It is a well-recognized rule of law that a section of the statute should be construed in the light of the purpose for which the legislature enacted the particular act, of which such section is a part.—Colburn v. Wilson, 24 Idaho, 94, 132 Pac. 579.

3. Meaning of Language.

Word "state" construed to include territory. See Taxation, I.

"After the passage of this act." See post, VI, (C).

"May" construed as "must." See Physicians and Surgeons.

"May" does not mean "must." See Receivers, II.

It is the duty of courts to execute laws according to their true intent and meaning; and that intent, when collected from the whole and every part of the statute taken together, must prevail over the literal sense of the terms and control the strict letter of the law, when the letter would lead to possible injustice, contradiction and absurdity.—Chandler v. Lee, 1 Idaho, 349.

In construing statutes, words are to be understood in their general signification; and when any doubt arises, although the doubt attaches only to a particular clause, the whole act is to be examined and taken together, in order to arrive at the true legislative intent.—People v. Owyhee Min. Co., 1 Idaho, 409.

In construing a statute, the courts will not defeat the will and intent of the legislature by giving force to trivial objections based solely on immaterial typographical errors.—State v. Mulkey, 6 Idaho, 617, 59 Pac. 17.

The fact that in Laws 1903, page 223, the word "contestant" is used where it clearly appears that the word "contestee" was intended is an error which will not render such statute so indefinite or uncertain as to be void or unconstitutional.—Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365.

Words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey, and uphold them.—Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280.

Words used in a statute without any technical meaning or application should be given

their ordinary significance as they are popularly understood, and the language used by the legislature must be construed in the light of the common acceptance of the terms employed.—In re Bossner, 18 Idaho, 519, 110 Pac. 502.

The words "general election," as generally used in constitutions and statutes, have reference to general elections held for the purpose of electing state and county officers.—Kessler v. Fritchman, 21 Idaho, 30, 119 Pac. 692.

4. Construction With Reference to Other Statutes.

See, also, Schools and School Districts, II, (A).

Different acts, passed by the legislature on the same day upon the same subject matter, will be read together as parts of the same act. Chandler v. Lee, 1 Idaho, 349.

R. S. 3325-3354, specifying and defining different liens, and R. S. 4520, 4523, providing the remedy for the enforcement of any right secured by mortgage, are to be construed as in pari materia so as to give effect to all of said statutes and to carry out their general policy and evident intent.—Brown v. Bryan, 6 Idaho, 1, 51 Pac. 995.

Statutes that pertain to the same subject matter should be construed together, unless they are in conflict, and in case they are, the latter or subsequent statute is deemed to repeal the former.—Noble v. Bragaw, 12 Idaho, 265, 85 Pac. 903.

Where there is a special statute relating to a particular subject, the special statute will control even as against a general statute of a later date.—Boise City Nat. Bk. v. Boise City, 15 Idaho, 792, 100 Pac. 93.

Where one statute refers to another, and makes the same a part of the former in so far as the same is applicable, in determining what provisions are applicable the court is called upon to construe into the former as a part thereof only such provisions of the latter as are applicable and will give force and effect to the former statute.—Gillesby v. Board of Commrs., 17 Idaho, 586, 107 Pac. 71.

Editorial Notes.

Construction together of contemporaneous statutes in pari materia: 18 Ann. Cas. 424.

5. Construction of Statutes Adopted from Other States.

Constitutional provision adopted from another state. See Constitutional Law, II.

Where the provisions of a statute are copied from the statutes of another state and at the time of their adoption they have been construed by the courts of such other state, the supreme court will adopt the construction placed upon them by the courts of the state from which they were taken.—Stein v. Morrison, 9 Idaho, 426, 75 Pac. 246; O'Neill v. Potvin, 13 Idaho, 721, 93 Pac. 20, 257; In re Niday, 15 Idaho, 559, 98 Pac. 845.

Where a statute of another state has been construed by the highest court of that state prior to its adoption by one state, the interpretation given it by that court will be followed by our courts.—*Russell v. Alt*, 12 Idaho, 789, 13 L. R. A., N. S., 146, 88 Pac. 416.

Where a state adopts the provisions of the statute of another state, it adopts with it the construction placed thereon by the supreme court of the state from which it was adopted. *O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20.

Where a statute adopted from another state has been repeatedly passed upon by the supreme court of that state prior to its adoption by this state, the construction placed on the statute by the courts of such other state will be accepted in this state.—*Burbank v. Kirby*, 6 Idaho, 210, 96 Am. St. Rep. 260, 55 Pac. 295.

Where a statutory or constitutional provision is adopted from another state and the courts of that state have placed a construction upon the language of such statute or constitution, it is to be presumed that it was taken in view of such judicial interpretation, and with the purpose of adopting the language as the same had been interpreted and construed by the courts of the state from which it was taken.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246; *Shoshone County v. Proffitt*, 11 Idaho, 763, 84 Pac. 712.

Where a statutory or constitutional provision is adopted from another state and the courts of that state have construed such provision, it is presumed that the statute was taken in view of such judicial interpretation and with the purpose of adopting the language as interpreted by the courts of the state from which the statute was taken.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

Owing to the fact that our codes were, to a great extent, copied from the California codes, the courts in this jurisdiction take notice of the California code for purposes of comparison, thus enabling our courts to ascertain the construction placed by the California supreme court on those statutes which we have borrowed from that state.—*Brown v. Bryan*, 6 Idaho, 1, 51 Pac. 995.

The rule that, by adopting a statute from a sister state, the construction of the statute by the courts of the latter state is also adopted, does not apply to a case where the statute borrowed has been so changed or modified by the state borrowing it as to materially change the policy of the statute thus borrowed, nor to a case where one state adopts only a portion of the statutes of another state upon a given subject, and the construction does not reasonably apply to the portion of the statutes so borrowed.—*Brown v. Bryan*, 6 Idaho, 1, 51 Pac. 995.

The common-law doctrine of champerty and maintenance was repudiated by the supreme court of California as early as 1863, and it was held that the common-law doctrine on the subject was incompatible with our institutions and form of government, and that the sub-

ject was governed by statute alone. The statutes of Idaho were copied from the California statutes which had thus been considered and construed by the court of the state from which they were taken, and the decisions of the California court on this subject are presumed to have been accepted and adopted by the legislature of this territory.—*Merchants' Protective Assn. v. Jacobsen*, 22 Idaho, 636, 127 Pac. 315.

Editorial Notes.

Construction of adopted statute: 1 Ann. Cas. 147.

(B) PARTICULAR CLASSES OF STATUTES.

Legislative power as to taxation. See *Taxation*, I.

The general rule of construction, as applied to statutes relating to the assessment and collection of taxes, is that what the law requires to be done for the benefit or protection of the taxpayer is mandatory, and not merely directory.—*People v. Moore*, 1 Idaho, 662.

Remedial statutes are to be construed to prevent a failure of the remedy, and extended to later provisions by subsequent statutes.—*Utah etc. Ry. Co. v. Crawford*, 1 Idaho, 770.

Code of Civil Procedure, section 3, reverses the rule that statutes in derogation of the common law are to be strictly construed.—*Darby v. Heagerty*, 2 Idaho, 282, 13 Pac. 85.

Under R. S. 4, providing that the statutes and proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice, statutes pertaining to revenue are to be strictly construed in favor of the purpose or object of the statute, while statutes of exemption are to be strictly construed against exemption and in favor of revenue.—*Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383.

A construction of a statute to raise revenue which extends the terms of a proviso therein contained, making exemptions, so as to exclude from taxation a large proportion of property in the state, owned and held by private persons for their individual benefit, the title thereto not being in the United States government, tends to defeat the object of such statute (raising revenue) and does not promote justice, and therefore violates the provisions of Rev. Stats., sec. 4, which provides that statutes must be "liberally construed, with a view to effect their objects and to promote justice."—*Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383.

R. S. 4288, authorizing the issuing of injunctions, is to be liberally construed.—*Shields v. Johnson*, 10 Idaho, 454, 79 Pac. 394.

No presumption arises, from a failure of the state through its legislative authority to speak on the subject, that the state intends to grant any right, privilege, or authority under its laws to be exercised beyond its jurisdiction.—*Walbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 812.

(C) TIME OF TAKING EFFECT.

The words "after the passage of this act" in a statute mean when the act by the terms thereof takes effect.—*Schneider v. Hussey*, 2 Idaho, 8, 1 Pac. 343.

Under Const., article 3, section 22, providing that no act shall take effect until sixty days from the end of the session at which it shall have been passed, except in case of emergency, which shall be declared in the act, the legislature may enact a statute, which will not become operative until a future date, and may specify upon what conditions or event it will become operative.—*Gillesby v. Board of Commrs.*, 17 Idaho, 586, 107 Pac. 71.

(D) RETROACTIVE OPERATION.

Statute extending time to redeem not retroactive. See Mortgages, XI.

Acts of the legislature are not to be construed retrospectively so as to take away vested rights, although they may alter or modify the remedy, nor can a healing act affect existing judgments.—*People v. Moore*, 1 Idaho, 662.

Statutes will not be construed to have a retrospective operation unless it clearly appears that such was the legislative intent, nor when to do so would render the statute unconstitutional and the words of the statute admit of any other construction.—*Lawrence v. Defenbach*, 23 Idaho, 78, 128 Pac. 81.

Editorial Notes.

Construction of statutes avoids retrospective effect: 5 Am. Dec. 315.

Retroactive statutes, when valid: 37 Am. Rep. 397.

Retroactive operation of statute of limitations: Ann. Cas. 1912A, 1041.

VII. PLEADING AND EVIDENCE.

Failure of the house journals to show that any step required by the constitution in the passage of a law was taken is conclusive evidence that it was not taken.—*Cohn v. Kingsley*, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

To ascertain whether the legislature has complied with the requirements of the constitution in the passage of a bill, the court may go back of the enrolled bill to examine whether the journals of both houses of the legislature show that the requirements of the constitution have been complied with in the passage of the act in question.—*Cohn v. Kingsley*, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

Where the validity of an act of the legislature is attacked for failure to comply with the requirements of the constitution in its passage, the proper procedure is to procure a transcript of the journals of both houses, certified by the Secretary of State to be full and correct.—*Cohn v. Kingsley*, 5 Idaho, 416, 38 L. R. A. 74, 49 Pac. 985.

Where the constitutionality of the enactment of a statute is questioned, it is impera-

tive that the trial court should have before it a copy of the original journals, showing the whole record of the enactment, duly certified by the Secretary of State.—*State v. Boise*, 5 Idaho, 519, 51 Pac. 110.

Where the constitutionality of the enactment of a statute is questioned, a stipulation between the attorney general, acting for the state, and counsel for defendant that certain writings therein contained constituted a copy of the journals of the legislature, is unauthorized, the proper way of showing such journals being by duly certified copies thereof.—*State v. Boise*, 5 Idaho, 519, 51 Pac. 110.

In the absence of evidence to the contrary, it will be presumed that a bill as printed corresponds with the engrossed bill.—*State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17.

Editorial Notes.

Enactment, proof of: 47 Am. St. Rep. 814.

Legislative journals as evidence of the due passage of statutes: 58 Am. Dec. 574.

Evidence of the enactment of statutes: 47 Am. St. Rep. 814.

Attacks which may be made upon statutes by showing illegal enactment of: 85 Am. Dec. 357.

Impeachment of act of legislature by reference to legislative journals: 9 Ann. Cas. 582; 20 Ann. Cas. 350.

Printed statute or enrolled bill as governing in case of variance: 17 Ann. Cas. 364.

Conclusiveness of enrolled bill: 23 L. R. A. 340; 40 L. R. A., N. S., 1.

STENOGRAPHERS.

Fees as costs. See Costs, V.

Stenographic reports. See Courts, II, (A).

STIPULATIONS.

See Submission of Controversy.

For appointment of referee as waiver of right to trial by jury. See Jury, II.

Construction and effect in action by trustee for conversion. See Bankruptcy.

Stipulation by district attorney on appeal from order refusing appointment of deputy sheriff. See Sheriffs and Constables, I, (U).

In promissory notes. See Bills and Notes, II.

—Affecting negotiability. See Bills and Notes, IV.

Affecting appeals. See Appeal and Error, VII, (A), 6; X, (A, B), 6.

Authority of district or prosecuting attorney to make. See District and Prosecuting Attorneys.

As to settlement of bill of exceptions. See Exceptions, Bill of.

For reference. See Reference.

In chattel mortgage. See Chattel Mortgages.

Stipulation for modification, effect on right to costs. See Costs, VII.

In contracts. See Contracts, I, (A).

Of telegraph company exempting company from damages for negligence. See Telegraphs and Telephones.

In an action of claim and delivery, it was stipulated by the parties through their respective attorneys that if plaintiff was entitled to recover at all, he was entitled to recover the full value of the property. The evidence showed that plaintiff was entitled to recover. Held, that defendants were estopped by their stipulation from raising the objection that the amount stipulated is too much.—*Mahoney v. Marshall*, 3 Idaho, 484, 31 Pac. 809.

A stipulation of parties in disregard of the rules of court will not be regarded.—*First Nat. Bk. v. Martin*, 6 Idaho, 204, 55 Pac. 302.

Where the facts of a case are stipulated as facts, oral testimony cannot be offered for the purpose of contradicting such stipulation. *Andrews v. Moore*, 14 Idaho, 465, 94 Pac. 579.

Where the facts are stipulated and show no liability on the part of the defendant, it is error to overrule a motion for judgment on the stipulation.—*Andrews v. Moore*, 14 Idaho, 465, 94 Pac. 579.

A stipulation entered into between the attorneys for the respective parties in an action, whereby they agree that the complaint, answers and cross-complaints in the case shall be "deemed amended to conform to the facts as found by the court," will not preclude the losing party from thereafter questioning the sufficiency of the findings or of the facts proven to support the findings.—*Farmers' etc. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481.

STREET RAILROADS.

See Railroads.

As carriers. See *Carriers*.

Condemnation of property. See *Eminent Domain*.

Taxation. See *Taxation*.

In an action for the death of a pedestrian caused by being run over by a trolley car at a street crossing, the question whether the negligence of the pedestrian was the proximate cause of the accident was for the jury where the facts were such that different minds might reasonably draw different conclusions therefrom.—*Pilmer v. Boise Traction Co., Ltd.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432.

Failure to look and listen before crossing a street-car track at a public street crossing is not, as a matter of law, negligence per se. *Pilmer v. Boise Traction Co., Ltd.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432.

In a city, a pedestrian has a right to rely on the motorman using due care in managing his car, and due care means having it under such control as occasion demands at a street intersection where people and vehicles are crossing.—*Pilmer v. Boise Traction Co., Ltd.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432.

In an action for the death of a pedestrian caused by being run over by a street-car, the

burden of proving that the deceased was guilty of contributory negligence is on the defendant.—*Pilmer v. Boise Traction Co., Ltd.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432.

In an action for death due to injuries received by being run over by an electric car, a nonsuit should be denied where different minds might reasonably reach different conclusions from the evidence as to whether the negligence of the deceased was the proximate cause of the accident, or whether the carelessness or negligence of the motorman was such cause.—*Pilmer v. Boise Traction Co., Ltd.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254, 94 Pac. 432.

SUBMISSION OF CONTROVERSY.

Stipulations and agreed statement of facts in general. See *Stipulations*.

Entry and effect of judgments rendered on submissions and agreed statement of facts. See *Judgments*.

A person cannot be made a party to an agreed case under R. S. 5068 without his consent.—*Potter v. Talkington*, 6 Idaho, 649, 59 Pac. 362.

SUBROGATION.

Where a creditor seeks to subject mortgaged personal property of a debtor to the payment of his claim and pays to the mortgagee the amount of the mortgage as provided by R. S. 3389, such payment discharges the mortgage and the lien thereunder, and the creditor cannot thereafter enforce the mortgage lien.—*Baumgartner v. Vollmer*, 5 Idaho, 340, 49 Pac. 729.

Where plaintiff paid off a valid lien on land, with the agreement and understanding that he should have a valid mortgage on said land to secure the repayment of the money so advanced by him, he is entitled to be subrogated to the rights and remedies of the mortgagee whose claim he paid.—*Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

Where a firm has a contract with the government for the construction of irrigation works, and receives payment from the government on such contract, and turns the money over to a creditor to be applied upon a debt due from such firm to such creditor, and it further appears that a third person made certain advances and loans to such contracting firm to aid them in carrying out their contract with the government, the payment made by such firm to its creditor will be deemed a payment by such firm, and not by the person advancing or loaning such money in aiding such firm to carry out said contract.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

Where money belonging to a mortgagor is paid to a mortgagee upon the mortgage indebtedness, and there is a second mortgage upon such property, it is the right of the second mortgagee to have the money paid by the mortgagor upon the first mortgage applied in discharge and in liquidation of such mort-

gage, and a third mortgagee cannot claim that he is subrogated to the rights of the first mortgagee by reason of the fact that he made advances and loans to the mortgagor which enabled the mortgagor to earn the money which was applied in payment of the first mortgage.—*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 27 L. R. A., N. S., 111, 106 Pac. 299.

Editorial Notes.

The right of subrogation: 99 Am. St. Rep. 474.

SUBSCRIPTIONS.

To stock of corporations. See Corporations, IV, (B).

Mortgage of newspaper for advances contingent on collection of subscriptions. See Chattel Mortgages, I.

A gratuitous subscription toward the building of a railroad with only one signer is but an offer, which until accepted by the promisee in express terms or by a performance of the conditions stipulated therein is but a nudum pactum, and cannot be enforced against such subscriber.—*Broadbent v. Johnson*, 2 Idaho, 325, 13 Pac. 83.

Editorial Notes.

Subscriptions, liability upon: 13 Am. Dec. 458.

SUNDAY.

See Holidays.

Exclusion of Sunday in computation of time. See Time.

Sunday law as class legislation. See Constitutional Law, IX.

— As deprivation of equal protection of laws. See Constitutional Law, X.

— As violating "due process of law" clause. See Constitutional Law, XI.

Injury occurring on Sunday through defective street. See Municipal Corporations, XIII.

Keeping saloon open and selling intoxicating liquors on Sunday. See Intoxicating Liquors, VI.

The act for the better observance of the Sabbath day, approved January 8, 1873, is a mere police regulation, which does not interfere with any vested rights, and is a valid law.—*People v. Griffin*, 1 Idaho, 476.

R. S. 3866, providing that no court can be opened nor can any judicial business be transacted on Sunday except for certain purposes therein stated, does not prohibit the filing of a complaint on Sunday and the issuing of a summons thereon, since such acts are purely ministerial and not judicial.—*Havens v. Stiles*, 8 Idaho, 250, 101 Am. St. Rep. 195, 56 L. R. A. 736, 67 Pac. 919.

R. S. 3866, prohibiting the opening of court or the transaction of judicial business on Sunday and certain specified holidays, does not prohibit the summoning of jurors in a criminal case on Sunday under a special venire, since this is a ministerial act.—*State v. Gilbert*, 8 Idaho, 346, 1 Ann. Cas. 280, 69 Pac. 62.

The question of determining what classes of business shall be exempt from a Sunday closing law is a matter of policy entirely within the power of the legislature and the

judicial department will not call in question the motion of the legislature in enacting a statute, unless such statute infringes upon some provision of the constitution.—*State v. Dolan*, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; *In re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

Under its general police power, the state has power to enact Sunday laws for the purpose of prohibiting certain business and amusements upon said day, in the interest of good morals, health and happiness.—*State v. Dolan*, 13 Idaho, 693, 14 L. R. A., N. S., 1259, 92 Pac. 995; *In re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

What is designated as a "scenic railway," being a railway constructed of rails, and on which cars are run for the purposes only of amusement, where the track is elevated a considerable distance above the ground at the place of beginning and is built on an incline with intervening elevations, and the cars are propelled by the force of gravity, is not "such place of public amusement," as a "merry-go-round," and is not prohibited from being kept open on Sunday under R. C. 6825. *In re Hull*, 18 Idaho, 475, 110 Pac. 256.

R. C. 6825 provides that "It shall be unlawful for any person or persons in this state to keep open on Sunday . . . any theater, playhouse, dance-house, race-track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling-alley, variety hall, or any such place of public amusement. . . ." Held that, in order to bring a public amusement not specifically enumerated by the statute under the general language of "any such place of public amusement," the likeness or similarity must exist in something other than the mere fact that it is a "public amusement," and must in a general way correspond to the amusements specified.—*In re Hull*, 18 Idaho, 475, 110 Pac. 256.

A moving picture show or exhibition comes within the inhibition of R. C. 6825, which forbids the opening or conducting upon Sunday of "any theater, playhouse, . . . circus or show, . . . or any such place of public amusement."—*In re Bossner*, 18 Idaho, 519, 110 Pac. 502.

Editorial Notes.

Validity of acts done on Sunday: 18 Am. Dec. 426.

Constitutionality of statutes requiring the observance of Sunday: 49 Am. Dec. 616; 78 Am. St. Rep. 264; Ann. Cas. 1913E, 935; 12 Ann. Cas. 1096.

Work which may be done on Sunday: 30 Am. St. Rep. 27.

Sunday, acts on, when illegal: 3 Am. Rep. 371.

Secular acts which are not unlawful on Sunday: 32 Am. Rep. 557.

Ministerial as distinguished from judicial acts under prohibitory Sunday law: 1 Ann. Cas. 278; 18 Ann. Cas. 1040.

Labor on Sunday: 14 L. R. A. 192.

SUPERSEDEAS.

See Appeal and Error, IX.

SURVEYS.

See *Boundaries; Public Lands, II, (A).*

TAXATION.

- I. NATURE AND EXTENT OF POWER IN GENERAL.
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Appeal in road poll tax suit against corporation. See *Appeal and Error, IV, (A).*

Apportionment between counties on alteration or division. See *Counties, I, (D).*

Duty of life tenant to pay taxes. See *Life Estates.*

Highway taxes in general. See *Highways, IV.*

School taxes. See *Schools and School Districts, II, (E).*

Payment as requisite of adverse possession. See *Adverse Possession.*

I. NATURE AND EXTENT OF POWER IN GENERAL.

Taxation of improvements on public lands. See *post, III, (O).*

Power of legislature where district is doubtful or disputed. See *post, IV.*

The limitation as to the place of taxation of bank shares, contained in the national currency act of 1864, and in the act of 1868, amendatory thereof, requiring the assessment to be made "at the place where the bank is located and not elsewhere," must be construed to mean the state within which the bank is located.—*People v. Moore, 1 Idaho, 504.*

The word "state," whenever used by Congress in the currency act of 1864, or in the amendments thereto, should be construed to mean "territory" as well, wherever the same is applicable.—*People v. Moore, 1 Idaho, 504.*

Under the currency act of 1864, shares in national banks, in the hands of individuals or corporations, are taxable wherever such associations are organized, whether in states or territories.—*People v. Moore, 1 Idaho, 504.*

Under the first proviso of section 41 of the national currency act of 1864, Congress did not intend to require uniformity in taxation in all the different municipalities of a state or territory but only that the same should be uniform in the municipality or subdivision in which the bank is located, or in which the shareholder resides.—*People v. Moore, 1 Idaho, 504.*

Congress has sufficiently authorized the legislature of this territory to pass a law requiring the taxation of national bank shares in the hands of individuals or corporations.—*People v. Moore, 1 Idaho, 504.*

The revenue laws of the territory of Idaho in force in 1871 did not authorize the assessment or taxation of shares of national bank stock in the hands of individuals or corporations.—*People v. Moore, 1 Idaho, 504.*

The only power the state has to levy any taxation, direct or indirect, upon national banks, their property, assets or franchises, is that granted by U. S. Rev. Stats. 5219, which is the measure of such power.—*Weiser Nat. Bank v. Jeffreys, 14 Idaho, 659, 95 Pac. 23.*

Under U. S. Rev. Stats. 5219 and Laws 1901, page 233, section 43, the assessor has no authority to assess the capital stock of a bank, his authority being limited to an assessment of the real estate belonging to the bank and assessment of the shares of stock to the owners thereof.—*Weiser Nat. Bk. v. Jeffreys, 14 Idaho, 659, 95 Pac. 23.*

Const., article 7, section 12, and Laws 1901, page 233, sections 54, 55, relating to equalization of taxes, apply only to "taxable property in the county," and hence a bank is not obliged to apply for relief to the board of equalization where its capital stock has been assessed under a void assessment.—*Weiser Nat. Bk. v. Jeffreys, 14 Idaho, 659, 95 Pac. 23.*

Const., article 7, section 2, which declares "that the legislature shall provide such revenue as may be needful by levying a tax by valuation," etc., applies to the raising of revenue for state purposes.—*Fenton v. Board*

of Commrs., 20 Idaho, 392, 119 Pac. 41; Dart v. Board of Commrs., 20 Idaho, 445, 119 Pac. 52; Independent School Dist. v. Board of Commrs., 20 Idaho, 448, 119 Pac. 52.

Where a final receipt is issued by the United States government upon proof being made as required by the laws of the United States, and a receiver's certificate is issued dated October 27, 1905, such land is assessable for the year 1906.—Armstrong v. Jarron, 21 Idaho, 747, 125 Pac. 170.

The rule generally recognized by the courts with reference to the taxation of lands for which patent has not yet issued is that when payment in full has been made and settlement and improvement has been had, and final proof thereof has been made, and the proper authorities of the Interior Department have accepted the proof and issued a final receipt to that effect, it operates to transfer such an equitable estate in the lands to the purchaser and settler as to immediately render the land liable to taxation, although the legal title is still held by the United States.—Bothwell v. Bingham County, 24 Idaho, 125, 132 Pac. 972.

Under R. C. 1653, as the same was in force and effect on January 9, 1911, a tax lien attached against all taxable property within the state at noon on that day, and where patent issued on that date from the general government to the state in trust for segregated Carey act lands, and the purchaser and claimant to a portion of such lands had prior to that date settled upon, cultivated and reclaimed the land in conformity with the acts of Congress and the statutes of the state, and had made his final proofs and received a final certificate from the register of the state land board, such land was taxable and subject to the tax lien attaching on that date for the year 1911.—Bothwell v. Bingham County, 24 Idaho, 125, 132 Pac. 972.

The general rule which has been applied to the taxation of a homestead, pre-emption and other lands acquired from the United States under the public land laws is applicable to the case of lands acquired under the Carey Act (Act Aug. 18, 1894, c. 301, sec. 4, 28 Stat. 422 [U. S. Comp. Stats. 1901, p. 1554], 6 Fed. St. Ann., p. 397, as amended by Act June 11, 1896, c. 420, sec. 1, 29 Stat. 435 [U. S. Comp. Stats. 1901, p. 1556], 6 Fed. St. Ann., p. 398.—Bothwell v. Bingham County, 24 Idaho, 125, 132 Pac. 972.

Editorial Notes.

Taxation of national banks by the states:
96 Am. Dec. 290; 69 Am. St. Rep. 32;
45 L. R. A., N. S., 743.

State taxation of national deposits: Ann.
Cas. 1912D, 37.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

A territorial statute requiring the payment of taxes in any other than lawful money, at par, is void as being in conflict with the act of Congress of February 25, 1862, authorizing the issue of legal tender notes.—Haas v. Misner, 1 Idaho, 170.

Taxes cannot be levied or collected at any other time, nor in any other manner, nor for any other purpose, than that designed by law.—Shoup v. Willis, 2 Idaho, 120, 6 Pac. 124.

Const., article 7, section 7, providing that all taxes levied and collected for state purposes must be paid into the state treasury, without any deduction for commissions or other charges, is self-acting.—Cunningham v. Moody, 3 Idaho, 125, 28 Pac. 395.

Const., article 7, section 5, providing that "all taxes shall be uniform on the same class of subjects within the territorial limits of authority levying the tax" is self-acting, and applies to all officers and boards that have anything to do with the levy and assessment of taxes upon all classes of property.—Orr v. State Board of Equalization, 3 Idaho, 190, 28 Pac. 416.

Where a taxpayer's property is assessed in two counties because of his refusal to furnish the statement on oath required by R. S. 1429, such assessment is not double taxation within the meaning of R. S. 1400, but is rather a penalty imposed for failure to furnish such statement.—Erwin v. Hubbard, 4 Idaho, 170, 37 Pac. 274.

R. S. 1644, requiring persons engaged in banking, loaning money at interest, buying or selling notes, bonds, stock, gold or silver, etc., to pay a specific license tax, to be retained by the county collecting it, is restricted to licenses and hence is not in conflict with Const., article 7, section 6, prohibiting the legislature from imposing taxes for county, city or town purposes, since this clause applies only to property taxes.—State v. Union Cent. Life Ins. Co., 8 Idaho, 240, 67 Pac. 647.

Under Const., article 7, section 2, which provides for the raising of revenue by a property tax, a license tax and a per capita tax, it is not double taxation prohibited by Const., article 7, section 5, to levy a tax on pool and billiard tables and at the same time to require the keeper thereof to pay a license tax under R. S. 1645, as amended by Laws 1903, page 104.—State v. Jones, 9 Idaho, 693, 75 Pac. 819.

A special road tax levied by a county on all the taxable property therein under Laws 1901, page 78, and a general tax levy made in the same year for road purposes, do not constitute duplicate taxation in contravention of Const., article 7, section 5, which provides that duplicate taxation of property during the same year for the same purpose is prohibited.—Humbird Lumber Co. v. Kootenai County, 10 Idaho, 490, 79 Pac. 396.

Const., article 7, section 9 (prior to amendment), provides that the rate of taxation of real and personal property for state purposes shall never exceed ten mills on each dollar of assessed valuation, and that if the taxable property in the state shall amount to fifty million (50,000,000) dollars the rate shall not exceed five mills. Const., article 8, section 1, places a limitation on public indebtedness incurred, inter alia, for internal improvements and the erection of public build-

ings and institutions. Held, that the term "state purposes" used in Const., article 7, section 9, was intended to cover the current and running expenses of maintaining the various departments of the state government and the operation and maintenance of state institutions, and that a tax levy for the purpose of paying the interest on indebtedness and bonds issued pursuant to Const., article 8, section 1, and providing a sinking fund therefor, does not fall within the limits prescribed by Const., article 7, section 9.—*Gooding v. Proffit*, 11 Idaho, 380, 83 Pac. 230.

Laws 1905, page 278, authorizing the board of commissioners of any county indebted to the state on account of state taxes due from such county to the state to make sufficient levy, not exceeding one mill, to pay the amount such county is indebted to the state, is not void as in conflict with Const., article 7, section 6, providing that the legislature shall not impose taxes for the purposes of the county, etc., but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.—*Gooding v. Proffit*, 11 Idaho, 380, 83 Pac. 230; *Gooding v. Cowen*, 11 Idaho, 392, 83 Pac. 234; *Gooding v. Anderson*, 11 Idaho, 392, 83 Pac. 234.

The duty of the assessor is to assess all of the taxable property of his county at its full cash value, and he has no legal right or authority to assess property in any other manner or at any other valuation.—*First Nat. Bk. v. Washington Co.*, 17 Idaho, 306, 105 Pac. 1053.

It is not double taxation for the statute to authorize the board of county commissioners to provide that seventy-five per cent of the general tax levy raised for road purposes in a good road district shall be expended in such district, and twenty-five per cent shall go into the county road fund for expenditure in the remaining portions of the county, as there is no taxing the same property twice during the same year for the same purpose while other and similar property is taxed only once during the same period for the same purpose.—*Hettinger v. Good Road District No. 1*, 19 Idaho, 313, 113 Pac. 721.

Laws 1911, page 121, chapter 55, relating to the organization of highway districts and authorizing the assessment of taxes within such districts, even though cities, towns or villages are included therein, is not in violation of Const., article 7, section 6, in that said act provides for double taxation of property in municipal corporations situated within highway districts.—*Shoshone Highway Dist. v. Anderson*, 22 Idaho, 109, 125 Pac. 219.

Under R. C. 1962, 1968, an election was held and a proposition for the issuance of bonds for the construction, building and repair of roads and bridges in Ada county was carried. Held, that the issuance of said bonds would not result in double taxation.—*Independent Highway etc. v. Ada Co.*, 24 Idaho, 416, 134 Pac. 542.

Editorial Notes.

Fourteenth amendment, state powers as affected by: 25 Am. St. Rep. 885; 14 L. R. A. 583.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) PRIVATE PERSONS AND PROPERTY IN GENERAL.

Personal property in the hands of a receiver is not subject to seizure and sale for the collection of taxes thereon.—*Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

Under R. S. 1448, providing that money and property in litigation in possession of a county treasurer, of a court, clerk or receiver must be assessed to such treasurer, etc., and the taxes paid thereon under the direction of the court, when property in the hands of a receiver is assessed, it is his duty to pay the taxes thereon under order of the court.—*Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

Under R. S. 901, making corporations or other employers of persons subject to pay road poll tax responsible for such tax upon proper notice to them, the employer is not liable for such tax unless he is indebted to the employee at the time of the service of the notice or becomes indebted to him after such service.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

Where real property has been purchased by the county at a delinquent tax sale, and the tax certificate is held by the county, or the title is held under a conveyance made by the assessor to the county, such property cannot be assessed as long as the title remains in the county, and where the county sells such property to a person, and such property is assessed for taxes to such person, the assessor in making such assessment had no authority or power to make a double assessment which includes an assessment for the year preceding the transfer of said property by the county to such person.—*Meserole v. Whitney*, 22 Idaho, 543, 127 Pac. 553.

(B) CORPORATIONS AND CORPORATE STOCK AND PROPERTY.

Liability of corporation for poll tax of employee.

See ante, III, (A); post, VIII, (B).

Assessment of railroad property by state board of equalization. See post, V, (B).

Power to tax national banks and bank shares. See ante, I.

The Fort Hall Indian Reservation being a part of, and included within, Idaho territory and Oneida county, the property of a railway company situated thereon is subject to taxation for territorial and county purposes.—*Utah etc. Ry. Co. v. Fisher*, 2 Idaho, 53, 3 Pac. 3.

Laws 1901, page 170, requires that all classes of insurance companies except fraternal organizations shall pay a two per cent tax on their gross earnings, less their losses and premiums returned, and that this shall be in lieu of their personal property taxes. Laws 1903, pages 74-81, authorizing the organization of mutual co-operation insurance companies for fire, tornado, fidelity, etc., insurance, fails to specify the amount to be paid to the insurance commissioner. Held, that a company organized under the latter law, which accumulates only such fund as shall

be necessary to pay its losses and expenses as they arise, is not within the purview of Laws 1901, and is subject only to the provisions of Laws 1903.—*Idaho Mut. etc. Ins. Co. v. Myer*, 10 Idaho, 294, 77 Pac. 628.

(C) PUBLIC PROPERTY AND INSTITUTIONS.

Property purchased by county at delinquent tax sale.

See ante, III, (A).

Right to tax homestead, pre-emption and Carey act lands. See ante, I.

Where only the improvements on land are assessed and taxed, a sale of the land for such tax is void.—*Quivey v. Lawrence*, 1 Idaho, 313.

Improvements upon public lands, as also the possessory right thereto, are taxable.—*Quivey v. Lawrence*, 1 Idaho, 313.

By the term "improvements" on public lands, as used in the revenue law, is meant the buildings and improvements belonging to the possessory claimant, such as miners' buildings, quartzmills, sawmills, outbuildings and fences.—*People v. Owyhee Min. Co.*, 1 Idaho, 409.

It is proper to list and assess a mill site and the immovable improvements upon public land, as real estate; but movable property situated thereon, such as blacksmith-shop, retort-house, barn, carpenter-shop, and the like must be listed, assessed and taxed as personal property.—*People v. Owyhee Min. Co.*, 1 Idaho, 409.

Where an assessor fails to discriminate between improvements, owned by the person who owns the land on which the same are situated, and those cases where the improvements are upon public lands, the supreme court cannot arrive at the conclusion that a want of such discrimination did not mislead him in assessing the property as to its value. *People v. Owyhee Lumber Co.*, 1 Idaho, 420.

Improvements upon lands belonging to the United States are not real estate within the meaning of the revenue act of the territory; and the listing of such improvements as real estate by an assessor is fatal to the assessment.—*People v. Owyhee Lumber Co.*, 1 Idaho, 420.

Lands belonging to the state are exempt from taxation, so that no title thereto can be acquired by tax deed.—*State v. Stevenson*, 6 Idaho, 367, 55 Pac. 886.

Editorial Notes.

Public property, what not subject to taxation: 33 Am. St. Rep. 406.

Exemption from taxation of lands owned by governmental bodies or in which they have an interest: 132 Am. St. Rep. 291.

(D) EXEMPTIONS.

Act of January 15, 1875 (Comp. Laws, p. 495), section 39, provides that in actions for the recovery of taxes, the defendant may answer that "such property is exempt from taxation under the provisions of section 4 of this act and no other answer shall be per-

mitted." Held, that such section applies to all statutory exemptions from taxes.—*Utah etc. Ry. Co. v. Crawford*, 1 Idaho, 770.

Courts should not, by technical or strained construction, extend the exemptions of property from taxation.—*Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383.

To exempt certain private property from taxation under a statute making all private property taxable, the exemption must be in terms so specific and certain as to admit of no doubt.—*Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383.

R. S. 1401, subdivision 7, provides that mining claims shall be exempt from taxation, but that machinery, property and improvements upon or appurtenant to mining claims shall not be so exempt. U. S. Rev. Stats. 1851 prohibits territories from taxing property of the United States. Held, that mines and mineral lands on which the United States has issued patents become private property and are subject to taxation.—*Salisbury v. Lane*, 7 Idaho, 370, 63 Pac. 383.

R. S. 1402 exempts from taxation all irrigating ditches, canals and water rights appurtenant thereto, when the owner or owners of said irrigating canals and ditches use the water thereof exclusively upon land or lands owned by him, her or them; provided, in case any water be sold or rented from any such canal or ditch, then such canal or ditch shall be taxed to the extent of such sale or rental. Held; that it is a question of fact as to whether or not a canal or ditch or water right has been assessed or is taxable in whole or in part or is entirely exempt from taxation. *Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

IV. PLACE OF TAXATION.

Taxation in two counties for failure to furnish statement not double taxation. See ante, II.

Power to tax national banks and national bank shares. See ante, I.

The legislature may provide for the assessment and collection of taxes by either of two counties in a disputed or doubtful district, when it is left optional with the taxpayer to pay the taxes in the county where the land is actually situated.—*People v. Wilkerson*, 1 Idaho, 619.

Where real estate and personal property have been assessed in a doubtful or disputed territory by two counties, the tax may be paid in the county where the land is actually located, and such payment will bar an action brought for the taxes in the other county.—*People v. Wilkerson*, 1 Idaho, 619.

Editorial Notes.

Situs of personal property for the purposes of taxation: 56 Am. Dec. 522; 62 Am. St. Rep. 448; 36 L. R. A., N. S., 295.

Debts evidenced by notes and mortgages: 16 L. R. A. 729.

V. LEVY AND ASSESSMENT.

(A) LEVY AND APPORTIONMENT.

Where the statute provides for the levying of a special tax by a school district, and pre-

scribes the manner in which such levy must be made, a literal compliance with the requirements of the statute is necessary to the validity of the tax.—*Bramwell v. Guheen*, 3 Idaho, 347, 29 Pac. 110.

R. S. 1410, as amended by Laws 1899, page 254, by which an ad valorem tax was levied on the counties of the state and the county commissioners authorized to levy certain taxes for county expenditures and such additional and special taxes as required by law, is not in conflict with nor does it repeal R. S. 1554, amended by Laws 1899, page 267, providing, *inter alia*, that whenever property sold to the county for taxes shall be redeemed, the redemption money shall be distributed between the state and the county.—*State v. Ada County*, 7 Idaho, 261, 62 Pac. 457.

The courts will assume, until the contrary appears, that the legislature in making their biennial appropriations and tax levy to meet the same estimated the amount of revenue to be derived from other sources than the tax levy, and that sufficient levy was made to cover the difference between the total appropriation and the amount to be received from other sources than that of a tax levy.—*Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

(B) ASSESSORS AND PROCEEDINGS FOR ASSESSMENT.

Assessors and tax collectors. See, also, post, VIII, (A).

It is the duty of the board of county commissioners to approve the bond of an assessor and tax collector pro forma, if, upon its face, it is *prima facie* good; and the board may at any time afterward, cite the sureties to make further justification, and in case it is deemed insufficient, may cite the officer to show cause why his office should not be declared vacant.—*Gorman v. Board of Commrs.*, 1 Idaho, 553.

The maximum compensation to be paid annually to the assessor and tax collector is limited by Const., article 18, section 7, to the sum of \$3,000 and he can in no event receive a larger sum.—*Guheen v. Curtis*, 3 Idaho, 443, 31 Pac. 805; *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71.

Assessors and tax collectors are not entitled to deputies or clerks at the public expense, since they are not named in Const., article 18, section 6, which states what officers are entitled to deputies and clerical assistance.—*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264.

Property of a railroad company, other than rolling stock, outside of the right of way, is assessable by the local assessor, and not by the state board of equalization, under Laws 1895, section 1490, providing that the state board of equalization shall have exclusive power to assess the railroad track and rolling stock of all railroads within the state, "railroad track" to be deemed to include right of way, superstructures on the right of way, whether on the main, side or second track, or turnouts, and the stations and improvements thereon, and that all other property, not included in the terms "railroad track and roll-

ing stock," shall be assessed by county assessors as other property is assessed.—*Oregon Short Line R. Co. v. Gooding*, 6 Idaho, 773, 59 Pac. 821.

Under the direct provisions of the revenue law, approved March 22, 1901 (Laws 1901, p. 257), the state board of equalization is authorized to fix for taxation the valuation of railroads and property belonging thereto.—*McConnell v. State Board of Equalization*, 11 Idaho, 652, 83 Pac. 494.

Under Laws 1901, p. 257, the state board of equalization is authorized to fix for taxation the valuation of telephone and telegraph lines and property belonging thereto.—*McConnell v. State Board of Equalization*, 11 Idaho, 652, 83 Pac. 494.

The power and jurisdiction of the state board of equalization with reference to the assessment of railroad property has reference to assessments made for general state, county and municipal purposes, and not to assessments made for local improvements.—*Oregon etc. R. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

Where property is subject to taxation, a substantial compliance with the requirements of the law in making assessments of taxes and in the procedure under the statute leading up to the issuing of a tax deed is all that is required, and the mere failure of officials to perform the duty required of them by law cannot be taken advantage of by a property owner for the sole purpose of escaping such taxation. There must be prejudice and injury to such owner.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

R. C. 1727, requiring the assessor to take and subscribe an affidavit in the assessment book, is directory, and not mandatory, and failure to make such affidavit does not affect the validity of the assessment so as to defeat a tax sale based thereon.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

Under R. C. 1788, the fact that the certificate required by R. C. 1724 to be attached to the assessment-book was not attached within the time fixed by law did not render the assessment illegal on account of such informality.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

R. C. 1728, requiring notice to be given of the meeting of the board of equalization, is directory, and does not require proof of the publication to be recorded, and the presumption is that the board complied with the law, and in the absence of proof to the contrary, the tax deed itself is evidence that the assessment was equalized as required by law.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

(C) MODE OF ASSESSMENT IN GENERAL.

Taxation in two counties for failure to furnish statement, not double taxation. See ante, II.

The assessor is not bound by the valuation placed upon real or personal property by the owner thereof.—*People v. Owyhee Min. Co.*, 1 Idaho, 409.

A letter of a taxpayer to the assessor stating that all his property had been assessed in another county is not equivalent to the written statement under oath required by R. S. 1429.—*Erwin v. Hubbard*, 4 Idaho, 170, 37 Pac. 274.

On demand of the assessor, the taxpayer must furnish the statement on oath required by R. S. 1429, and if he neglects or fails to do so, the assessor must assess such taxpayer's property within his jurisdiction, and the taxpayer cannot recover taxes paid under protest on the property so assessed.—*Erwin v. Hubbard*, 4 Idaho, 170, 37 Pac. 274.

It is not necessary to the validity of an assessment that the statement, under oath, of all property owned by the person assessed be demanded by the assessor as provided in R. S. 1429.—*Co-operative Savings etc. Assn. v. Green*, 5 Idaho, 660, 51 Pac. 770.

Under our statute, two contiguous town lots, owned by the same individual, may be jointly assessed, and one valuation fixed therefor, in the absence of a demand on the assessor to assess them separately.—*Co-operative Savings etc. Assn. v. Green*, 5 Idaho, 660, 51 Pac. 770.

Where a taxpayer has furnished the assessor with a statement of his real property, and the assessor, relying thereon, has assessed the property therein described against the person furnishing the list, such person in an action to enjoin the collection of the tax will thereafter be estopped to deny the ownership of the property or alleging that the title thereto is in the United States.—*Inland Lbr. etc. Co. v. Thompson*, 11 Idaho, 508, 114 Am. St. Rep. 274, 7 Ann. Cas. 862, 83 Pac. 933.

Under Laws 1901, section 35, page 248, providing that if any person after demand made by the assessor, neglects or refuses to give under oath the statement therein provided for, the assessor must make an estimate of the value, a taxpayer desiring to attack an assessment as disproportionate to other like property in the same vicinity, or for any other reason, must, under oath, state the full cash value of the property alleged to be erroneously assessed.—*Humbird Lbr. Co. v. Thompson*, 11 Idaho, 614, 83 Pac. 941.

One claiming the right to deduct unsecured debts must personally waive the right to plead the bar of the statute of limitations against any of the claims listed and for which he claims a deduction.—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

The deduction allowed to the taxpayer on account of unsecured debts due to bona fide residents of this state, as provided for in R. C. 1682, 1683 and 1685, is a personal right and privilege accorded the taxpayer and must be claimed by the taxpayer himself.—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

The county assessor has no power or authority to bind the county or its board of equalization by any agreement he may make or enter into with the taxpayer as to the valuation to be placed upon any specific property, or the waiver of deductions and

exemptions.—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

(D) MODE OF ASSESSMENT OF CORPORATE STOCK, PROPERTY OR RECEIPTS.

Under R. S. 1463, machine and repair shops of a railroad company situated on lands other than the right of way, but connected with the main line of the railroad by a side-track, should be assessed by the local assessor and not by the territorial board of equalization.—*Oregon etc. Ry. Co. v. Yeates*, 2 Idaho, 397, 17 Pac. 457.

Property of a railroad, other than "railroad track" or rolling stock" as defined by Laws 1895, page 115, sections 1490, 1491, is assessable by the local assessor, and not by the state board of equalization.—*Oregon Short Line Ry. v. Gooding*, 6 Idaho, 773, 59 Pac. 821.

The owner of bank stock is not entitled to a proportionate or corresponding reduction in valuation thereof for the purpose of taxation on account of any of the capital, surplus, or undivided profit of such bank being deposited in any bank or banks outside of the state.—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

Under R. C. 1682, 1683 and 1685, together with the form of list incorporated in section 1685, and made a part thereof, the shares of stock in national and state banks are classed along with "unsecured, solvent debts" due from others to the taxpayer, and the taxpayer is, accordingly, entitled to a deduction therefrom of his "unsecured debts due to bona fide residents of this state."—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

The state board of equalization, in valuing and assessing railroad property under R. C. 1710 to 1715, are authorized, directed, and required to value and assess "main line or main track," and to cause such valuation and assessment to be certified to the auditors of the several counties, and they have no power or authority to separately value and assess "second track" as a separate and independent railroad property, or to certify such an assessment.—*Northern Pac. Ry. Co. v. Kootenai County*, 19 Idaho, 75, 112 Pac. 320.

Editorial Notes.

Deduction in valuation of capital stock for purpose of taxation: 58 L. R. A. 594.

(E) ASSESSMENT—ROLLS OR BOOKS.

The blending together of the several different kinds of taxes in an assessment-roll invalidates the entire tax.—*People v. Moore*, 1 Idaho, 662.

Where a particular form of assessment-roll is prescribed by the statute, that form must at least be substantially followed; the courts will not permit the substitution of a different one.—*People v. Moore*, 1 Idaho, 662.

The four classes of property mentioned in the revenue law as subject to taxation are to be listed, set down, and valued separately in

the assessment-roll.—*People v. Owyhee Mining Co.*, 1 Idaho, 409.

Where the aggregate of a column of figures is preceded by a dollar mark, the result must follow that each item of such column is also dollars, though not preceded by such mark; and the assessment will not be invalid by reason of such omission.—*People v. Owyhee Lumber Co.*, 1 Idaho, 420.

The payment of subsequent assessments cannot correct a totally invalid and void description of the land assessed.—*Booth v. Cooper*, 22 Idaho, 451, 126 Pac. 776.

Where certain lots are described by number and block, and are designated as being in "South Boise, Londoner's addition," when in fact they were in "Londoner's First subdivision" such description is not so defective as to make the assessment void, as said description indicates that said lots, as assessed, were in the vicinity of South Boise and in Londoner's addition or subdivision.—*Booth v. Cooper*, 22 Idaho, 451, 126 Pac. 776.

Editorial Notes.

Necessity of verification of assessment-roll by assessor: 11 Ann. Cas. 720.

(F) EQUALIZATION OF ASSESSMENTS.

See, also, post, V, (G).

Writ of error to review judgment on appeal from order of commissioners reducing assessment. See Appeal and Error, IV, (A).

Authority of state board in making assessments of railroads, telegraph and telephone lines. See ante, V, (B).

— Mode of assessment. See ante, V, (D).

National bank not required to apply to board of equalization against void assessment. See ante, I.

Under Const., article 7, section 12, providing that the boards of county commissioners for the several counties of the state shall constitute boards of equalization for their respective counties, and article 18, section 6, providing for a board of county commissioners, the board of equalization and the board of county commissioners are separate and distinct boards with separate and distinct functions and duties.—*General Custer Min. Co. v. Van Camp*, 2 Idaho, 40, 3 Pac. 22; *Feltham v. Board of Commissioners*, 10 Idaho, 182, 77 Pac. 332.

R. S. 1776, as amended by Laws 1899, page 248, allowing appeals from any act, order or proceeding of the board of county commissioners, does not authorize an appeal from an order or decision of the board of equalization. *Feltham v. Board of Commissioners*, 10 Idaho, 182, 77 Pac. 332; *Humbird Lumber Co. v. Morgan*, 10 Idaho, 327, 77 Pac. 433.

On a writ of error from judgment of the district court modifying an order of the board of county commissioners fixing the assessment of plaintiff in error, the record need not show that plaintiff in error has paid or tendered the tax on its property upon the valuation thereof as fixed by the commissioners.—*Van Camp v. Board of Commissioners*, 2 Idaho, 29, 2 Pac. 721.

Under Laws 1891, page 227, specifying the powers of the state board of equalization, such

board is not authorized to raise or diminish the valuation put upon any class or classes of any property, nor to fix the valuation of any class of property, but may raise or diminish the aggregate valuation of the property of any county by such percentage as justice may require.—*Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416.

The state board of equalization, in exercising the functions conferred upon it by law, is exercising judicial functions.—*Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416.

Where a citizen and taxpayer seeks by writ of review to have certain proceedings of the state board of equalization in excess of its jurisdiction declared void, it is no defense that the board has performed the acts complained of, forwarded the results to the county auditors with directions to make the changes indicated in the assessment list, and that presumably such changes have been made and a large portion of the taxes collected, and that therefore it is too late to have their acts declared unlawful.—*Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416.

Under R. S. 1483, amended by Laws 1899, page 454, prescribing the power of the board of equalization over assessments, such board has jurisdiction to order additions made to the list of property assessed to an individual taxpayer.—*Murphy v. Board of Equalization*, 6 Idaho, 745, 59 Pac. 715.

Mere irregularity in the exercise of a rightful power by a board of equalization will not be received on certiorari.—*Murphy v. Board of Equalization*, 6 Idaho, 745, 59 Pac. 715.

Since there is no statutory authority for an appeal from an order of the board of equalization in equalizing assessments, the court to which the appeal is taken is without jurisdiction to enter any judgment therein except an order and judgment dismissing the appeal.—*Humbird Lumber Co. v. Morgan*, 10 Idaho, 327, 77 Pac. 433.

Laws 1901, page 233, sections 53, 65, making it the duty of the board of equalization to examine the assessment-roll, and providing that the board shall remain in session until all parties appearing have been heard after published notice by the clerk of the board of commissioners under section 92 (page 269), constitutes notice to the taxpayer of the meeting of the board of equalization and of his right to appear at the meetings of the board and protest against any assessment or action of the board in relation to the assessment.—*Inland Lumber etc. Co. v. Thompson*, 11 Idaho, 508, 114 Am. St. Rep. 274, 7 Ann. Cas. 862, 83 Pac. 933.

Under Laws 1901, page 233, sections 60, 65, making it the duty of the assessor to assess any property which has escaped assessment and fixing the fourth Monday in July as the date of the meeting of the board of equalization and that such board shall continue in session till all parties appearing shall be heard, and until all additional assessments, etc., shall be acted on, an assessment of such property made before final adjournment of

the board is not void for want of notice or opportunity to be heard in relation thereto.—*Inland Lbr. etc. Co. v. Thompson*, 11 Idaho, 508, 114 Am. St. Rep. 274, 7 Ann. Cas. 862, 83 Pac. 933.

Under Laws 1901, page 233, section 60, requiring notice to persons who have been assessed and whose assessments are "altered, modified, or affected in the amount of valuation of property charged to them," there is no requirement that a notice be mailed to a person who has never been assessed and whose assessment is ordered by the board.—*Inland Lbr. Co. v. Thompson*, 11 Idaho, 508, 114 Am. St. Rep. 274, 7 Ann. Cas. 862, 83 Pac. 933.

(G) REVIEW, CORRECTION OR SETTING ASIDE OF ASSESSMENT.

See, also, ante, V, (F).

The owner of property subject to taxation is not estopped from disputing the correctness of the description of property listed and given in by him under oath to the assessor.—*People v. Owyhee Min. Co.*, 1 Idaho, 409.

Every citizen and taxpayer of the state has the right to bring a proper suit to determine whether any board or officer having any authority connected with the levy and assessment of taxes has performed his or its duties as required by law.—*Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416.

R. S. 1483, amended by Laws 1899, page 454, prescribing the power of the board of equalization over assessments, does not conflict with any constitutional provision.—*Murphy v. Board of Equalization*, 6 Idaho, 745, 59 Pac. 715.

The noting of the change ordered upon the assessment-roll by the county board of equalization, if made by the wrong officer, cannot be reviewed on certiorari, because it is a mere ministerial act.—*Murphy v. Board of Equalization*, 6 Idaho, 745, 59 Pac. 715.

Whether the state board of equalization exceeded its jurisdiction in that it assessed the railroad and telegraph property of the state at less than its full cash value is a question of fact and not of law, and hence cannot be inquired into on an application for a writ of review.—*McConnell v. State Board of Equalization*, 11 Idaho, 652, 83 Pac. 494.

Under R. C. 1692, requiring the county commissioners to meet on the second Monday in July, in each year, as a board of equalization, no special, separate, or personal notice of this meeting is required to be given to the taxpayer of any action proposed to be taken; but any raise, change, or alteration in the assessment of the property of any taxpayer amounts only to a proposal by the board that such property should be so raised, or the assessment changed or altered, and notice thereof is thereafter given by the clerk in conformity with R. C. 1699 of the time and place when and where the taxpayer may be heard to object and protest against the proposed raise, change, or alteration.—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

Where the board of equalization has made an order proposing a raise on the valuation of

any specific property, and the person against whom such property is assessed thereafter appears at the time and place fixed for the hearing on such proposed change and protests against the same and submits his evidence, he thereby waives the service of notice and cannot thereafter be heard to object to the action of the board on the ground that he was not served with notice.—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

Under R. C. 1701, the board is required to again meet as a board of equalization on the fourth Monday of July, in each year, for the purpose of hearing the objections that may be made by any party whose assessment it has proposed to change, alter, or modify; and it is at such meeting that the order is made final, and that the change is authorized to be entered upon the assessment-roll, in conformity with R. C. 1700.—*First Nat. Bank v. Washington County*, 17 Idaho, 306, 105 Pac. 1053.

Editorial Notes.

Mandamus to review decision of tax official or board in matter of assessment of property: Ann. Cas. 1912B, 786.

VI. LIEN AND PRIORITY.

Tax lien as within covenant against encumbrances. See Covenants.

R. S. 1412 provides that every tax has the effect of a judgment against the person and every lien created by this title has the force and effect of an execution, etc.; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof. R. S. 1413 declares that every tax due on personal property is a lien on the real property of the owner. R. S. 1414 makes every tax due on real estate a lien thereon. R. S. 1560 provides that at any time after personal property is assessed, the tax collector may collect the tax (except where real estate is liable therefor) by seizure and sale of any personal property owned by defendant. Held, that the tax levied on personal property is not a lien thereon until actual seizure thereof.—*Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

A tax certificate vests in the purchaser a lien for the sum paid.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

Assessment and payment in doubtful or disputed district. See ante, IV.

The tax collectors of the several counties in the territory have no right to demand the payment of taxes in gold coin, or in anything but the legal currency of the United States at its par value; and they must pay over the same kind of funds received by them.—*Crutcher v. Sterling*, 1 Idaho, 306.

Taxes are payable in the legal currency of the United States, at its face value.—*Crutcher v. Sterling*, 1 Idaho, 306.

The board of county commissioners has no authority to refund a tax that has been paid,

whether the tax was illegal or not.—*Howell v. Board of Commrs.*, 6 Idaho, 154, 53 Pac. 542.

The cashier of a bank has no authority to list the capital stock of the bank for assessment against the bank, since such capital stock is not so assessable, and his mistake in so doing will not estop the bank from recovering the taxes paid under protest on such void assessment.—*Weiser Nat. Bk. v. Jeffreys*, 14 Idaho, 659, 95 Pac. 23.

Taxes illegally assessed and paid may always be recovered, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to recover them.—*Shoup v. Willis*, 2 Idaho, 120, 6 Pac. 124.

A complaint in a suit to recover back an illegal tax paid which avers that the same was paid after notice in writing to defendant assessor that the tax was illegal, and that suit would be commenced against him to recover the same, is sufficient.—*Shoup v. Willis*, 2 Idaho, 120, 6 Pac. 124.

Where S. sold his shares of stock in a national bank subsequent to the date on which taxes attach for the year and prior to the payment of such taxes by the bank, the bank cannot thereafter pay over the earnings and dividends from the stock to the purchaser of such stock, and then maintain a personal action against the vendor of the stock for recovery of the taxes so paid subsequent to the sale and transfer of the stock.—*Shainwald v. First Nat. Bank*, 18 Idaho, 290, 109 Pac. 257; *Steeves v. Bank of Weiser*, 18 Idaho, 299, 109 Pac. 260.

Under R. C. 1672, providing that the shares of stocks in banks must be assessed against the owners of such stock, and the tax thereon must be paid by the bank, the liability on the part of the bank to pay the taxes assessed against the stock carries with it an implied lien in favor of the bank and against the stock and the earnings, dividends and profits derived therefrom for reimbursement in the sum so paid.—*Shainwald v. First Nat. Bank*, 18 Idaho, 290, 109 Pac. 257; *Steeves v. Bank of Weiser*, 18 Idaho, 299, 109 Pac. 260.

Where a bank pays the taxes against the shares of stock owned by its stockholders, it cannot lawfully charge the same up against the aggregate earnings of the bank as current expense or otherwise, but must charge the amount paid against the shares of stock on which such payment was made, or against the present owner of such stock.—*Shainwald v. First Nat. Bank*, 18 Idaho, 290, 109 Pac. 257; *Steeves v. Bank of Weiser*, 18 Idaho, 299, 109 Pac. 260.

Where a property owner pays the taxes on a tract or parcel of land to the county assessor, and the assessor thereupon gives an informal and unofficial receipt for such taxes, and fails to turn the money in to the county or to credit the land owner on the books of his office, and the county thereafter advertises the property for delinquent sale and sells the same and it is struck off to the county, and the county thereafter takes a tax deed to

the property, the county had no right to sell the property, and acquired no valid title thereto.—*Griffith v. Anderson*, 22 Idaho, 323, 125 Pac. 218.

The clause, "so grossly overestimated that the same was a mistake," contained in R. C. 1791, with reference to the refunding of tax money, was intended to authorize granting relief, where the valuation has been placed upon property, as the same appears upon the assessment-roll, so excessive and disproportionate to the generally estimated value of the property as to suggest in itself that some error or mistake has been made in the assessment, and may cover a case where the assessor was mistaken as to the location or distribution of the property, its extent, or bounds, or was misinformed as to the value of that or similar property, or had no knowledge whatever as to the probable value of the property.—*Bengoechea v. Elmore Co.*, 23 Idaho, 397, 130 Pac. 459.

The clause, "so grossly overestimated that the same was a mistake," contained in R. C. 1791, does not have reference to an assessment made in good faith, with full knowledge on the part of the assessor of the extent, description, situation, and probable or generally estimated value of the property, and where the assessment was made in the regular way in due course of official duty.—*Bengoechea v. Elmore Co.*, 23 Idaho, 397, 130 Pac. 459.

Where a taxpayer is dissatisfied with the valuation placed on his property, he must apply to the board of equalization for relief at its regular session, and he cannot apply to the board of commissioners for a reduction to collect a part of the taxes he has paid under protest unless he has so applied to the board of equalization.—*Bengoechea v. Elmore Co.*, 23 Idaho, 397, 130 Pac. 459.

Where a person offers to pay the taxes on his land, and is informed by the proper officer that there is no tax to be paid on such land, and he relies on such statement in good faith, a subsequent tax deed based on such tax will not pass title.—*Smith v. Davidson*, 23 Idaho, 555, 130 Pac. 1071.

Editorial Notes.

Recovery by taxpayer of taxes paid: 22 Am. Dec. 519; 45 Am. Dec. 164; 94 Am. St. Rep. 425.

Payment of tax to avoid imposition of penalty (including forfeiture of right to do business) as involuntary payment: Ann. Cas. 1913C, 1052.

Necessity that protest against payment of tax should specify grounds thereof: Ann. Cas. 1913D, 568; 36 L. R. A., N. S., 476.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(A) COLLECTORS AND PROCEEDINGS FOR COLLECTION IN GENERAL.

Effect of payment to assessor and his failure to turn money into treasury. See ante, VII.

Assessors and tax collectors. See, also, ante, V, (B).

Act of January 7, 1867, creating the office of tax collector for the county of Owyhee, is repealed by act of January 11, 1867, amending the revenue law and providing inter alia, that the sheriff shall collect the taxes, etc.—*People v. Lytle*, 1 Idaho, 143.

The statute does not require a tax collector to give a bond with sureties in double the amount of the whole penal sum of his bond. *Gorman v. Board of Commrs.*, 1 Idaho, 553.

An assessor and tax collector, whose oath of office as both assessor and tax collector is indorsed on his bond as assessor, is not required to take another oath as tax collector when he files his bond as tax collector.—*Gorman v. Board of Commrs.*, 1 Idaho, 553.

Under the school laws of the territory, tax collectors are not entitled to compensation for collecting school tax or revenue raised for the maintenance and support of the public schools.—*Gorman v. Commissioners of Boise County*, 1 Idaho, 647.

Act of January 10, 1873, sections 5, 6, provides that a road tax shall be collected in the same manner as other per capita tax and that the tax collector shall retain ten per cent thereof as his compensation. Act of December 29, 1874, section 4, provides that the assessor of Boise county shall receive fifteen per cent of all poll or per capita tax collected; and said act repeals all acts or parts of acts in conflict therewith. Held, that the assessor and tax collector of Boise county was entitled to retain fifteen per cent of all road tax collected by him.—*Gorman v. Commissioners of Boise County*, 1 Idaho, 647.

Plaintiff was duly elected to the office of assessor and tax collector, and presented his bond for approval to the county commissioners, who refused to accept it, and thereupon appointed B. to fill the office. B. duly qualified, collected the taxes, and received compensation therefor. Held, that plaintiff, on being restored to office, could not recover from the county the fees to which he would have been entitled if in office.—*Gorman v. Commissioners of Boise County*, 1 Idaho, 655.

Such parts of R. S. 1679 and 2157, subdivision 5, as relates to fees of county auditors for services in connection with the assessment and collection of taxes are repealed by Laws 1891, page 174, section 4, prescribing the fees of county auditor and recorder.—*Cunningham v. Moody*, 3 Idaho, 125, 28 Pac. 395; *Wickersham v. County Commrs.*, 4 Idaho, 137, 36 Pac. 700.

Laws 1893, page 97, section 84, provides that the tax collector of the county shall pay over, on demand, to the treasurer of any city or village, all money received by him arising from taxes levied belonging to such city or village. Held, that the tax collector was required to pay over, on demand, all such moneys collected by him and that he could not retain therefrom any money as compensation for such collection.—*City of Moscow v. Latah County*, 5 Idaho, 36, 46 Pac. 874.

An action will not lie against the sureties on the official bond of a tax collector to recover money wrongfully and illegally paid to him by the board of commissioners after the expiration of his term of office, the receipt of such money by the collector not being an official act for which the sureties are responsible.—*Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1071.

A judgment in favor of a county against its tax collector for the recovery of money illegally paid to him by the board of county commissioners after the expiration of his term of office is not evidence in an action against his sureties on his official bond.—*Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1071.

Under R. S. 403, providing that every official bond executed by any officer is in force and obligatory upon the principal and sureties therein to and for the state of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, the sureties on the official bond of a tax collector are liable for the wrongful seizure and sale of personal property by such officer, though he acted in good faith in the matter.—*Palmer v. Pettin-gill*, 6 Idaho, 346, 55 Pac. 653.

Tax collectors are not entitled to a fee for making a deed to the county for property sold for delinquent taxes.—*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264.

An order of the board of county commissioners allowing a salary to the assessor and tax collector is void for want of jurisdiction, since such officer's fees are payable in fees and commissions, and such order may be attacked directly or collaterally, no appeal therefrom being necessary.—*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264.

R. S. 623 prohibited assessors and collectors from charging fees or commissions for collecting public school moneys. R. S. 2156 allowed them commissions on all taxes collected by them. Held, that the Revised Statutes having been adopted as a whole and at the same time and taking effect at the same time, the latter section did not repeal the former, and therefore that the tax collector was not entitled to commissions on public school moneys collected by him.—*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264.

Laws 1888-89, page 3, requiring the payment of poll taxes, makes it the duty of county assessors and collectors to collect on each poll after the second Monday in December the sum of \$3.50. R. S. 1593, as amended by Laws 1895, page 119, makes "all unpaid taxes delinquent on the first Monday in January in each year following the tax levy. Held, that the latter statute does not relate to poll taxes and that the tax collector must account to the county at the rate of \$3.50 on each poll collected after the second Monday in December.—*Sponberg v. Oneida County*, 6 Idaho, 722, 59 Pac. 532.

The power to levy a tax carries with it the implied power to employ the necessary means

and procedure to execute the power and collect the revenue contemplated by the grant of power to make the levy.—*Stanrod v. Case*, 24 Idaho, 365, 133 Pac. 651.

(B) SUMMARY REMEDIES AND ACTIONS.

The legislature may define by law the grounds upon which a party sued for his taxes may defend such suit.—*People v. Wilkerson*, 1 Idaho, 619.

Under section 41 of the revenue act, in suits for taxes in which judgment is rendered for the defendant, the judgment should be general, without costs.—*People v. Moore*, 1 Idaho, 662.

Personal property in the hands of a receiver at the time of its assessment is not subject to seizure and sale for the collection of the taxes thereon.—*Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

Laws 1899, page 392, section 1, authorizing the seizure and sale of personal property to enforce the payment of road poll taxes, provides an additional means for collecting such tax and does not repeal R. S. 901, making corporations or other employers liable for such tax on proper notice that their employees are liable therefor.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

After a corporation or employer becomes liable under R. S. 901 to pay the road poll tax of its employees, the county, through its prosecuting attorney, may bring an action therefor.—*Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054.

(C) REMEDIES FOR WRONGFUL ENFORCEMENT.

Enjoining sale. See post, IX.

An action to enjoin the collection of judgments for taxes will not lie where the parties have not interposed their defenses in the action to collect such taxes.—*Wilkerson v. Walters*, 1 Idaho, 564.

Injunction will lie to restrain the collection of an illegal tax, where it creates a cloud upon the title to real estate.—*Bramwell v. Guheen*, 3 Idaho, 347, 29 Pac. 110.

Where an illegal tax is levied and the person affected fails to appear before the board of equalization for relief, he has a remedy by injunction to prevent the collection thereof.—*Howell v. Board of Commrs.*, 6 Idaho, 154, 53 Pac. 542.

Where it appears that the state board of equalization, by error or mistake, have failed to include an item of railroad property designated as 5.67 miles of "second track" within the total valuation of the property of such company for the purpose of ascertaining the valuation per mile to be placed on the main track of such road, but, on the contrary, have certified the same down as an independent assessment, and the railroad company seeks to remove the cloud of such invalid assessment from its property and to enjoin and restrain the taxing officers from collecting such tax or holding a lien therefor against the

property, and it appears that the company has not in fact paid its proportionate part of taxes for the year upon such piece or parcel of property, it will be required to do equity before it can take a decree clearing its title, and must accordingly pay to the county the proportionate share of taxes on the specific piece of property to which the county would have been entitled by reason of the total mileage or main line of road within its borders, had the state board of equalization complied with the statute in including the valuation of such property within the total valuation of the railroad company's property.—*Northern Pac. Ry. Co. v. Kootenai County*, 19 Idaho, 75, 112 Pac. 320.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

Injunction against tax sale after sale. See *Injunction*, I, (B).

Claims for publishing delinquent tax list. See *Counties*, III, (B).

Lands cannot be sold for taxes unless they be assessed, and they must be sold by the same description as that given in the assessment-roll and delinquent list.—*Quivey v. Lawrence*, 1 Idaho, 313.

No law of the territory can authorize the sale of the lands of the United States for taxes.—*People v. Owyhee Min. Co.*, 1 Idaho, 409.

The owner of cattle listed the number thereof with the assessor and thereafter, before the date prescribed by law for the assessment thereof, sold the cattle, but failed to notify the assessor of such sale or offer to have the proceeds of such sale listed for assessment or show why such proceeds should not be assessed. The board of equalization refused to make any reduction in the amount of such assessment and the owner brought an action to enjoin the sale of his property for unpaid taxes on the cattle so sold. Held, that he was estopped to question the constitutionality of the act under which the assessment had been made, since no injustice had been done to him by the assessment complained of.—*McGinness v. Davis*, 7 Idaho, 665, 65 Pac. 364.

A complaint to enjoin the assessor and tax collector from selling property to satisfy a tax levy regular in form on the ground that the levy was excessive must allege the full cash value of the property.—*Humbird Lbr. Co. v. Thompson*, 11 Idaho, 614, 83 Pac. 941.

Under Laws 1901, page 230, section 10, providing that all taxable property must be assessed at its full cash value, and section 3, subdivision 5, page 235, defining the terms "value" and "full cash value," a complaint to enjoin the sale of lands for taxes does not sufficiently allege the full cash value of the property by the use of the terms "cash value," "fair value" or "true value."—*Humbird Lbr. Co. v. Thompson*, 11 Idaho, 614, 83 Pac. 941.

An allegation that other property of similar character and value in the vicinity or county has been assessed at a less valuation

than that of plaintiffs without any allegation of fraud, oppression or want of good faith on the part of the assessor is not sufficient to warrant injunctive relief against a sale of land for taxes.—*Humbird Lbr. Co. v. Thompson*, 11 Idaho, 614, 83 Pac. 941.

Recitals in tax certificates and deed examined and held sufficient to show that the county was not a competitive bidder and that there was a substantial compliance with R. S. 1539, amended by Laws 1901, page 247, requiring the assessor to first offer the property generally, and if there is no offer to purchase, then to offer it again on the same day or at any time subsequent to the first offer, and providing that if there be no purchaser, the same may be struck off to the county.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511; *Stewart v. White*, 19 Idaho, 60, 112 Pac. 677.

A tax sale certificate issued under R. C. 1759, which recites that the tax for which the property was sold was "state and county, \$28.00; penalty and costs, 3.05; total, \$31.05," and leaves blank the space following the enumeration of poll tax, city, town, village, and independent school district tax, is a substantial compliance with the statute, for the reason that such statement on its face excludes the idea that the taxes for which the property was sold included anything other than "state and county tax" and "penalties and costs."—*White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674.

R. C. 1743, relating to the publication of the name of the owner in delinquent tax lists, is directory, and a mistake in the name of the owner, under R. C. 1789, will not vitiate a tax sale based thereon.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

The oath required of the tax collector by R. C. 1768 in no manner affects the property rights of the owner of property assessed.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

Neither R. C. 1748 nor R. C. 6053 requires that the publication of the delinquent tax list shall be shown by the affidavit of the printer or publisher, and proof of such publication may be otherwise made.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

The fact that the signature of the assessor was attached to a tax sale certificate, with a rubber stamp instead of writing the name, when it clearly appears that it was the intention in using such stamp to sign the name of the assessor, would not invalidate the instrument.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

Where a tract of land is sold at delinquent tax sale, and is struck off to the county, and the property is thereafter assessed from year to year to the land owner and the taxes so assessed are paid from time to time, and the assessor has failed and neglected to carry the property on the assessment-roll in red ink entry, as provided by R. C. 1755, the county acquires no valid title to the property and cannot give a good title to a purchaser.—*Griffith v. Anderson*, 22 Idaho, 323, 125 Pac. 218.

In issuing a tax deed, the officer executing the same in describing the property may extend abbreviations contained in the certificate, and make a fuller and more complete description of land which was sufficiently described in the tax sale certificate, but he has no right or authority to add to or complete an incomplete and insufficient description contained in the tax sale certificate, and he has no authority to go beyond the certificate for extraneous evidence describing the property intended to be described in the certificate.—*Wilson v. Jarron*, 23 Idaho, 563, 131 Pac. 12.

Editorial Notes.

Injunction against sale of property for illegal taxes: 69 Am. Dec. 198; 49 Am. Rep. 287; 23 Am. Rep. 622; 53 Am. Rep. 110.

Validity of certificate of tax sale as dependent on time of issuance: Ann. Cas. 1913B, 587.

Validity of tax sales where nonpayment is due to mistake or negligence of the tax officers: 20 L. R. A. 487.

X. REDEMPTION FROM TAX SALE.

R. S. 1554, giving the right to redeem real estate sold for taxes by paying the amount of taxes due thereon at the time of the sale, with ten per cent interest, and fifty per cent penalty thereon, and also all costs and expenses, does not authorize the imposition of such penalty on the costs and expenses.—*Cummings v. Cone*, 4 Idaho, 259, 38 Pac. 650.

Where plaintiff seeks to set aside a tax deed, and alleges payment of taxes by defendants and tenders into court sufficient money to reimburse defendants for all payments and statutory interest thereon, equity will not decree him a clear title until he has reimbursed defendants.—*Hole v. Van Duzer*, 11 Idaho, 79, 81 Pac. 109.

Where the proceedings have been in substantial compliance with the law, and the tax sale has been made in substantial conformity therewith, and the time within which the land owner may redeem is fixed and limited by the statute, there is no right of redemption, whether a deed has been issued or not, after the expiration of the statutory period allowed for redemption.—*White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674.

The time allowed for redemption from tax sale at the time of the sale can neither be lengthened nor shortened by subsequent legislation.—*Lawrence v. Defenbach*, 23 Idaho, 78, 128 Pac. 81.

R. C. 1763, as amended by Laws 1912, page 43, requiring notice to be given of every tax sale purchase to the occupant of the lands sold or the owner of the record title, does not apply to the execution of a tax deed to lands sold for delinquent taxes, where the sale has been made and the time for redemption has expired, and where the purchaser was entitled to an absolute deed under the statute at the time such act became a law.—*Lawrence v. Defenbach*, 23 Idaho, 78, 128 Pac. 81.

XI. TAX TITLES.

Effect of offer to pay and notification by officer that taxes are already paid. See ante, VII.

Liability of abstract company for failure to show existence of tax deed. See Abstracts.

Purchase of tax title by cotenant. See Tenancy in Common, II.

Right of attorney to purchase tax title from county. See Attorney and Client, I.

(A) TITLE AND RIGHTS OF PURCHASER AT TAX SALE.

No title can be acquired by a tax deed on state lands.—*State v. Stevenson*, 6 Idaho, 367, 55 Pac. 886.

Under R. S. 1547, as amended by Laws 1899, page 267, and Laws 1901, page 276, section 126, a tax sale certificate vests in the purchaser only a lien for the sum paid.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

The holder of a tax title to real estate who finds the property unoccupied may enter upon and take actual possession of the premises, and in doing so he is not liable to the original owner of the property whose title has been divested by the tax deed.—*Steltz v. Morgan*, 16 Idaho, 368, 101 Pac. 1057.

Where it appears that real property, offered at a tax sale, has been legally assessed, and the sale legally made, and the purchaser is entitled to a tax sale certificate, the fact that the auditor in issuing such tax certificate dates the same subsequent to the date of the tax sale does not render such tax certificate void, as a substantial compliance with R. C. 1759 is sufficient.—*McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

Where property is the subject of taxation, and the assessment has been legally made, and there is a default in the payment of such taxes, and the property is sold at tax sale in accordance with the provisions of the statute, such property cannot thereafter escape taxation through some failure of the officer to perform his duty, unless it has actually misled the party to his injury.—*McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

The fact that the county auditor in issuing a tax deed recites the amount for which the property was sold, and adds to such amount one dollar for auditor's and collector's fees, in a case where the property is sold to the county, does not render the tax deed thus issued void, notwithstanding the fact that the auditor is not authorized to make the charge of one dollar for fees where the sale is made to the county.—*McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

A tract of land was sold in the year 1905 for the taxes of 1904, and the property was struck off to the county, and was thereafter assessed each year during the period of redemption against the land owner, and the assessor failed and neglected to make the entry of the subsequent assessments in red ink, as required by R. C. 1755. The property owner remained in possession of the land continuously until the commencement of an action to quiet title. Held, that the failure on the part of the taxing officer to make

the entry required by R. C. 1755, was an error which prejudiced a substantial right of the land owner, and is sufficient to defeat the tax deed, where the land owner tenders and offers to pay the taxes, penalty, interest, and costs incurred.—*Parsons v. Wrble*, 21 Idaho, 695, 123 Pac. 638; *Parsons v. Wrble*, 21 Idaho, 703, 123 Pac. 641.

An error or omission in the performance of a duty imposed by law on a taxing officer, which results to the prejudice of a taxpayer, or which would raise the presumption that he was prejudiced, when viewed in the light of his conduct and the surrounding facts and circumstances under which he acted, should be resolved and construed in favor of the taxpayer and on the side of equity.—*Parsons v. Wrble*, 21 Idaho, 695, 123 Pac. 638; *Parsons v. Wrble*, 21 Idaho, 703, 123 Pac. 641.

Where lots were assessed as being in "block 13, South Boise," and the plat of South Boise on file in the recorder's office contains no block 13, and where said lots were not in South Boise, but were in "South Boise First subdivision," as shown on the plat of South Boise First subdivision, such description is so indefinite and uncertain as to invalidate said assessment; and a tax sale and assessor's deed in pursuance thereof does not convey the title to such lots.—*Booth v. Cooper*, 22 Idaho, 451, 126 Pac. 776.

Where a double assessment is made under R. C. 1681, and such assessment is not paid, and such property is offered for sale for delinquent taxes and sold, and a deed made to the purchaser, and such purchaser relies upon said sale in an action brought against such purchaser to quiet title, and it appears in such assessment that such double taxation is void by reason of the fact that such property was not assessable for one of the years included in such double taxation, and that such assessment is so indefinite and uncertain that it is impossible to separate the assessments for the respective years and determine what part of said taxes was valid and what was invalid, the entire assessment will be held void, and the sale and deed based upon such assessment would convey no title.—*Meserole v. Whitney*, 22 Idaho, 543, 127 Pac. 553.

Editorial Notes.

Tax titles, presumptions in favor of power of the legislature to create: 36 Am. St. Rep. 686.

(B) TAX DEEDS.

Under R. S. 1555, a tax deed is made prima facie evidence of the facts and things mentioned in the eight subdivisions of said section; and to defeat such deed the defendant must show the nonexistence of such facts or some of them.—*Co-operative etc. Assn. v. Green*, 5 Idaho, 660, 51 Pac. 770; *Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

Where defendant relies upon a tax deed for title, plaintiff may contest those matters in regard to which the statute makes the tax deed only prima facie evidence.—*McMasters v. Torsen*, 5 Idaho, 536, 51 Pac. 100.

Where a certificate of a sale issued in July, 1896, for the delinquent taxes for the year

1895, is valid, a deed made upon such tax sale certificate in April, 1905, is not void for the reason that such tax deed also covers sales for other years.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

A recitation in a tax deed as follows: "That the said least quantity or smallest portion of interest in said land lying and being within said Ada county, as hereinafter described . . . was by the said H. E. Neal, as treasurer of said independent school district of Boise City, sold and struck off to said W. F. Locke who paid the full amount of said taxes, costs and charges," was sufficient to make a prima facie case on the question that that was the least quantity or smallest portion of the property sold that the purchaser would take and pay taxes and costs.—*Wilson v. Locke*, 18 Idaho, 582, 111 Pac. 247.

Where a tax deed was not in fact made, executed, and delivered until after the time for redemption by the property owner had expired, it is not fatal to the deed, and will not render it invalid if it recite upon its face that the purchaser or his assignee was entitled to a deed one day earlier than he was in fact entitled to it under the law.—*White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674.

Where a tax sale certificate shows on its face the year for which the tax was assessed, and a deed thereafter issued leaves the year blank, and does not show upon its face the year for which the tax was assessed, it is competent and proper for the officer on discovering the mistake to execute a new deed for the correction of the error.—*White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674.

Where the power is vested in an officer to execute a tax deed, such power and authority is not exhausted until a deed is made in compliance with the law, provided the preceding steps have been taken in accordance with the law as the same appears of record in his office. The making of an insufficient, defective, and invalid deed does not exhaust the power of the officer where the facts exist upon which a valid deed may be made.—*White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674.

R. C. 1763 and 1764 must be construed together, and when so construed only require the officer making a tax deed to incorporate therein "substantially the matters contained in the certificate," and a substantial compliance therewith is all that is necessary.—*White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674.

Where a tax sale certificate, among other things, recites, "and that unless redeemed within three years from the date of sale, the purchaser will be entitled to a deed," and the deed thereafter issued, among other things, recites, "And whereas no person has redeemed the property so sold during the time allowed by law for its redemption, and it appearing that G. G. Pickett was on the 10th day of July, 1907, entitled to a deed for the premises so sold as above set forth," the language thus used in the deed is a substantial compliance with the language used in the

certificate, and sufficiently states that the property has not been redeemed, and that the holder of the certificate of sale is entitled to a deed therefor.—*McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

Where a certificate of tax sale contains the assignment thereof in the following language: "Sold to G. G. Pickett this 1st day of February, 1907. Axel P. Ramsted, Auditor, by G. F. Walker, Deputy"—and the deed thereafter issued recites, "And whereas the said Latah county, state of Idaho, under and by virtue of the laws of the state of Idaho, has sold its certificate of sale No. 487, and all its rights thereunder, unto the said party of the second part, as appears from said certificate of sale and assignment thereof now on file in the tax collector's office in said county," such recital in the deed in substance contains the same matter as is covered by the indorsement, and clearly shows the assignment by the county, and to whom, and such deed is not void because it does not contain an exact copy of the indorsement of the assignment upon the certificate.—*McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

A tax deed, which recites that, "at said auction, there being no bidder, Latah county, state of Idaho, by virtue of law, became the purchaser of said land, or lot, for the taxes, costs and charges due thereon, which taxes, costs and charges amounting to \$11.33," states substantially the same thing as is stated in the certificate of tax sale, wherein it is recited, "The property was struck off to the said Latah county, who paid the full amount of said taxes, penalties, costs and charges"; and such deed is not void.—*McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

Where it is admitted or proven that property is subject to taxation, and correctly and legally assessed, and that such assessment is not paid, and that the property was sold for such delinquent taxes in accordance with law, and the owner neglects to pay subsequent assessments made against said property prior to the expiration of the statute limit to the period of redemption, and a tax deed is thereafter issued to the purchaser, or assignee of the purchaser, such deed will not be set aside on the ground that the officer issuing the same did not strictly follow the language of the statute in reciting in such deed the literal language used in the tax sale certificate, as a substantial compliance with the statute is sufficient.—*McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

Under R. C. 1787, authorizing the use of figures, initial letters and abbreviations in the assessment of lands and sale thereof for taxes, descriptions set forth and held sufficient to locate the land.—*Armstrong v. Jarmon*, 21 Idaho, 747, 125 Pac. 170.

A tax sale certificate describing lands sold as "S. ½ N. W. 4, sec. 1, twp. 4, range 2," is insufficient and invalid for the purpose of furnishing a description on which a valid tax deed can be executed, and a tax deed executed on such certificate after the expiration of the time allowed for redemption which describes the property conveyed as "The South

$\frac{1}{2}$ of the Northwest $\frac{1}{4}$ of sec. one (1), twp. four (4) north, range two (2) West of Boise Meridian, Canyon county, state of Idaho," is not a substantial compliance with R. C. 1763 and 1764, which require a tax deed to contain the same description and recitals contained in the tax sale certificate.—*Wilson v. Jarron*, 23 Idaho, 563, 131 Pac. 12.

Editorial Notes.

Tax deeds as evidence: 17 Am. Dec. 505; 28 Am. St. Rep. 19; 2 L. R. A. 774.

Tax deeds, recitals in, effect of as evidence: 31 Am. St. Rep. 233.

Tax deeds, power of the legislature to make them prima facie or conclusive evidence: 4 Am. St. Rep. 187.

Sufficiency of tax deed with respect to designation of grantee: Ann. Cas. 1913A, 1195.

(C) ACTIONS TO CONFIRM OR TRY TITLE.

Right of original owner to maintain trespass against holder of tax title. See *Trespass*.

For the purpose of defeating a tax deed, evidence may be given that the land was public land.—*Quivey v. Lawrence*, 1 Idaho, 313.

For the purpose of defeating a tax deed, evidence may be given that the land was not assessed.—*Quivey v. Lawrence*, 1 Idaho, 313.

Under R. S. 1555, providing, inter alia, that a tax deed is prima facie evidence that the property was equalized and assessed as required by law, evidence is admissible in favor of a party attacking a tax deed to show that the property was not equalized nor assessed as required by law.—*McMasters v. Torsen*, 5 Idaho, 536, 51 Pac. 100.

Where plaintiff asks for equitable relief in clearing his title from a tax sale certificate and deed, and his complaint shows that defendants have paid the taxes on the land and received their deed from the county, and plaintiff tenders the money into court to reimburse defendant for all payments, with interest, equity will not decree him a clear title until he has reimbursed the defendant.—*Hole v. Van Duzer*, 11 Idaho, 79, 81 Pac. 109.

Where a defendant pleads title under a tax deed, and it appears that the law governing the assessment and sale of property for taxes has been substantially complied with, the original owner of the property cannot question the constitutionality of the law under which the sale was made, where he had permitted the property to be sold for delinquent taxes and the purchaser to take possession thereof and pay taxes thereon for a period of twelve years, during which time the original owner asserted no right or ownership therein, as in such case the original owner is guilty of laches.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

In an action to quiet title, defendant filed a cross-complaint setting up his claim of title under several tax sale certificates and two separate tax deeds. Held, that the certificates and deeds were mere muniments of title, that it was not necessary to plead them, and

that therefore a motion and demurrer, based on the ground that they constituted separate causes of action, were properly overruled.—*Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511.

A tax deed has no more force or effect as a writ of assistance for procuring the possession of real estate than any other deed, and the holder of such deed who finds the property occupied must, if the occupant refuses to surrender possession, resort to the same legal remedy for possession as the holder of any other deed would employ.—*Steltz v. Morgan*, 16 Idaho, 368, 101 Pac. 1057.

The presumption is that the officer performed his duty in making the tax sale, and that the land was not struck off to the county as a competitive bidder, unless the tax sale certificate affirmatively shows to the contrary. *Stewart v. White*, 19 Idaho, 60, 112 Pac. 677.

Where an owner of real property permits the taxes thereon to go delinquent for fifteen years, and neglects his obligation to pay the taxes thereon, and thereafter conveys the same by quitclaim deed for the nominal consideration of one dollar, the grantee has no special equities that would require a court to exercise a nice discrimination in laying down a rule for the preservation of a just balance between the state and such grantee.—*Stewart v. White*, 19 Idaho, 60, 112 Pac. 677.

Where omissions and errors have been made in assessments and sales of property for delinquent taxes, and such questions are not jurisdictional but merely legislative directions in such proceedings, and by such omissions and errors the property owner is prejudiced, then such facts may be shown to defeat the tax title.—*Armstrong v. Jarron*, 21 Idaho, 747, 125 Pac. 170.

In an action to quiet title under a tax deed, held, that the evidence is sufficient to sustain the findings of the trial court quieting title in the owner as against the holder of the tax deed.—*Smith v. Davidson*, 23 Idaho, 555, 130 Pac. 1071.

Where in an action to quiet title under a tax deed the trial court finds that the equities are with defendant and quiets title in the defendant, the judgment will be modified so as to require defendant to pay the amount paid for the delinquent tax certificate and penalty thereon with interest at the rate of eighteen per cent per annum for three years or up to the time the holder of the tax certificate would have been entitled to a deed.—*McKinnon v. McIlhargy*, 24 Idaho, 720, 135 Pac. 826.

(D) RIGHTS AND REMEDIES OF PURCHASER OF INVALID TITLE.

(No paragraphs.)

XII. FORFEITURES AND PENALTIES.

(No paragraphs.)

XIII. LEGACY, INHERITANCE AND TRANSFER TAXES.

The wife is not liable under R. C. 1873, upon the death of her husband to pay an inher-

ance tax on her one-half of the community property, for the reason that the property does not pass to her "by will or by the intestate laws of this state."—*Kohny v. Dunbar*, 21 Idaho, 258, Ann. Cas. 1913D, 492, 39 L. R. A., N. S., 1107, 121 Pac. 544.

Editorial Notes.

Taxation of collateral inheritances: 41 Am. St. Rep. 580; 88 Am. St. Rep. 513.

Liability to succession tax of transfer to alien: Ann. Cas. 1912A, 857.

Situs of debt for purpose of succession tax: Ann. Cas. 1912A, 903.

Assessment of succession tax as affected by appreciation or depreciation of property subsequent to death of decedent: Ann. Cas. 1912C, 1017.

Community property as subject to inheritance tax: Ann. Cas. 1913D, 496; 20 L. R. A., N. S., 208; 39 L. R. A., N. S., 1107.

Personal property in foreign jurisdiction at time of death of owner as subject to succession tax in state of owner's residence: Ann. Cas. 1913D, 520.

Constitutionality of succession taxes: Ann. Cas. 1913D, 757; 1 Ann. Cas. 30; 12 Ann. Cas. 953.

Succession tax on conveyance to take effect after grantor's death: 38 L. R. A., N. S., 1141.

XIV. DISPOSITION OF TAXES COLLECTED AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

The territorial treasurer must pay the territorial indebtedness in such funds as he receives; he cannot legally pay in any other funds.—*Crutcher v. Sterling*, 1 Idaho, 306.

Const., article 7, section 7, providing that all taxes levied and collected for state purposes must be paid into the state treasury, without any deduction for commissions or other charges, is self-acting and goes into effect without any legislation.—*Cunningham v. Moody*, 3 Idaho, 125, 28 Pac. 395.

Under Const., article 7, section 7, all taxes levied and collected for state purposes must be paid into the state treasury, without any deduction for commissions or other charges. *Cunningham v. Moody*, 3 Idaho, 125, 28 Pac. 395; *Guheen v. Curtis*, 3 Idaho, 443, 31 Pac. 805; *Wickersham v. County Commrs.*, 4 Idaho, 137, 36 Pac. 700.

County treasurers must hold twenty-five per cent of the property road tax levied and collected by the county within the corporate limits of towns and villages for their use, to be paid over on proper demand.—*City of Genesee v. Latah County*, 4 Idaho, 141, 36 Pac. 701.

Const., article 7, section 7, provides that all taxes levied for state purposes shall be paid into the state treasury, and no county, city, etc., nor the property therein shall be released or discharged from their or its proportionate share of taxes to be levied for state purposes. R. S. 1410, as amended by Laws 1895, page

101, and Laws 1899, page 254, levied an ad valorem tax on the counties of the state and authorized county commissioners to levy certain taxes for county expenditures and such additional and special taxes as the laws of the state authorized or required them to levy. R. S. 1411, as amended, required the board of county commissioners to ascertain the rate of state taxes to be levied in order to secure the amount apportioned to each county, etc., and to levy the same. R. S. 1554, as amended by Laws 1899, page 267, provides that whenever property sold to the county shall be redeemed, the moneys received on account of such redemption shall be distributed between the state and the county. Held, that the state is not entitled to recover from the county its proportion of the delinquent taxes until the same is collected by the redemption or other disposition of the property struck off to the county for such delinquent taxes.—*State v. Ada County*, 7 Idaho, 261, 62 Pac. 457.

R. S. 1773, requiring claims of individuals against the county to be itemized, verified and presented to the board within a year after the last item of the account accrued, does not apply to a municipality claiming twenty-five per cent of the road taxes collected on property within its limits under R. S. 870, subdivision 6, as amended by Laws 1899, page 127.—*Village of Mountainhome v. Elmore County*, 9 Idaho, 410, 75 Pac. 65.

TELEGRAPHS AND TELEPHONES.

Negligence in operating electric light plant. See Electricity.

Mandamus against railroad to compel railroad company to permit installation of telephone. See Mandamus, II, (C).

A "telegraph company" is a public service corporation engaged in a public utility, and in receiving, transmitting and delivering messages should be treated as an independent principal or contracting party, and be held liable both in contract and tort, the same as other principals.—*Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

A sender of a telegraphic message does not constitute the telegraph company his agent, and is not bound to the receiver of the message by the terms of the message as negligently changed or altered by the company.—*Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

The reasonableness or unreasonableness of rules and regulations made by a telegraph company must be determined with reference to public policy, precisely as in the case of common carriers, and a stipulation which exempts such company from damages for its own negligence is void.—*Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

Where a telegraph company fails to transmit a message correctly, the proof of that fact is prima facie evidence of the company's negligence.—*Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

Where S. sent a telegram to C. Co. inquiring if the company would honor draft in payment for eighty-four head of steers at \$3.95 per hundred, and the telegraph company negligently changed or altered the message so that when received at its destination and delivered to the sendee it read \$3.25 instead of \$3.95, and the stock was shipped and C. Co. paid therefor at the rate of \$3.25, if S. acted prudently and with due diligence after discovering the mistake, so as to minimize the damage and loss, the measure of damage which they will be entitled to recover from the telegraph company for its tort will be the difference between the market value of the stock the day the message was sent and the price actually paid by C. Co.—*Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

Where the evidence shows that a telegram was delivered to the agent of the company for transmission and was accepted by it, and that the company made a mistake in its transmission, such showing made a *prima facie* case in favor of the plaintiff, and the court erred in granting a nonsuit.—*Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

Where a telephone company attaches its wires to a pole erected by others and thereafter removes all its wires from said pole and attaches such wires to a pole of its own, it thereby abandons any rights it may have gained in the old pole by user, and is not responsible for an accident arising on the taking down of said old pole by third persons.—*Powers v. Independent etc. Tel. Co.*, 19 Idaho, 577, 114 Pac. 666.

Defendant company attached its wires to a pole that had been erected by others and left its wires so attached for about four years. Thereafter it erected its own pole within a foot or eighteen inches of the old pole, and took all of its wires from the old pole and left it standing as it was when it first attached its wires thereto. Thereafter another telephone company attached its wires to the old pole and used the same for two or three months, after which said pole was taken down by someone unknown to defendant and laid close to the sidewalk where it remained for six weeks or two months, at the end of which time plaintiff, while passing along the sidewalk, caught her foot in a wire attached to said pole and was thrown violently to the ground and severely injured. Held, that defendant was not liable.—*Powers v. Independent etc. Tel. Co.*, 19 Idaho, 577, 114 Pac. 666.

Editorial Notes.

Conditions which telegraph and telephone companies may impose on senders of messages: 71 Am. Dec. 463.

General duties and liabilities: 81 Am. Dec. 613.

Notices limiting liability unless the message is repeated: 9 Am. Rep. 149; 24 Am. Rep. 283; 10 Ann. Cas. 857; 11 L. R. A., N. S., 561; 30 L. R. A., N. S., 409.

Telegraph and telephone companies are agents of the party employing, and he

must suffer for mistakes in transmission: 39 Am. Rep. 359.

Whether telegraph and telephone companies are common carriers: 45 Am. Rep. 487.

Conditions as to repeating messages, mistakes, delays, etc., when valid: 45 Am. Rep. 488.

Damages, what are proper elements of in actions for failure to deliver messages: 10 Am. St. Rep. 778; 117 Am. St. Rep. 286.

Liability of sender of telegram to receiver thereof for error in transmission: Ann. Cas. 1912A, 68.

Liability of telegraph company for erroneous transmission of message announcing prices of state of market: Ann. Cas. 1912C, 1279; 3 Ann. Cas. 429.

Right of addressee of telegram to sue for delay in delivery: 30 L. R. A., N. S., 1116.

TENANCY IN COMMON.

I. CREATION AND EXISTENCE.

II. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF COTENANTS.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

In mining property. See *Mines and Minerals*, I. (B), 3, (h); III, (B).

I. CREATION AND EXISTENCE.

A contract between plaintiff and one W. recited the acquisition of a dam and power site by the parties and their purpose to raise funds for the erection of a dam and provided that in the event of W. failing to raise sufficient funds to construct such dam or failing to make satisfactory progress within one year, W. should assign all his right, title and interest therein to plaintiff. The necessary funds were not raised, but the parties continued in possession and operated the property for some time after the end of the year. No assignment was made by W. or demanded of him. Following the above agreement, W. obtained a warranty deed to the property from B., the owner thereof, under an agreement by which W. was to pay part cash and part in mortgage bonds of the corporation to be formed for the development of a power plant on the property. Subsequently, B. and W. entered into a new agreement to replace the first agreement, the new agreement reciting that "whereas B. is the equitable owner of the real property hereinafter described and W. holds the legal title thereto and the parties are desirous of entering into a new agreement, it is agreed that W. has this day become the owner, absolute, of the equitable as well as the legal title to an undivided half interest in the property, etc. Thereafter B. gave a quitclaim to plaintiff covering the entire property in dispute. Thereafter W. quitclaimed his undivided half interest to defendant's predecessors, who in turn quitclaimed to defendant. Held, in an action to quiet title, that plaintiff and defendant each owned an undivided half interest in the property.—

Whitney v. Dewey, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117.

Under R. C. 3059 and 3104, the common-law rule of joint tenancy has been abrogated, and every interest in real estate granted or devised to two or more persons, other than executors or trustees, constitutes a tenancy in common, unless expressly declared to the contrary by grant or devise.—Powell v. Powell, 22 Idaho, 531, 126 Pac. 1058.

Where the heirs of a deceased entryman upon public land of the United States receive a patent for such land after the death of the entryman, they will take their title under the laws of this state as tenants in common, each heir taking the same interest and share in such property that he would have taken in the separate property of the deceased under the laws of succession of this state.—Powell v. Powell, 22 Idaho, 531, 126 Pac. 1058.

Where several parties construct a lateral ditch for the purpose of taking water from a main ditch to the lands of such parties for a beneficial use, and it is understood that said lateral shall become the property of such persons in proportion to the quantity of water owned by each land owner, and water is conveyed through said lateral ditch to such lands, such persons so constructing said ditch are co-owners and tenants in common, and are entitled to the use of the same for the carriage of water to irrigate their lands.—Keyser v. Morehead, 23 Idaho, 501, 130 Pac. 992.

II. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF COTENANTS.

The possession of one tenant asserting an exclusive right to the land under a deed conveying the land to him by specific description is adverse to cotenants having notice of the deed.—Ames v. Howes, 13 Idaho, 756, 93 Pac. 35.

The registration of a deed under which a tenant in common claims exclusive right to the land is notice thereof to his cotenants.—Ames v. Howes, 13 Idaho, 756, 93 Pac. 35.

A remainderman in expectancy took a deed in January, 1902, from the life tenant and at a time when it could not be known or foreseen whether the life estate would mature into a fee simple title or the remaindermen would ever acquire any title or interest in the estate, and the deed thus executed purported to convey an absolute and fee simple title to the estate, and the purchaser took such conveyance, believing she was acquiring an absolute estate, and entered into the possession of the property thereunder and continued in the open, exclusive and notorious possession thereof, occupying and cultivating the same continuously until the commencement of an action by the other remaindermen in expectancy in November, 1908, paying all taxes and assessments thereon, and making improvements. Held, that such facts constitute color of title and adverse possession within R. C. 4038, 4039 and 4040, and bar any right of recovery on the part of the other remaindermen in expectancy.—Wilson v. Linder, 21 Idaho, 576, 42 L. R. A., N. S., 242, Ann. Cas. 1913E, 148, 123 Pac. 487.

Equity does not obligate a cotenant to pay out his own money to protect the common title, but it rather permits him to do so, and, when he has done so, it then lays an obligation upon the other cotenants to exercise reasonable diligence and do equity in contributing their shares in the way of reimbursing him for his outlay, and a failure to do so within a reasonable time will be taken as an election on their part to allow him to take the benefit of his expenditure, and the title he has thus acquired for his individual use and benefit.—Wilson v. Linder, 21 Idaho, 576, 42 L. R. A., N. S., 242, Ann. Cas. 1913E, 148, 123 Pac. 487.

Where one of several remaindermen in expectancy was in possession of the property as lessee of the life tenant, paying the annual rental to the life tenant during the years for which the taxes were allowed to go delinquent, and he subsequently buys the property at delinquent tax sale, he is under no obligation to personally bear the expense of such taxes; and it is the duty of the other remaindermen who claim the protection of such tax title to bear their respective shares of the expenses incurred in the purchase of the property and the payment of such taxes and assessments.—Wilson v. Linder, 21 Idaho, 576, 42 L. R. A., N. S., 242, Ann. Cas. 1913E, 148, 123 Pac. 487.

The rule that a cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and assert it against his companions in interest is applied in this case to a joint remainderman in expectancy, and accordingly a remainderman in expectancy cannot acquire a tax title to the property so as to exclude or cut off the expectancy of his coremaindermen where the expectant interests flow from a common title, provided the other remaindermen contribute or offer to contribute their respective shares of the money expended for the protection of such title within a reasonable time.—Wilson v. Linder, 21 Idaho, 576, 42 L. R. A., N. S., 242, Ann. Cas. 1913E, 148, 123 Pac. 487.

Where a remainderman in expectancy has purchased the land at tax sale, and other remaindermen with like expectant interests, all flowing from a common source, seek the protection of the tax deed acquired under such purchase, equity imposes upon them the duty of paying or offering to pay their respective shares of the money thus expended, and they must do so within a reasonable time in order to entitle them to equitable relief.—Wilson v. Linder, 21 Idaho, 576, 42 L. R. A., N. S., 242, Ann. Cas. 1913E, 148, 123 Pac. 487.

Where a remainderman in expectancy purchased the property at tax sales for the taxes imposed for the years 1900 and 1901, and his coremaindermen in expectancy had notice of this fact, and did not contribute or offer to contribute their respective shares, and thereafter in November, 1908, commenced an action to have their respective titles in expectancy in the property quieted, and still did not pay or offer to pay their share of the money expended to protect such tax title, they are guilty of such delay and laches and lack of equity as to preclude any right of recovery.

Wilson v. Linder, 21 Idaho, 576, 42 L. R. A., N. S., 242, Ann. Cas. 1913E, 148, 123 Pac. 487.

Where a lateral ditch has been constructed by several persons as co-owners, and it becomes necessary to repair said ditch, and all the co-owners agree upon the improvement, and such improvement is made by all the co-owners except one, who does not contribute to the same and such improvement is used as a part of the ditch, and permission is given to the cotenant, who refused to contribute to use said ditch for one year, and thereafter he demands his water through said pipe-line and through the said ditch, and offers to pay his share, the co-owners who constructed the same cannot deprive him of his interest in said canal and the portion improved by the pipe upon his paying his share of such expenses.—*Keyser v. Morehead*, 23 Idaho, 501, 130 Pac. 992.

A tenant in common is entitled to contribution for expenditures absolutely necessary for the benefit and preservation of the common property, and to charge the cotenants with their proportion of the reasonable expenses incurred fairly and in good faith for the benefit of the common property.—*Keyser v. Morehead*, 23 Idaho, 501, 130 Pac. 992.

Editorial Notes.

Adverse possession by one tenant in common against another: 13 Am. Dec. 140.

Purchase of outstanding superior title by cotenant: 28 Am. Dec. 83.

Adverse possession, against cotenants terminated as to one, when terminates as to all: 33 Am. Dec. 629.

Adverse possession by one cotenant, when will create title by prescription: 109 Am. St. Rep. 609.

Tax title, right of cotenant to acquire and enforce: 116 Am. St. Rep. 367; 8 Ann. Cas. 988; 17 Ann. Cas. 1199.

Right of joint remainderman in expectancy to acquire tax title to property: Ann. Cas. 1913E, 152.

Effect of conveyance by one cotenant to third person to found adverse possession against others: 32 L. R. A., N. S., 702.

III. RIGHTS AND LIABILITIES OF CO-TENANTS AS TO THIRD PERSONS.

S. had title to sixty-eight acres of land and entered into a contract with third persons to clear the land of sagebrush, plow and cultivate it, such third persons to furnish the fruit trees and do certain other work in connection with planting said land to fruit, in consideration of which S. should own one-half thereof and such third persons the other half. S. thereafter sells his one-half interest in said land to B. with the knowledge and consent of such third persons and she takes possession of said land and proceeds to comply with S.'s part of said contract in regard to the cultivation of said land, and thereafter the third persons and one H. enter into negotiations with B. for the purchase of her one-half interest in said land, and finally purchase the same for the sum of \$2,500, and such third

persons and H. form the plaintiff corporation, which takes over the title to said land. Held, that B. and her grantor are not liable to said corporation for one-half of said land at the rate of \$250 per acre, or any other sum, under the terms of said contract.—*Twin Falls Orchard etc. Co. v. Salsbury*, 20 Idaho, 110, 117 Pac. 118.

Where tenants in common own certain real estate, the legal title to which is in one of them, and the others consent that the one so holding the title may transfer or sell his interest therein, they thereby accept the purchaser as a tenant in common with them and would have no more right of action against such purchaser under the contract between them than they would have had against their former cotenant had he held the title to the property himself.—*Twin Falls Orchard etc. Co. v. Salsbury*, 20 Idaho, 110, 117 Pac. 118.

TENDER.

Withdrawal, as authorizing the striking of defense of fraud from answer. See Ejectment.

Sufficiency of, under escrow agreement. See Escrows.

Waiver by subsequent acceptance. See Contracts, (V).

A tax, levied or authorized by the territorial legislature, is a debt within the meaning of the act of Congress authorizing the issue of legal tender treasury notes.—*Haas v. Misner*, 1 Idaho, 170.

"Tender" is an unconditional offer of a debtor to the creditor of the amount of his debt. It is the real amount of the debt as fixed by the law, the purpose being to enable the debtor to relieve himself of interest and costs, and to relieve his property of encumbrance by offering his creditors all that he has any right to claim. It does not mean that the debtor must offer an amount beyond reasonable dispute, but the amount actually due. *Kelley v. Clark*, 23 Idaho, 1, 31, 129 Pac. 921.

Editorial Notes

Sufficiency and effect of tender: 77 Am. Dec. 470; 30 Am. St. Rep. 460.

TERRITORIES.

Authority of territorial legislature to limit jurisdiction of probate court. See Courts, I.

Territorial courts. See Courts, I.

The supreme court cannot render judgment against the territory for costs.—*Beachy v. Lamkin*, 1 Idaho, 50.

Where the territory is liable for costs in an action, the account must be presented in the usual way and the liability discharged as all others are.—*Beachy v. Lamkin*, 1 Idaho, 50.

Act of Congress of March 3, 1863, organizing the territory of Idaho by cutting off certain territory from the already organized territories of Washington, Dakota, Nebraska and Utah, contained no provisions recognizing former laws. Held, that none of the criminal laws of the territory out of which Idaho was organized had any application in the new territory.—*People v. Williams*, 1 Idaho, 85.

Claims against the territory must be presented to the controller with the evidence in support thereof, within two years after the same have accrued.—*Crutcher v. Cram*, 1 Idaho, 372.

The designation, "attorney for said territory," as used in the organic act of Idaho territory, is synonymous with that of "the attorney of the United States" in the organic act of Washington territory.—*People v. Heed*, 1 Idaho, 402.

A territorial legislative assembly is limited in its expenses to the amount provided by Congress, and cannot appropriate money from the territorial treasury to pay attaches not authorized by the act of Congress.—*Stevenson v. Moody*, 2 Idaho, 260, 12 Pac. 902.

The legislative power of the territory extends to all "rightful subjects of legislation" subject to the limitations placed thereon by the constitution of the United States.—*Taylor v. Stevenson*, 2 Idaho, 180, 9 Pac. 642.

The number of officers and attaches of the territorial legislative assembly is determined by the laws of the United States, and cannot be increased by any act of the legislative assembly itself.—*Stevenson v. Moody*, 2 Idaho, 260, 12 Pac. 902.

TEST OATH.

"Test oath" as qualification of voter. See Elections, IV.

Constitutionality of test oath act. See Constitutional Law, VIII.

THEATERS AND SHOWS.

Moving picture show within Sunday closing law. See Sunday.

THREATS.

Affecting validity of contract. See Contracts, I, (E).

As defense in prosecution for resisting officer. See Obstructing Justice.

Evidence of threats in criminal prosecutions. See Criminal Law, and titles of particular crimes.

Under R. C. 7080 and 7081, "extortion" is the obtaining of property from another with his consent, induced by a wrongful force or fear or under color of official right, and fear such as will constitute extortion may be induced by a threat to accuse the party of the commission of a crime.—*Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069.

Although one party has committed a crime in the theft of property from another, the party whose property is thus taken is not justified and cannot be protected by the courts in extorting money from the one who committed the theft under threats of arrest and imprisonment, where he uses such threats as a means of procuring a payment from the guilty party in excess of the reasonable value of the property taken.—*Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069.

W. was accused by B. of wrongfully and unlawfully converting and appropriating goods and property from B.'s store and threatened W. with arrest and prosecution, and W. thereupon paid B. the sum of \$2,150,

and W. thereafter prosecuted his action against B. to recover the same on the ground that it was procured through duress. Held, that the jury should have been instructed that if they found the payment was made under duress, and that any part of the whole thereof was justly due from W. to B. as the value of property unlawfully converted and appropriated, that W. should not be allowed to recover such part of the payment so made as represented the reasonable value of the property taken or the debt due.—*Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069.

Editorial Notes.

Threats, duress per minas: 30 Am. St. Rep. 337.

Liability as for extortion of one who obtains property believed to belong to himself or to person for whom he is acting: Ann. Cas. 1913D, 453.

TIME.

Period of publication of summons. See Process, II. As essence of contract. See Specific Performance.

When of the essence of the contract. See Contracts, II, (D).

As essence of contract for sale of real estate. See Vendor and Purchaser, III, VI.

For filing certificate of nomination. See Elections, VI.

Damages recoverable for loss of time. See Damages, VIII.

Right to sue on note payable at bank after closing hours on day note is due. See Bills and Notes, VIII.

To plead. See Pleading.

Where a note due one day after date is made on Saturday, the maker has until the close of business hours on Monday in which to pay the same.—*Sabin v. Burke* (on rehearing), 4 Idaho, 179, 37 Pac. 352.

The judgment-roll of a suit tried in a California court showed that the period of publication of the summons expired on May 28th and that the judgment was entered on June 29th following. Held, that thirty days after the expiration of the period of publication had expired before the entry of judgment.—*Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

Under the provisions of section 10 of the direct primary law, the time for filing an acceptance of nomination by a candidate is computed by excluding the first day and including the last day, unless the last day is a holiday, in which case it is also excluded, and the candidate has until the following legal day to file his acceptance.—*Seawell v. Gifford*, 22 Idaho, 295, Ann. Cas. 1914A, 1132, 125 Pac. 183.

R. C. 11 provides that a holiday shall be excluded, when it is the last day in which any act provided by law is to be done, and section 12 refers to an act which is to be done upon a particular day; and said sections have no application to a case where the thirty-day period begins on a Sunday, as the election law requires nomination papers to be filed at least thirty days prior to the date of the primary, and such paper cannot be legally filed within such thirty-day period.—*Seawell v. Gifford*, 22 Idaho, 295, Ann. Cas. 1914A, 1132, 125 Pac. 183.

Editorial Notes.

Computation of time: 7 Am. Dec. 250; 46 Am. Rep. 410; 78 Am. St. Rep. 872.

Computation of time, fractions of a day, when will be considered: 26 Am. Dec. 234; 2 Ann. Cas. 135.

Inclusion of day of accrual of action in computing limitation against action: Ann. Cas. 1913D, 1068; 12 Ann. Cas. 58; 49 L. R. A. 193; 15 L. R. A., N. S., 686.

Computation of time for performance of act required by statute when last day falls on Sunday: 7 Ann. Cas. 325; 20 Ann. Cas. 1318.

TORTS.

Joint tort-feasors as proper parties defendant. See Parties, II.

Joint liability for negligence. See Negligence, I.

Negligence in operating electric light plant. See Electricity.

A complaint alleged that while plaintiff in the exercise of due care was crossing a public street in a city, defendant's agent negligently, carelessly and wantonly drove a team and wagon against her, striking her on the head and inflicting great physical injuries; that at the time of the injury defendant's team and wagon were being driven in a fast and furious manner, contrary to the provisions of a city ordinance forbidding fast driving; that by the blow so struck plaintiff was knocked violently to the ground and suffered great physical injuries thereby; that she was severely wounded and bruised thereby and suffered great physical and mental pain; that she was permanently injured; and that she was damaged in the sum of \$2,500. Held, sufficient as against a demurrer based (1) on the ground of failure to state facts sufficient to constitute a cause of action and (2) on the ground that complaint does not definitely state the injuries received by plaintiff.—*Hoehnan v. New York Dry Goods Co.*, 8 Idaho, 196, 67 Pac. 798.

No one is liable for damages caused by the forces of nature, but he who wrongfully augments and accelerates those forces is liable for the damages caused by his wrongful acts. *Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075; *Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 35 L. R. A., N. S., 824, 113 Pac. 92.

In an action to recover damages for a tort, the complaint should allege the place where the injury occurred, in order to give the defendant an opportunity to set up all defenses which might arise by reason of the law of the place where the injury occurs.—*McClain v. Lewiston etc. Racing Assn.*, 17 Idaho, 63, 25 L. R. A., N. S., 691, 104 Pac. 1015.

TOWNS.

See Municipal Corporations.

TOWNSITE.

On government lands. See Public Lands, II, (B), 4.

TREATIES.

With relation to Indians and Indian lands. See Indians.

Rights of Chinese under treaty. See Aliens.

TREES.

See Logs and Logging.

Warranty in sale of nursery trees. See Sales, VI.

TRESPASS.

Action for trespass cannot be set up as counterclaim in action on contract. See Setoff and Counterclaim.

Separate trespasses by different persons, joinder of causes of action. See Action, III.

Civil trespass will not justify shooting trespasser. See Assault and Battery.

Entering on lands of another for purpose of appropriating water. See Waters and Watercourses, VI, (A).

Where a complaint is based on R. S. 4531, giving treble damages for the wrongful cutting or removal of timber, and plaintiffs on the trial expressly waive their right to have the damages trebled, defendants are not prejudiced by such waiver.—*Gumaer v. White Pine Lbr. Co.*, 11 Idaho, 591, 83 Pac. 771.

Under an action of trespass *quare clausum fregit*, where the plaintiff does not allege title either in fee or for a term in himself, he must show actual possession of the realty at the time of the trespass.—*Steltz v. Morgan*, 16 Idaho, 368, 101 Pac. 1057.

The original owner of real estate, whose title has been divested by a tax deed, cannot maintain trespass against the holder of a valid tax deed for entering into possession of the premises, unless such original owner maintains and is in actual possession of the premises at the time of the trespass.—*Steltz v. Morgan*, 16 Idaho, 368, 101 Pac. 1057.

R. C. 4531, authorizing treble damages for unlawfully cutting and carrying off timber from the lands of another, is not applicable where it is not shown that the trespass was willfully and intentionally committed.—*Menasha Woodenware Co. v. Spokane etc. Ry. Co.*, 19 Idaho, 586, 115 Pac. 22.

An action to recover treble damages under R. C. 4531, for unlawfully cutting timber, where it is not alleged that the damage was committed willfully or intentionally, does not come within the purview of said section, but is good as an action at common law, which may entitle the plaintiff to recover his actual damages.—*Menasha Woodenware Co. v. Spokane etc. Ry. Co.*, 19 Idaho, 586, 115 Pac. 22.

A trespasser upon the lands or possession of another cannot initiate a legal right which in itself is dependent for its inception upon a rightful actual entry on such land in order to do the thing necessary to initiate such right.—*Batterton v. Douglas Mining Co.*, 20 Idaho, 760, 38 L. R. A., N. S., 1121, 120 Pac. 827.

Any person who is present at the commission of a trespass, encouraging or inciting the

same, is liable as a principal.—*Lee v. Boise Development Co.*, 21 Idaho, 461, 122 Pac. 851.

Editorial Notes.

Cotrespassers, who are and their liability: 73 Am. Dec. 137.

Timber, statutory penalties for cutting, destroying, or carrying away: 1 Am. St. Rep. 496.

TRIAL.

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 Trial of criminal prosecutions. See Criminal Law, and titles of particular crimes.

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I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

Where an action at law is brought and an equitable defense is interposed by a cross-complaint, and also in an action cognizable in equity where a cross-action at law is interposed, the proper rule of procedure for the court is to hear and dispose of the equitable cause of action before proceeding to try the issues at law.—*Penninger Lateral Co. v. Clark*, 22 Idaho, 397, 126 Pac. 524.

II. DOCKETS, LISTS AND CALENDARS.

(No paragraphs.)

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

Motion to compel defendant to file affidavit in foreclosure proceedings. See *Chattel Mortgages*, IX, (B).

In actions of breach of contract. See *Contracts*, VI, (E).

It is improper for a trial judge to comment on the evidence or to make statements of fact in their presence.—*McKissick v. Oregon etc. Ry. Co.*, 13 Idaho, 195, 89 Pac. 629.

In an action brought to cancel promissory notes, in which the plaintiff alleges that such notes have been paid by a return of the property for which they were given, in accordance with the contract of sale, and to recover partial payments made thereon, the affirmative is with the plaintiff, and the plaintiff should have the right to open and close the evidence and argument, and it is error for the court, over the objection of the plaintiff, to deny the plaintiff such right.—*Harrison v. Russell*, 17 Idaho, 196, 105 Pac. 48.

R. C. 4928 provides a remedy by which one person can require another to come into court for the purpose of having determined an adverse claim which the latter may claim to hold against the former for money or property upon an alleged obligation, and in such action the plaintiff must prove the allegations of his complaint, and has the right to open and close the case, as the action is not one to require the defendant to bring suit upon his pretended claim or obligation, but is purely a statutory action, in which the adverse claim may be adjudicated and determined.—*Harrison v. Russell*, 17 Idaho, 196, 105 Pac. 48.

The trial court must avoid remarks that tend to give to the jury the impression that counsel is asking foolish questions and trifling with the court, and thus create prejudice.—*Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82.

The burden of proof, with its incident right to open and close, naturally and necessarily is in the first instance with the plaintiff or party who initiates the action, suit, or proceeding, and remains with such party so long as it continues incumbent upon him to make any proof whatever. When the defendant, either by an admission in express and absolute terms or by refraining from denial of the plaintiff's cause of action and alleging affirmative matter in avoidance of it, renders it wholly unnecessary for the plaintiff to give

any evidence whatever to have a complete recovery of all that he claims, the burden and right are with the defendant.—*Grisinger v. Hubbard*, 21 Idaho, 469, Ann. Cas. 1913E, 87, 122 Pac. 853.

Editorial Notes.

Effect of denial of right to open and close: Ann. Cas. 1912D, 251.

IV. RECEPTION OF EVIDENCE.

Examination of witnesses in general. See Witnesses, III.

Examination of expert witness. See Evidence, XII, (D).

(A) INTRODUCTION, OFFER AND AD-MISSION OF EVIDENCE IN GENERAL.

Nature, scope and limits of cross-examination. See Witnesses, III, (B).

Where documentary evidence is in the possession and under the control of a party to a suit, which is material to the adverse party, he cannot be required to produce it, except on due notice; but if such party has the evidence in his possession in court at the trial, notice upon the trial is sufficient; otherwise, notice must be served in time to enable him to produce it on the hearing of the case.—*Alvord v. United States*, 1 Idaho, 585.

Allowing a party to identify and introduce exhibits on cross-examination of his adversary's witness is bad practice and should be permitted only where the exhibit contradicts something the witness has testified to upon his examination in chief or is intimately connected with something about which he has testified.—*Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868.

(B) ORDER OF PROOF, REBUTTAL AND REOPENING CASE.

Expert evidence as to custom, limitation as to rebuttal evidence. See Banks and Banking, III, (O).

Rebutting evidence is that which is given to explain, repel, counteract or disprove testimony or facts given in evidence by the opposite party; and the general rule is that anything may be given as rebutting evidence, which is a direct reply to that introduced by the other side.—*People v. Page*, 1 Idaho, 189.

It is a general rule that the defendant should not open the defense by cross-examination of plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court.—*Hopkins v. Utah Northern Ry. Co.*, 2 Idaho, 300, 13 Pac. 343.

The practice of permitting the introduction of evidence in chief, after the close of the case, is largely within the discretion of the court, but should be discouraged to the extent of requiring the party to show some reasonable excuse, such as ignorance of the existence of such evidence, or oversight, inability to produce the evidence before closing, or other good cause, before permitting a party to open a case after it has been closed.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Where in a suit for services a letter from plaintiff has been identified and through an oversight of defendant's attorney it is not offered when he is putting in defendant's evidence in chief, it is reversible error to subsequently exclude it.—*Pelikan v. Bidpath*, 8 Idaho, 617, 71 Pac. 125.

Plaintiff cannot be required, before he has rested his case, to put in evidence rebutting evidence given by his own witnesses on cross-examination; nor can he be required to put in any rebuttal evidence until defendant has rested.—*Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 8 L. R. A., N. S., 903, 10 Ann. Cas. 328, 88 Pac. 245.

The granting or refusal of a motion to reopen the trial of an action for the purpose of introducing rebuttal testimony is within the legal discretion of the court.—*Hall v. Jensen*, 14 Idaho, 165, 93 Pac. 962.

The trial court did not err in opening the case and permitting the parties to introduce additional evidence.—*Union Sav. etc. Co. v. McClain*, 23 Idaho, 325, 130 Pac. 84.

Editorial Notes.

Right of court to reopen case after submission to jury for reception of additional evidence: Ann. Cas. 1913C, 1010.

(C) OBJECTIONS, MOTIONS TO STRIKE OUT AND EXCEPTIONS.

Comment by counsel on evidence stricken. See post, V.

It is not error of the trial court to strike out evidence which is hearsay and immaterial, and which could in no way affect the rights of the opposite party.—*Valentine v. Rosenhaupt*, 19 Idaho, 130, 112 Pac. 685.

In a suit to quiet title, where the defense sets up title by adverse possession, and offers to prove payment of taxes by oral testimony, and objection is sustained to such evidence on the ground that it is not the best evidence, and the facts of the payment of taxes are brought out by the same witness on cross-examination, where no objection is made, the evidence is competent, and must receive consideration by the court.—*Cramer v. Walker*, 23 Idaho, 495, 130 Pac. 1002.

Editorial Notes.

Right to have direct testimony stricken out where cross-examination is interrupted wholly or in part by sickness or death of witness: 15 L. R. A., N. S., 493.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

Counsel should refrain from comments upon the motive of opposing counsel in making objections to the introduction of evidence.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Counsel, in making opening statements to the jury, are confined to pointing out the issues of fact made by the pleadings, and to a statement of the facts expected to be proved and have no right to state to the jury their

views of the law of the case.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

The fact that plaintiff's counsel, in his opening statement to the jury, fails to state facts sufficient to entitle plaintiff to recover is not ground for granting a nonsuit before evidence is offered to support the plaintiff's claim.—*Wheeler v. Oregon R. etc. Co.*, 16 Idaho, 375, 102 Pac. 347.

Where an amended answer has been filed in a case which omits and abandons certain affirmative defenses pleaded in the original answer, the trial court should not permit the counsel for the plaintiff in his opening statement to read and comment upon the defenses contained in the original answer, and which have been omitted and abandoned in the answer on which the case is to be tried.—*Rasi-cot v. Royal Neighbors of America*, 18 Idaho, 85, 138 Am. St. Rep. 180, 108 Pac. 1048.

Where objectionable and improper matters are alleged in a complaint and are stricken from such complaint because the same do not constitute any part of the cause of action, and are of such character as would prejudice the jury against the defendant, it is error for the trial court to permit counsel to discuss or comment upon such matters in his opening statement to the jury.—*Unfried v. Libert*, 20 Idaho, 708, 119 Pac. 885.

Where counsel in his argument to the jury deliberately goes outside of the evidence and states immaterial matters or matters not shown by the evidence, and attempts to incite the passion or prejudice of the jury in favor of his client, the judgment will be set aside, even though the court thereafter instructs the jury that they must pay no attention to what the counsel has said, unless it affirmatively appears that the verdict was right and would have been the same in the absence of such unauthorized argument.—*Goldstone v. Rustemeyer*, 21 Idaho, 703, 123 Pac. 635.

Editorial Notes.

Argument of counsel, limitations which may be imposed upon: 46 Am. St. Rep. 23; 25 L. R. A., N. S., 1027; 42 L. R. A., N. S., 209.

Attorneys, misconduct at, and its effect: 100 Am. St. Rep. 690.

VI. TAKING CASE OR QUESTION FROM JURY.

Dismissal where plaintiff offers no proof to support complaint. See Pleading, XI.

(A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

Where plaintiff's evidence makes a prima facie case, a motion for nonsuit is properly denied.—*Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360; *Idaho Mercantile Co. v. Kalan-quin*, 7 Idaho, 295, 62 Pac. 925; *Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868.

Where there is any competent evidence to support plaintiff's complaint, a motion for nonsuit should be denied.—*Martin v. Dowd*, 8 Idaho, 453, 69 Pac. 276; *York v. Pacific etc. Ry. Co.*, 8 Idaho, 574, 69 Pac. 1042; *Idaho*

Comstock Min. etc. Co. v. Lundstrum, 9 Idaho, 257, 74 Pac. 975.

Where a party shows no right to recover under any possible state of the proof, the court is not bound to submit the case to a jury.—*Gorman v. Commissioners of Boise County*, 1 Idaho, 655.

Where there is evidence to support the case, a nonsuit will not be granted.—*Black v. City of Lewiston*, 2 Idaho, 276, 13 Pac. 80.

Where upon all the facts and circumstances there is a reasonable chance or likelihood of the conclusions of reasonable men differing, the question is one for the jury.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

Where witnesses testify positively that a bell was rung and a whistle sounded on a locomotive engine and that the engine was at the same time displaying a headlight and other witnesses testify that they did not see a headlight and did not hear a bell or whistle, and it appears from the evidence that the latter witnesses were looking and listening for the train and were in a position near the track where they could see and hear equally as well as the other witnesses, the evidence of those testifying to the negative is entitled to go to the jury and be considered by them the same as that of the witnesses testifying to the positive.—*Fleenor v. Oregon etc. R. Co.*, 16 Idaho, 781, 102 Pac. 897.

Where evidence of the rental value of an entire tract of land has been given, and the evidence shows that the cross-complainants have been deprived of the use of only a portion of said tract, the rental value of which is not shown, there is no error in directing a motion for nonsuit on the cross-complaint.—*Lee v. Boise Development Co.*, 21 Idaho, 461, 122 Pac. 851.

Where there is evidence introduced for the plaintiff which tends to prove the cause of action as alleged in the complaint, and a prima facie case is made by such proof, the evidence is sufficient to go to the jury, and it is error for the court to grant a motion for a nonsuit.—*Culver v. Kehl*, 21 Idaho, 595, 123 Pac. 301.

Where certain expert witnesses testify that a dam is a given elevation above sea level, and that it did not and could not hold back flood waters and cause the overflow of lands above that elevation, and other witnesses, who saw the lands at the time of high or flood water season, testified that it actually was flooded and submerged to a higher elevation than that testified to by the expert witnesses, there is such a substantial conflict in the evidence as to go to the jury; and the conflict is a proper matter to be settled by the jury as a disputed fact in the case.—*Petajaniemi v. Washington Water Power Co.*, 22 Idaho, 20, 124 Pac. 783.

Where five or six witnesses testify positively that the bell of the engine which struck plaintiff was ringing and plaintiff testified that he did not hear the bell, the court was justified in instructing the jury as a matter of law that the bell was ringing.—*Neil v. Idaho etc. R. Co.*, 22 Idaho, 74, 125 Pac. 331.

The evidence of D., called for the purpose of identifying H., who was defendant in the suit, as being at a certain place on a certain day, when objected to as not tending to sustain the verdict, presents a question which the jury alone was called upon to determine in arriving at the verdict in the case and was not a question to be determined by the court. This evidence might aid other evidence, and the evidence altogether might be sufficient to sustain the verdict, although standing alone it might not sustain the verdict.—*Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho, 304, 133 Pac. 669.

Editorial Notes.

Questions of law or fact: 14 L. R. A. 559.

(B) DISMISSAL OR NONSUIT.

Evidence in action by real estate broker sufficient to prevent granting nonsuit. See *Brokers*.

Nonsuit in action for false imprisonment. See *False Imprisonment*.

Right of appeal from judgment of nonsuit. See *Appeal and Error*, III, (D).

Appeal limited to grounds stated on motion for nonsuit. See *Appeal and Error*, V, (B).

Insufficiency of complaint not ground for dismissal or nonsuit. See *Dismissal and Nonsuit*, II.

For insufficiency of opening statement by counsel. See *ante*, V.

Under R. S. 4354, subdivision 5, the court may enter a judgment of nonsuit where the plaintiff fails to prove a sufficient case for the jury.—*Lewis v. Lewis*, 3 Idaho, 645, 33 Pac. 38.

A party moving for a nonsuit must specify particularly the points relied on for such nonsuit or the motion will be denied.—*Idaho Mercantile Co. v. Kalanquin*, 7 Idaho, 295, 62 Pac. 925.

A motion for a nonsuit on the ground that "plaintiff has shown by his own evidence that he has no right of recovery in this action" is properly denied as being too vague, indefinite and uncertain.—*Givens v. Keeney*, 7 Idaho, 335, 63 Pac. 110.

Under R. S. 4354, subdivision 5, providing that nonsuit may be entered by the court upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury, a nonsuit should not be granted until the plaintiff rests his case or fails to prove a sufficient case for the jury and rests.—*Rauh v. Oliver*, 10 Idaho, 3, 77 Pac. 20.

A motion for a nonsuit should be denied unless the evidence wholly fails to establish a right of recovery.—*Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461.

On motion for nonsuit, defendant is deemed to have admitted all the facts of which there is any evidence and all the facts which the evidence tends to prove.—*Later v. Haywood*, 12 Idaho, 78, 85 Pac. 494; *Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497; *Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 8 L. R. A., N. S., 903, 10 Ann. Cas. 328, 88 Pac. 245; *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161, 15 L. R. A., N. S., 254,

94 Pac. 432; *Mineau v. Imperial Dredge etc. Co.*, 19 Idaho, 458, 114 Pac. 23.

A motion for nonsuit should point out specifically the grounds on which the same is based and the particulars in which it is claimed the evidence does not support the allegations of the complaint or entitle the plaintiff to recover.—*Colvin v. Lyons*, 15 Idaho, 180, 96 Pac. 572.

A motion for a nonsuit admits the truth of the plaintiffs' evidence, and every inference of fact that can be legitimately drawn therefrom, and on such motion the evidence must be interpreted most strongly against the defendant.—*Colvin v. Lyons*, 15 Idaho, 180, 96 Pac. 572.

R. C. 4354, prescribing the grounds on which a judgment of nonsuit may be entered, does not authorize a motion for nonsuit until all of the evidence of the plaintiff has been put in or offered and the plaintiff rests his case.—*Wheeler v. Oregon etc. Nav. Co.*, 16 Idaho, 375, 102 Pac. 347.

Failure of a complaint to state a cause of action is not ground for motion for nonsuit. *Strong v. Western Union Tel. Co.*, 18 Idaho, 289, Ann. Cas. 1912A, 55, 109 Pac. 910.

On application for a nonsuit, the defendant is deemed to admit all of the facts which the evidence tends to prove.—*McDaniel v. Moore*, 19 Idaho, 43, 112 Pac. 317.

It is a settled rule in this state that on a motion made by the defendant for a nonsuit, after the plaintiff has introduced his evidence and rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence, and all the facts which the evidence tends to prove, and that the evidence must be interpreted most strongly against the defendant.—*Culver v. Kehl*, 21 Idaho, 595, 123 Pac. 301.

Editorial Notes.

Nonsuit, compulsory, when should be granted: 24 Am. Dec. 620.

Right to direct verdict or enter nonsuit on opening statement of counsel: 29 L. R. A., N. S., 218.

(C) DIRECTION OF VERDICT.

Where plaintiff refuses to introduce evidence to prove his case, and defendants fail to produce evidence to prove their cross-demand against plaintiff, the action should be dismissed or judgment of nonsuit entered and it is error to instruct the jury to find for the defendant.—*Simmons v. Cunningham*, 4 Idaho, 426, 39 Pac. 1109.

Where the evidence clearly shows that plaintiff has not made his case, the jury should be instructed to bring in a verdict for defendant.—*Holt v. Spokane etc. Ry. Co.*, 4 Idaho, 443, 40 Pac. 56.

Where the pleadings present an issue of fact, and there is evidence which tends to support the allegations of the complaint, and it is necessary to determine such issue of fact in order to determine whether the plaintiff or the defendant shall recover, an instruction

which directs the verdict of the jury for the defendant has the same effect as the sustaining of a motion for a nonsuit, and admits the truth of the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and is to the effect that there is no evidence supporting the plaintiff's case and that the evidence would not support a verdict, even if found for the plaintiff; and, if there is evidence supporting the complaint, such instruction is erroneous.—*Keane v. Pittsburg Lead Min. Co.*, 17 Idaho, 179, 105 Pac. 60.

Editorial Notes.

Right of court to direct verdict in favor of one codefendant at close of plaintiff's case: *Ann. Cas.* 1912D, 1061.

VII. INSTRUCTIONS TO JURY.

Instructions as to damages in general. See *Damages*, VIII.

(A) PROVINCE OF COURT AND JURY IN GENERAL.

An instruction that, in passing upon the credibility of witnesses, the jury "should reconcile all of the different parts of the testimony, if possible, and that it is only when it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated as to such statement by other evidence, that the jury is warranted in disregarding the entire testimony of such witness," does not infringe on the province of the jury.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

In an action upon a promissory note, where fraud and breach of warranty are plead as a defense, it is error for the trial court to incorporate as a part of an instruction the following language: "The court charges you as a matter of law that a willful ignorance of facts is as much evidence of bad faith as actual knowledge of the same." By use of this language the court invades the rights and privileges of the jury in determining the weight of the evidence, inasmuch as the court advises the jury that willful ignorance of facts has as much weight as actual knowledge of the same.—*Park v. Brandt*, 20 Idaho, 660, 119 Pac. 877.

Editorial Notes.

Jury, invasion by the court of the province of, what deemed to be: 14 Am. St. Rep. 36.

(B) NECESSITY AND SUBJECT MATTER.

Where plaintiff's witnesses testified positively to facts and defendant testified to conclusions and to a want of recollection, an instruction "that when witnesses are otherwise equally credible, greater weight and credit should be given to those who swear affirmatively or positively to a fact, rather than to those who swear negatively or to a want of recollection," should have been given. *Idaho Mercantile Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933.

In an action on a note, an instruction that the positive statement of the plaintiff as to

his actions in purchasing the note is not necessarily to be taken as conclusive, but the jury should consider all of the circumstances and facts known and given in evidence and determine from all of the facts and circumstances, together with the statements of the plaintiff, whether the plaintiff is a bona fide purchaser, is proper.—*Park v. Brandt*, 20 Idaho, 660, 119 Pac. 877.

An instruction that the jury has no right to disregard the testimony of any witness, that it must give careful consideration and weight to the testimony of every witness, and, wherever a witness has made a statement that is not corroborated, that should be taken into consideration, is not technically correct, since, where there is a direct conflict in the evidence, which the jury cannot reconcile, they may disregard the testimony of a witness, if his evidence shows he is not worthy of belief. *Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

Where an action is brought to recover a debt alleged to be due for maintaining and keeping up a canal through which water is carried to the respective owners of said ditch, and said cause is put in issue by general denials, and an equitable defense is also filed to said cause of action by a cross-complaint alleging title in the defendant and cross-complainant in the said canal and praying that the title of defendant be quieted, it is error for the trial court to submit to the jury the issues made by the complaint and answer, and also the issues arising upon the cross-complaint and the answer thereto, as a single question, to be determined by a general verdict.—*Penninger Lateral Co. v. Clark*, 22 Idaho, 397, 126 Pac. 524.

It is not error for a trial court to give instructions requested by counsel on each side of the case, setting forth the law applicable to the theory of the case advanced by the party requesting the instruction, if such instructions correctly state the law, and there is any evidence in the case which would justify the jury adopting the theory advanced by either the one or the other of the respective parties. *Keim v. Gilmore etc. R. Co.*, 23 Idaho, 511, 131 Pac. 656.

Editorial Notes.

Instructions to jury to disregard evidence of witnesses who are competent to testify: 86 Am. Dec. 328.

Instructions to jury, what are proper subjects of: 72 Am. Dec. 538.

(C) FORM, REQUISITES AND SUFFICIENCY.

It is erroneous to instruct the jury that if they believe the version of the case by one or the other party to be correct, they will find in his favor.—*Ralston v. Plowman*, 1 Idaho, 595.

Where the court instructs a jury on what state of facts they must find a verdict for or against either party, the instructions should include all the facts in the controversy material to the rights of the parties upon the claim of the plaintiff or the defense of the de-

fendant.—*Deasey v. Thurman*, 1 Idaho, 775; *Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

Voluminous instructions tend to uncertainty and to confuse the jury and lose the issue and should not be given.—*Thatcher v. Quirk*, 4 Idaho, 267, 38 Pac. 652.

Instructions in an action against a city for personal injuries examined and compared, and held to be conflicting, inconsistent and confusing.—*Smith v. City of Rexburg*, 24 Idaho, 176, 132 Pac. 1153.

(D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

An instruction setting up a contract not alleged in the pleadings or shown by the evidence was properly refused.—*Henry v. Jones*, 1 Idaho, 48.

Instructions asked are properly refused when they are not based upon some evidence material to the controversy, though correct as abstract principles of law.—*Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48.

In instruction, defining an abstract proposition of law, where there is no evidence in the case to which such instruction is applicable, should not be given.—*Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

Where the complaint alleges the sale of personal property and the payment of cash to the defendant, and the defendant denies the allegations of the complaint and files a cross-complaint alleging that the defendant sold to the plaintiff certain personal property, and that the plaintiff paid part of the purchase price in personal property and cash, and judgment is demanded for the balance of the contract price, and there is evidence tending to support the cross-complaint of the defendant, it is error for the court to instruct the jury that, if the plaintiff, after agreeing to receive the hay, declined to receive the same at the time agreed upon for delivery, then in that event, in order for the defendant to recover damages, he should have established upon the trial the actual market value of such hay at the time fixed for delivery, less the contract price, since defendant was not seeking damages for breach of contract, but was seeking to recover the contract price for which he sold the hay.—*Idaho Implement Co. v. Lambach*, 16 Idaho, 497, 101 Pac. 951.

Where the complaint alleges the sale of personal property and the payment of cash to the defendant, and the defendant denies the allegations of the complaint and files a cross-complaint alleging that the defendant sold to the plaintiff certain personal property, and that the plaintiff paid part of the purchase price in personal property and cash, and judgment is demanded for the balance of the contract price, and there is evidence tending to support the cross-complaint of the defendant, it is error for the court to instruct the jury that the defendant set up an offset for damages against the plaintiff's claim by reason of plaintiff's refusal to receive the property alleged to have been sold by the defendant to the plaintiff.—*Idaho Implement Co. v. Lambach*, 16 Idaho, 497, 101 Pac. 951.

In an action to forfeit an option to purchase water rights, or, in case a forfeiture cannot be had, for damages, an instruction proceeding on the theory that it is an action for the purchase price of the water rights is erroneous.—*Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

In an action against the holders of an option to purchase water rights, which option provided that if the holders found the project practicable they would purchase, an instruction that the liability of defendants is not to be determined on the question whether defendants notified plaintiff that they deemed the project impracticable, but whether, as a matter of fact, they did find the project impracticable, improperly withdrew from the jury the question whether defendants notified plaintiff that they deemed the project impracticable.—*Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

Instructions examined but not stated and held applicable to the evidence.—*Lott v. Oregon etc. R. Co.*, 23 Idaho, 324, 130 Pac. 88.

(E) REQUESTS OR PRAYERS.

Where a defendant asks the court to give certain instructions prepared by him, and the same contain the law of the case, but so mixed with erroneous matter as will probably mislead the jury, it is not error for the court to refuse the whole.—*People v. Buchanan*, 1 Idaho, 681.

Where the court instructs the jury on all the material issues presented by the pleadings and disclosed by the evidence, it is not error to refuse further instructions unless it is shown that the instructions given, or some portions of them, are erroneous.—*Hansen v. Haley*, 11 Idaho, 278, 81 Pac. 935.

The instructions requested by defendant on the subject of contributory negligence were involved, misleading and erroneous, and were rejected by the court, and the court on its own motion instructed the jury that in order to find for the plaintiffs they must be satisfied that the defendant caused plaintiffs' boat "to sink without any fault on the part of the plaintiffs, or either of them." Held, that the instruction is sufficiently favorable to defendant on the question of contributory negligence, in the absence of a request by defendant for a correct instruction on contributory negligence.—*Carscallen v. Coeur d'Alene etc. Transp. Co.*, 15 Idaho, 444, 98 Pac. 622.

The supreme court will not reverse the judgment for failure to give certain instructions where it appears that the trial court gave to the jury instructions which state the essence and substance of the instructions offered and refused.—*Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Where the instructions given fairly stated the law of the case applicable to the issues and evidence, error cannot be predicated on the trial court's failure to instruct more fully in the absence of a request for further instructions.—*Barter v. Stewart Min. Co.*, 24 Idaho, 540, 135 Pac. 68.

Editorial Notes.

Instructions to jury, how to obtain and to review errors in giving or refusing: 99 Am. Dec. 118.

(F) OBJECTIONS AND EXCEPTIONS.

Where the court gives a general charge to the jury and the charge is correct in any material particular, a general exception thereto is insufficient.—*Black v. City of Lewiston*, 2 Idaho, 276, 13 Pac. 80.

(G) CONSTRUCTION AND OPERATION.

The instructions given in a particular case must all be read and viewed together, and if they are not in conflict with each other, and correctly state the law as far as they go, the circumstance that an isolated sentence or paragraph is obscure, incomplete or indefinite will not of itself constitute a ground of reversal.—*Just v. Idaho Canal etc. Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Where instructions when all read together may be harmonized and reconciled, the court will not reverse a judgment because some particular, isolated instruction, when read alone, might be misleading or give the jury an improper understanding as to the law of the case; but where the instructions are in irreconcilable conflict on a decisive or controlling question to be determined by the jury, they cannot be construed together, and where no one can tell which instruction the jury followed, a reversal of the judgment must necessarily follow.—*Portneuf-Marsh etc. Irr. Co. v. Portneuf Irr. Co.*, 19 Idaho, 483, 114 Pac. 19.

Instructions in this case examined, and, when taken together and as an entire statement of the law governing the particular facts of the case, they show that the court was not in error, although some of the instructions do not state the law as fully as might have been given on the particular subject attempted to be embraced in each instruction. *Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

A judgment will not be reversed for the reason that an instruction does not state all the law applicable to the facts of the case, where it appears that other instructions given state the law applicable to the facts of the case when taken into consideration with the instruction to which the objection is made, and the jury has not been misled or misdirected, when all the instructions are considered.—*Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15.

Where an instruction, standing alone, is misleading, but when taken with another instruction is sufficiently explained, and the two instructions taken together correctly state the law, there is no error.—*Quirk v. Sunderlin*, 23 Idaho, 368, 130 Pac. 374.

VIII. CUSTODY, CONDUCT AND DE-LIBERATIONS OF JURY.

Effect of failure to object to alleged misconduct of jury. See Appeal and Error, V, (B).

A verdict arrived at by resorting to chance should be set aside.—*McDonald v. Great Northern Ry. Co.*, 5 Idaho, 8, 46 Pac. 766.

Under R. C. 4383, subdivision 4, it is the duty of the court to send all written instructions to the juryroom for the use of the jury in considering the case, unless one of the parties to the action makes objection to the giving of written instructions, as provided by R. C. 4383, subdivision 6, in which event the court must charge the jury in accordance with the provisions of R. C. 4384 and 4385, unless the parties consent to the giving of oral instructions as provided in R. C. 4383, subdivision 7.—*Hilbert v. Spokane Int. Ry. Co.*, 20 Idaho, 54, 116 Pac. 1116.

Editorial Notes.

Verdict ascertained by averaging the aggregate separate markings of all the jurors: 34 Am. Rep. 815.

IX. VERDICT.

Affidavit of juror to impeach verdict. See New Trial, III.

(A) GENERAL VERDICT.

Failure of the jury to find by their verdict the amount due, when that question is not in controversy, does not deprive the prevailing party of his right to a judgment for the sum admitted to be due by the pleadings.—*Betts v. Butler*, 1 Idaho, 185.

Objections to the form of a verdict should be made before judgment.—*Blackfoot Stock Co. v. Delamue*, 3 Idaho, 291, 29 Pac. 97.

Under R. S. 4397, providing that "in an action for the recovery of money only or specific real property, the jury in their discretion may render a general or special verdict," neither the court, by instructions, nor counsel, by stipulation, in such an action, can enforce the finding of a special verdict by the jury.—*Shaw Lumber Co. v. Manville*, 4 Idaho, 369, 39 Pac. 559.

The objection that a verdict is too vague and indefinite to support the judgment cannot be raised after judgment.—*Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

Under R. C. 4394, where a verdict is reached, but is not agreed to by the entire jury it should be signed by each member of the jury agreeing to the same, and the court should in such cases see to it that the requirements of the statute are complied with; but where this requirement is not observed, but the jury is polled in open court, and ten of them answer that the verdict returned and signed by the foreman is their verdict and their names are entered on the minutes of the court, and no objection or exception is taken to the form of the verdict, and no request is made to have it signed by the jurors agreeing to it, the error is not prejudicial, and the objection cannot be raised for the first time in the appellate court.—*Keim v. Gilmore etc. R. Co.*, 23 Idaho, 511, 131 Pac. 656.

In an action for foreclosure of a mortgage, where the answer raises no issue on any of

the material allegations of the complaint, but sets up a counterclaim for damages arising out of the transaction for which the note and mortgage were given, the only issue to be tried by a jury is the amount of damages sustained by the defendant, and in such a case where the jury returns the following verdict: "We, the jury impaneled in the above-entitled cause, find for the defendant and assess his damages for the sum of \$—,—," such a verdict is indefinite and uncertain and irregular, and is not sufficient upon which to render a judgment, as it does not find any damage in favor of the party alleging damages.—*Moore v. Evans*, 24 Idaho, 153, 132 Pac. 971.

(B) SPECIAL INTERROGATORIES AND FINDINGS.

Findings of fact must be responsive to all the material issues raised by the pleadings.—*Carson v. Thews*, 2 Idaho, 176, 9 Pac. 605; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.

Where there is an inconsistency between the special findings and the general verdict of a jury, the special findings control the judgment.—*Bradbury v. Idaho etc. L. Imp. Co.*, 2 Idaho, 239, 10 Pac. 620.

Findings which are responsive to all the material issues tendered by the pleadings are sufficient.—*Chamberlain v. Woodin*, 2 Idaho, 642, 23 Pac. 177.

Where the issues are numerous, and their nature such as likely to confuse a jury, it will be an abuse of the court's discretion to refuse to submit a special verdict to the jury.—*Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.

The true test as to whether special findings are inconsistent and contradictory, either in themselves or with the general verdict, is whether they would authorize a different verdict or judgment from that given.—*Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

Under R. S. 4397, where the special finding of facts is inconsistent with the general verdict, the special finding controls accordingly.—*Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

The submission of special findings to the jury is, to some extent, a matter of discretion, and it is not an abuse of discretion to refuse to submit interrogatories when the issues are not complicated and the questions to be determined are not so numerous or complex that they will tend to confuse the jury.—*Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.

Findings should be statements only of the ultimate facts in controversy, and not of the probative facts, although findings of probative facts where the ultimate facts necessarily result from them may be sufficient.—*Leggat v. Blomberg*, 15 Idaho, 496, 98 Pac. 723.

Certain findings of fact by the jury in the form of special verdicts held answers to questions of fact, which it was proper for the court to submit to the jury, and constituted a substantial compliance with the request of appellant in relation thereto.—*Menasha Wood. enware Co. v. Spokane etc. Ry. Co.*, 19 Idaho, 586, 115 Pac. 22.

Under R. C. 4396 and 4397, it is discretionary with the jury, in certain designated cases, to find either a general or special verdict; and, where the issues are numerous, and their nature such as likely to confuse the jury, the court should insist on a special verdict, and should formulate the issues into distinct propositions and logical and concise questions; and the power of the court is a discretionary power to determine whether the issues are such that the jury will be aided by the submission of certain questions, where the separate issues are distinctly stated in logical concise questions, so that the jury will be able to intelligently answer the same; and, unless this discretionary power of the trial court is abused, there is no error in refusing to submit to the jury special interrogatories.—*Fodey v. Northern Pac. Ry. Co.*, 21 Idaho, 713, 123 Pac. 835.

Under R. C. 4397, in an action for the recovery of money only or specific real property, the jury in their discretion may render a general or special verdict, and in all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues.—*Norman v. Rose Lake Lumber Co.*, 22 Idaho, 711, Ann. Cas. 1913E, 673, 128 Pac. 85.

Under R. C. 4397, where a special finding of fact is not consistent with the general verdict, the special finding controls the general verdict.—*Calkins v. Blackwell Lumber Co.*, 23 Idaho, 128, 129 Pac. 435.

Editorial Notes.

What special verdict must contain: 24 L. R. A., N. S., 1.

X. TRIAL BY COURT.

(A) HEARING AND DETERMINATION OF CAUSE.

Remarks and conduct of judge. See ante, III.

(B) FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Adoption of findings of jury in equity cases. See Equity, V.

Failure to find on issues in highway proceedings. See Highways, I.

Finding on question of former adjudication unnecessary when court finds against plaintiff on merits. See Divorce, IV, (E).

Form and sufficiency of findings on question of dedication. See Dedication.

Finding on defense of limitations. See Limitation of Actions, V.

Findings on report of referee. See Reference.

Conclusions of law based upon findings of fact outside the issues raised by the pleadings cannot be sustained and will not support a judgment.—*Carson v. Thews*, 2 Idaho, 176, 9 Pac. 605.

Where the findings in an action of fraud are sufficient to sustain the judgment, the fact that the court fails to find upon certain allegations in the complaint which would not affect the result is no cause for a new trial.—*Tage v. Alberts*, 2 Idaho, 271, 13 Pac. 19.

It is not error for the court to amend its conclusions of law after they are filed and

before entering judgment, or to vacate an order directing judgment to be entered for a certain amount, and thereafter render judgment for a different amount when the findings of fact warrant it.—*Curtis v. Walling*, 2 Idaho, 416, 18 Pac. 54.

The findings of the court should be responsive to the allegations in the pleadings and a finding upon such allegation is conclusive as to each item of evidence offered to sustain it.—*Broadbent v. Brumbach*, 2 Idaho, 366, 16 Pac. 555.

The court has the right to amend its findings before judgment.—*McGuire v. Lamb*, 2 Idaho, 378, 17 Pac. 749.

Under R. S. 4407, requiring the trial court, when a case is tried to the court without a jury, to give its decision in writing, in which the facts found and the conclusions of law must be separately stated, such decision should not contain a statement of the case and the reason for the decision, but only the ultimate facts established by the evidence and the conclusions of law resulting therefrom.—*Hamilton v. Spokane etc. R. R. Co.*, 3 Idaho, 164, 28 Pac. 408.

A judgment will not be reversed on the ground that the findings refer to maps and plats on file for the definite description of the property involved, though such practice is not commendable; but if the findings are capable of being made certain by such reference, the judgment will be sustained.—*Murry v. Nixon*, 10 Idaho, 608, 79 Pac. 643.

Where defendant's answer and cross-complaint present no material issues, though considerable evidence thereon is introduced, findings thereon are unnecessary.—*Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339.

In an action on a note given for the balance of the purchase price of a mining claim, defendant alleged that plaintiff agreed to furnish proof of forfeiture on the part of plaintiff's locator for failure to do assessment work, and further that plaintiff had entered into an additional parol agreement extending the time of payment until he perfected title. Defendant's cross-complaint alleged that subsequent to deeding the mining claim to defendant, plaintiff conveyed an undivided half interest therein to a third person, thereby casting a cloud on defendant's title; that thereafter, defendant tendered back a deed to plaintiff for all the interest he had received in the mining claim and demanded that he be reimbursed the portion of the purchase price paid and the amount expended for annual labor and assessment work. Defendant answered the cross-complaint and tendered a deed from the said third person for all the interest received by the conveyance of said half interest. Held, that the matters set up in the answer and cross-complaint did not raise any material issues and hence there was no error in the failure of the trial court to make findings thereon.—*Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339.

Under the allegations of the pleadings, the following findings are held sufficient to support a judgment of dismissal in favor of defendant: "That plaintiff did not purchase or

pay for the 30,000 shares which plaintiff claims defendant holds in trust for him; that the allegations of the complaint are not true and not supported by the evidence; that the allegations of defendant's affirmative defense are proven and true."—*Wilkinson v. Bethel*, 13 Idaho, 746, 93 Pac. 27.

A finding of the court that the sum of \$10,000 came into defendant's hands, that he expended \$6,000 thereof and is indebted to plaintiff for the balance, \$4,000, when the latter fact was denied by the answer and no evidence was offered by the plaintiff to support such allegation, is unsupported and erroneous.—*Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161.

Where the findings of the court upon the affirmative case are necessarily a complete negative of the case as pleaded by the answer, such findings are sufficient.—*Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

A general finding that all the material allegations of the answer are supported by the evidence and true, and that all the material allegations of the complaint in conflict with the foregoing findings are unsupported by the evidence and untrue, is insufficient to support a judgment.—*Sterrett v. Sweeney*, 15 Idaho, 416, 128 Am. St. Rep. 68, 20 L. R. A., N. S., 963, 98 Pac. 418.

Where all the findings of fact in regard to the issues made by the cross-complaint are that the court finds "that there is no competent evidence to sustain the facts as stated in the allegation" (giving its number as it appears in the cross-complaint and following that with the allegation), "and the court finds as a matter of fact" that the allegations of the paragraph are untrue, the finding is insufficient, the vice thereof being in the statement that "there is no competent evidence." *Pittock v. Pittock*, 15 Idaho, 426, 98 Pac. 719.

The finding of ultimate facts includes the finding of all probative facts necessary to sustain the finding of the ultimate facts.—*Leggat v. Blomberg*, 15 Idaho, 496, 98 Pac. 723.

Where an action is brought to foreclose a chattel mortgage and a counterclaim or setoff and a claim for damages because of failure of warranty is set up as a defense, and the question of whether there is anything due the plaintiff under the issues made by the pleadings is submitted to the jury on the evidence and under the instructions of the court, and the jury finds for the defendants in the sum of one dollar, and the court enters judgment thereon, the failure of the court to make further findings of fact is not reversible error.—*Edmundson v. Taylor*, 17 Idaho, 618, 106 Pac. 991.

The jury having determined by the verdict that there was nothing due on the promissory note, the payment of which had been secured by the mortgage sought to be foreclosed, it was not necessary for the court to make findings of fact on the issues made by the complaint to foreclose said mortgage, aside from the finding made by the verdict of the jury.—*Edmundson v. Taylor*, 17 Idaho, 618, 106 Pac. 991.

It is not necessary for the court to make any findings upon issues made by the complaint which are admitted, or not denied, by the answer.—*Edmundson v. Taylor*, 17 Idaho, 618, 106 Pac. 991.

Where the findings of fact cover all the material issues presented by the complaint, and are sufficient to support the judgment, and are inconsistent with the truth of the allegations of a separate defense and impliedly negative such allegations, the judgment will not be reversed because of the failure to make a specific finding on a given allegation contained in the answer of the defendant, which has been thus negated by the findings.—*Matthews v. Coate*, 17 Idaho, 624, 106 Pac. 990.

R. C. 4407 is complied with when the court makes its findings and conclusions of law, and states them separately and follows the same by a judgment based thereon; and it makes no difference whether they are written on one or more different pieces of paper.—*Dukes v. Boise County Commrs.*, 17 Idaho, 736, 107 Pac. 491.

Where an action is brought to recover for money had and received and for services alleged to have been performed at the instance and request of the defendant, and the answer in effect denies the allegations of the complaint and sets up by way of cross-complaint certain damages alleged to have been sustained by the defendant on account of the neglect and incompetency of the plaintiff in performing certain services for defendant, and the cause is tried by the court with a jury, and the jury renders a verdict in favor of the plaintiff on his first cause of action and in favor of the defendant on the second cause of action, and does not mention the cause of action set out in the cross-complaint, the effect of such verdict is that the defendant is not entitled to recover on the alleged cause of action set up in the cross-complaint, and it is unnecessary for the trial court to make findings thereon.—*Featherstone v. Keane*, 18 Idaho, 24, 108 Pac. 337.

Where the findings of the court cover all the issues essential to the final determination of a case, it is unnecessary for the court to find on other questions which would not influence or affect the judgment to be entered.—*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.

Findings must be liberally construed in support of the judgment.—*Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

There is no necessity for findings upon immaterial issues, nor upon facts alleged in the complaint and admitted by the answer.—*Fouch v. Bates*, 18 Idaho, 374, 110 Pac. 265.

Where the defendant sets up affirmative matter in an answer, which presents no material and substantial issue, and which in no way affects the rights of the plaintiff in the action, it is unnecessary for the court to make findings thereon, and a failure to make such findings is not error.—*Montpelier Mill Co. v. City of Montpelier*, 19 Idaho, 212, 113 Pac. 741.

Findings of fact and conclusions of law are not required where the cause is tried to a jury, and are only required upon the trial of questions of fact by the court.—*Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463.

Where a defendant files a separate answer, setting up affirmative matter constituting a defense, it is error for the trial court to fail to make findings on the issues thus raised, where a finding favorable to the defendant on the issue presented would defeat the plaintiff's right of recovery.—*Lorenzi v. Star Market Co.*, 19 Idaho, 674, 35 L. R. A., N. S., 1142, 115 Pac. 490.

Where an action is brought and an equitable defense is interposed by a cross-complaint, and also in an action cognizable in equity where a cross-action at law is interposed, the court may direct the jury to find a general verdict upon issues made by the complaint and answer. And if the court desires the advice or aid of the jury in the equity suit made by the cross-complaint, it is proper for the court to submit such questions as are proper and applicable to the issues to the jury for their answers, and may adopt such findings of the jury as the findings of the court; but where such special questions are not submitted to the jury, it is necessary for the trial court to make findings in the equity action as a basis upon which the judgment is founded.—*Penninger Lateral Co. v. Clark*, 22 Idaho, 397, 126 Pac. 524.

Where there is substantial evidence supporting the findings of the trial court upon the issues of fact, and such findings can be reconciled as a whole, and the decree is in accordance with the findings supporting such issues, such findings will not be held to be contradictory or inconsistent.—*Brinton v. Steele*, 23 Idaho, 615, 131 Pac. 662.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

Where a motion for nonsuit is denied and defendant then introduces evidence in support of his defense, he waives his motion for a nonsuit, unless he renews such motion at the close of all the evidence.—*Shields v. Johnson*, 12 Idaho, 329, 85 Pac. 972; *Robbins v. Porter*, 12 Idaho, 738, 88 Pac. 86; *Barrow v. B. E. Lewis Lbr. Co.*, 14 Idaho, 698, 95 Pac. 682; *Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho, 304, 133 Pac. 669.

Where a motion for nonsuit is made by the defendant at the close of plaintiff's testimony because of its insufficiency and overruled, defendant, by then introducing his testimony, waives his right to have the error in overruling the motion reviewed.—*Chamberlain v. Woodin*, 2 Idaho, 642, 23 Pac. 177.

Where it is stipulated that a finding as to the cost of construction of a ditch is immaterial and the court nevertheless makes a finding thereon, error cannot be predicated on such finding.—*Kent v. Richardson*, 8 Idaho, 750, 71 Pac. 117.

Where a motion is made for a nonsuit at the close of the evidence on the part of the

plaintiff, upon the ground that the evidence is insufficient to warrant the submission of the case to a jury, and the motion is denied, and evidence is thereafter offered by the defendant, the ruling of the trial court is not reviewable upon appeal from the judgment, or from the order overruling the motion for a new trial.—*Smith v. Potlatch Lbr. Co.*, 22 Idaho, 782, 128 Pac. 546.

TROVER AND CONVERSION.

By mortgages. See *Chattel Mortgages*, IV.
Of logs and timber. See *Logs and Logging*.

A complaint which alleges the wrongful taking of the property in question, the detention, the demand, and damages for wrongfully withholding the same, is sufficient.—*Crews v. Baird*, 2 Idaho, 103, 6 Pac. 116.

In an action for the wrongful sale of personal property and the wrongful conversion of the proceeds thereof, it is error for the clerk to enter a final judgment, as upon default, but the plaintiff in such case should go into court and prove his damages.—*Parke v. Wardner*, 2 Idaho, 285, 13 Pac. 172.

Where action is brought for the conversion of a stock of merchandise, the measure of damages is not the retail price thereof, but rather the cost of such stock in like quantity at the place of the alleged trespass, if purchasable there in such quantity; otherwise, the wholesale price at the nearest market where a like quantity could be purchased, with the necessary expense of getting the goods to the place of the alleged trespass.—*Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122.

Where, in an action for the wrongful taking and detention of personal property, the record shows that the property had passed out of defendant's possession, no demand was necessary before beginning the action.—*Coombs v. Collins*, 6 Idaho, 536, 57 Pac. 310.

In action to recover the possession of personal property wrongfully converted, or the value thereof in case return cannot be had, the plaintiff cannot be limited in his right of recovery to the price for which the property was sold by defendant.—*Cowden v. Finney*, 9 Idaho, 619, 75 Pac. 765; *Cowden v. Mills*, 9 Idaho, 626, 75 Pac. 766.

Where a complaint contains the usual allegations in an action of trover and conversion, alleging that at the time of the conversion plaintiffs were the owners of and entitled to the possession of the property described, and each of these allegations is specifically denied, defendants may show that plaintiffs authorized them to sell the property and account for the proceeds.—*Haynes v. Kettenbach Company*, 11 Idaho, 73, 81 Pac. 114.

Where personal property is seized and taken possession of unlawfully and without authority of law and is thereafter retained and converted to the use and benefit of the person taking such possession, in an action for damages by the owner of such property for conversion of the same, the plaintiff is entitled to recover, as a general rule, the market value of such property at the time the same was

taken.—*Unfried v. Libert*, 20 Idaho, 708, 119 Pac. 885.

Editorial Notes.

Title on which trover maintainable: 1 Am. Dec. 585.

Offer to return property: 11 Am. Dec. 523.

Conversion, what is: 15 Am. Dec. 151.

Damages, measure of in actions of trover: 24 Am. Dec. 70; 54 Am. Rep. 421.

Conversion of personality sufficient to sustain action of trover: 24 Am. St. Rep. 795.

TRUSTS.

Trust deed construed to be mortgage. See *Mortgages*, I.

Trustee in bankruptcy. See *Bankruptcy*.

Fraud in procurement of loan by one bank from another, trust fund. See *Banks and Banking*, II.

Loan to bank officer of trust funds. See *Banks and Banking*, IV.

Reputation of trust by adverse possession. See *Adverse Possession*.

A resulting trust is raised only where there is fraud in the acquisition of title, or where the money of one is used to pay for real property, the title to which is taken in the name of another at the time such title is taken, and neither a promise to pay nor after payment will give rise to such trust.—*Motherwell v. Taylor*, 2 Idaho, 254, 10 Pac. 304.

Evidence in a suit to establish a resulting trust held sufficient to make a prima facie case.—*Lewis v. Lewis*, 3 Idaho, 645, 33 Pac. 38.

Plaintiff left with her brother B. for collection a note signed by S. S. executed an instrument authorizing C., the defendant, to sell his property for a certain sum and to pay B. \$500 thereof. C. accepted the trust in writing. Held, that on the sale of the property, a right of action accrued in favor of plaintiff against C. for the \$500.—*Smith v. Caldwell*, 6 Idaho, 436, 55 Pac. 1065.

One who takes the title to real estate purchased with funds of another, and for the benefit of the latter, holds as trustee and parol evidence is admissible to establish such trust.—*Branstetter v. Mann*, 6 Idaho, 580, 57 Pac. 433.

One who purchases land held in trust, with notice thereof, takes the land subject to the trust.—*Branstetter v. Mann*, 6 Idaho, 580, 57 Pac. 433.

The president of a national bank made a loan for his personal use, to be invested, as the lender understood, in a purely personal transaction of the president. Held, that the fact that the money so borrowed was, or might have been, mingled with the money of the bank created no liability on the part of the bank as trustee.—*Netherlands American Mtg. Bk. v. Connaway*, 7 Idaho, 109, 61 Pac. 590.

In a suit to establish a resulting trust in mining claims and to obtain specific performance of an alleged "grubstake and informa-

tion contract," the contract sought to be enforced must be fully and clearly proved, a mere preponderance of the evidence being insufficient.—*Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290.

In a suit to establish a trust, the evidence showed that the transactions between the parties were at arm's-length and in the ordinary course of business and that no special, peculiar or extraordinary degree of trust or confidence was reposed by one party in the other; that a fair market price had been obtained for the land involved; that the dealings were made in the open and with full knowledge of the nature thereof; that the facts surrounding the transaction, as well as the transaction itself, were apparently equitable and just. Held, that the finding of the trial court that no trust or fiduciary relation existed will not be disturbed on appeal. *Fountain v. Lewiston Nat. Bk.*, 11 Idaho, 451, 83 Pac. 505.

A resulting trust may be established by parol evidence.—*Pittock v. Pittock*, 15 Idaho, 426, 98 Pac. 719.

Trust funds may be followed into the trustee's estate, although no particular property or asset can be identified as having been purchased or acquired by the particular funds, where it appears that the trust fund was mixed and commingled with the general funds and property of the trustee's estate, and went into the general assets, either in the purchase of paper and securities, or in the payment of the debts of the trustee; and in such case the lien of the cestui que trust will attach against the entire assets of the trustee's estate for the payment of such claim.—*State v. Bruce*, 17 Idaho, 1, 134 Am. St. Rep. 245, 102 Pac. 831.

Courts of equity may declare and enforce a trust, but they have no authority to create a trust, or to make a contract for the parties, where they did not see fit to make the contract themselves, under circumstances where no trust could be implied or result by operation of law.—*Bliss v. Bliss*, 20 Idaho, 467, 119 Pac. 451.

No exact words or terms are necessary to establish a trust, but a voluntary trust cannot be complete, unless there is reasonable certainty as to the manner in which the trust fund is to be used or applied; and the purposes of the trust must be plainly indicated.—*Bliss v. Bliss*, 20 Idaho, 467, 119 Pac. 451.

Where a son had before his marriage insured his life, naming his father and mother in the insurance policy as beneficiaries, and subsequent to marriage declined to change the beneficiaries in such policy, but expressed to the father the hope and expectation that the father and mother would take care of his family in case of death, and never allow them to want for anything, such words are not sufficient to establish a trust, or fix its terms.—*Bliss v. Bliss*, 20 Idaho, 467, 119 Pac. 451.

Where the executors of a will are appointed such by its terms, and are also thus appointed trustees of a certain portion of said estate, their duties as executors and trustees

are separate, distinct, and independent of each other; and until the estate is settled or distributed, in whole or part, and the executors are discharged, their duties as executors continue as to the part of the estate not distributed, and they do not assume the duties of trustees as to the part not distributed. *Jones v. Broadbent*, 21 Idaho, 555, 123 Pac. 476.

Where trust duties are imposed upon testamentary trustees, who are also devisees and legatees as well as executors under the will, such executors cannot act as trustees until there has been a distribution to them of the trust estate.—*Jones v. Broadbent*, 21 Idaho, 555, 123 Pac. 476.

A testamentary trustee is not entitled to take possession of and hold the property of the estate, for the purpose of trust, until the estate has been settled or distribution made.—*Jones v. Broadbent*, 21 Idaho, 555, 123 Pac. 476.

When the same person has been appointed by will to perform some dual duty, such as executor and trustee, in respect of the property of an estate, no service is demanded of him, as trustee, until he has performed his executory obligations.—*Jones v. Broadbent*, 21 Idaho, 555, 123 Pac. 476.

It is a well-known rule of equity that an owner of property who has been defrauded of the possession or ownership of the same may recover such property from the person who has secured it, and that the title of such property does not pass to the taker, but is held in trust, and that the owner has a superior right to such property as against the creditors of the taker; and, where it has been used or converted by the taker, the owner of such property should also have a superior right to the value of the same whenever it can be recovered without causing a reduction in the pro rata distribution of the remaining assets among creditors.—*Bellevue State Bank v. Coffin*, 22 Idaho, 210, 125 Pac. 816.

In a case where an attorney is employed by a person to secure real property belonging to the client, and in the course of such employment, and before the employment terminates, such attorney secures a supposed interest in such property, and repudiates his fiduciary obligation, and receives in his own name the title to such property he has been employed to secure for his client, such title will be declared to be held in trust for the use and benefit of the client.—*Ainsworth v. Harding*, 22 Idaho, 645, 128 Pac. 92.

Where an attorney is employed to secure and protect the interests of his client in real property, it imposes upon such attorney good faith, and requires that such duty be not violated, and such duty continues as long as the employment continues, and the obligation of good faith does not end even upon the termination of the contract of employment, but continues thereafter to the extent that, if an attorney be retained to defend a particular title to real property, he cannot thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain.—

Ainsworth v. Harding, 22 Idaho, 645, 128 Pac. 92.

Where the cestui que trust has inexcusably and unreasonably delayed asserting his rights, a court of equity may refuse to enforce a trust on the ground of laches.—*Olympia Min. & Mill. Co. v. Kerns*, 24 Idaho, 481, 135 Pac. 255.

Where a contract is entered into for the purpose of consolidating all of the interest in certain mining claims, and thereafter forming a corporation to prospect, develop and work the same, and a declaration of trust is thereafter made, in which it is declared that K. holds the legal title to certain mining claims for the use and benefit of a corporation to be thereafter formed, to be named the Olympia Mining Company, "provided, Clarence Cunningham, of the city of Wallace, in the county of Shoshone, state of Idaho, or the said corporation, shall comply with the provisions of an agreement in writing dated the 28th day of May, 1901, between the said Clarence Cunningham and the said Kerns," and Clarence Cunningham, or the corporation to be formed, failed, neglected, and refused to comply with the provisions of said contract, no trust is created.—*Olympia Min. & Mill. Co. v. Kerns*, 24 Idaho, 481, 135 Pac. 255.

The doctrine of laches applies to the enforcement of an express trust only when there has been an open breach or repudiation of the trust or assertion of adverse title by the trustee, which is so brought home to the actual or constructive knowledge of the cestui que trust as to require him to assert his rights.—*Olympia Min. & Mill. Co. v. Kerns*, 24 Idaho, 481, 135 Pac. 255.

Where an agreement contains conditions to be performed by the beneficiary, or some person for him, the beneficiary can enforce the trust only upon the performance of such conditions.—*Olympia Min. & Mill. Co. v. Kerns*, 24 Idaho, 481, 135 Pac. 255.

In an action to enforce a resulting trust claimed by the plaintiff in certain land, where the plaintiff had testified that during the negotiations for the sale of the land to the defendant she had agreed, with his consent, to try to secure a loan for him, evidence that immediately thereafter she had applied to another for a loan to the defendant is admissible.—*De Puy v. Peebles*, 24 Idaho, 550, 135 Pac. 264.

Editorial Notes.

Fiduciary relation of trustee and beneficiary: 16 Am. Dec. 616.

Resulting trusts, definition of and when created: 51 Am. Dec. 751; 2 L. R. A. 146.

Legal estate, when vests in beneficiaries under the statute of uses: 78 Am. Dec. 406.

Right to pursue and recover trust funds: 32 Am. St. Rep. 125; 46 Am. St. Rep. 608; 7 L. R. A. 570.

Voluntary trusts arising from the declaration of the trustor: 34 Am. St. Rep. 189.

Establishment and enforcement of voluntary trusts in equity: 34 Am. St. Rep. 194.

Creation of trusts by writings payable to or in favor of "trustee": 82 Am. St. Rep. 513.

Parol creation of trust in land by: 115 Am. St. Rep. 774.

Validity of testamentary trust whose purpose is defined only in oral instructions given by testator: Ann. Cas. 1912A, 834.

Effect of statute of statute of frauds on oral trust fully executed: Ann. Cas. 1913A, 954.

Proof of express trust by written declaration of trustee: Ann. Cas. 1913B, 1023.

Resulting trust arising from purchase of land by agent in his own name: 5 Ann. Cas. 255; 12 Ann. Cas. 805.

Grantee's oral promise to grantor to hold in trust as giving rise to constructive trust: 39 L. R. A., N. S., 906.

TWO MILE LIMIT LAW.

See Animals.

ULTRA VIRES.

See Corporations, VII, (A).

UMPIRES.

See Arbitration and Award.

To determine controversy in respect of contracts. See Contracts.

UNDERTAKINGS.

See Bonds and Undertakings.

In special proceedings or for particular purposes. See Appeal and Error; Attachment and Garnishment; Claim and Delivery; Costs; Bail and Recognizance, II.

UNDUE INFLUENCE.

As affecting deeds. See Deeds, I, (E). See, also, Fraud.

UNITED STATES.

Necessity of presenting claim of United States to administrator or executor of intestate. See Executors and Administrators, VI, (B).

Action on recognizance in criminal action. See Bail and Recognizance.

Action on bond payable to people of the United States. See Bonds.

District attorney. See District and Prosecuting Attorneys.

Under the organic law of Idaho and the general territorial laws, the United States is in no case chargeable with the trial of any cause where the United States is not a party. *People v. Heed*, 1 Idaho, 402.

Under a contract between the United States and a railroad company, the latter agreed to pay certain rebates upon freight paid on supplies and material, transported over its line and used in construction work on a certain reclamation project which was being built under a contract between the

government and M. and P. The rebates were to be paid to the contractors and the only supervision or connection therewith on the part of the government was the checking up of the list of rebates. Held, that the contractors had no claim against the government for such rebates.—*Porter v. Title Guarantee etc. Co.*, 21 Idaho, 312, 121 Pac. 548.

Under a contract between the United States and a railroad company, the latter agreed to pay certain rebates upon freight paid on supplies and material, transported over its line and used in construction work on a certain reclamation project which was being built under a contract between the government and M. and P. The rebates were to be paid to the contractors and the only supervision or connection therewith on the part of the government was the checking up of the list of rebates. M. and P. thereafter assigned their claim to such rebates to the defendant. Held, that the claim against the government was not governed by the provisions of the U. S. Rev. Stats. 3477, providing that claims against the government cannot be assigned except in accordance with the provision of said statute.—*Porter v. Title Guaranty etc. Co.*, 21 Idaho, 312, 121 Pac. 548.

Where M. and P. entered into a contract with the government of the United States for the construction of canals and ditches and other works to be used for the purpose of reclaiming public lands of the United States, and in such agreement it is provided that railroad transportation companies will allow and pay certain rebates on freight, paid by such contractors in transporting supplies and material used in the construction of such works, the collection and payment of such rebates will depend upon the conditions of the agreement made by the railroad company and the government, and the payment of such rebates is not thereby made an obligation of the government.—*Porter v. Title Guaranty etc. Co.*, 21 Idaho, 312, 121 Pac. 548.

Under U. S. Rev. Stats. 3477 claims against the United States government cannot be transferred or assigned unless such assignment is made in accordance with the provisions of such statute, and all pretended transfers or assignments of such claims, or any part thereof, unless made in accordance with the provisions of the statute, are declared null and void.—*Porter v. Title Guaranty etc. Co.*, 21 Idaho, 312, 121 Pac. 548.

Where the contract sued upon was made between M. and P. and the United States and the surety company, and the surety company agreed to pay certain indebtedness in dispute in consideration of M. and P.'s turning over to the company its property and the contract and to assume the responsibility of M. and P. thereunder, and the contract of plaintiff, M. and P., is shown to have been completely performed, plaintiff is entitled to recover the damages proven and alleged in the complaint.—*Beymer v. Monarch*, 23 Idaho, 292, 129 Pac. 919.

USE AND OCCUPATION.

Requisite for obtaining title by adverse possession.
See Adverse Possession.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

II. PENALTIES AND FORFEITURES.

Action by benevolent corporation to cancel mortgage for usury. See Charities.

In contract with building and loan association. See Building and Loan Associations.

Appealability of judgment by consent where usury statute not followed. See Appeal and Error, III, (F).

Stipulations for exchange and attorneys' fees not usurious. See Bills and Notes, II.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

The question as to whether a note which is made and delivered in Utah is usurious or not is to be decided by the laws of Utah.—*Winters v. Swift*, 2 Idaho, 61, 3 Pac. 15.

Coupon notes given for the interest of the principal debt which, by their terms, draw interest after maturity, are usurious under R. S. 1265, 1266, prohibiting compound interest, and no recovery can be had thereon for interest or costs.—*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 37 L. R. A. 509, 49 Pac. 314; *Vermont Loan etc. Co. v. Tetzlaff*, 6 Idaho, 105, 53 Pac. 104; *Vermont Loan etc. Co. v. Maxwell*, 6 Idaho, 108, 53 Pac. 1130.

Where a complaint shows that the cause of action is based upon a usurious contract, the principal of which has been fully paid, a general demurrer to such complaint should be sustained.—*Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779.

Under R. S. 4802, providing that any party aggrieved may appeal in the cases prescribed in the code, the state is a "party aggrieved" on failure of the court to render judgment in its favor under R. S. 1266, when it is ascertained that an action is brought on a contract providing an illegal rate of interest.—*State v. Eves*, 6 Idaho, 144, 53 Pac. 543.

Defendant made a written application to plaintiff, wherein he appointed plaintiff his agent to procure a loan of \$600 for five years, with interest at eight per cent per annum, payable annually. Plaintiff charged defendant ten per cent commission for procuring the loan. Held, that such charge for commission, in the absence of proof showing that plaintiff was acting as agent for the person loaning the money, or that such person was interested in or received any part of the commission, was not usurious.—*Cornwell v. McCoy*, 6 Idaho, 219, 55 Pac. 240; *Cornwell v. Carter*, 6 Idaho, 222, 55 Pac. 1100; *Cornwell v. Urton*, 6 Idaho, 269, 55 Pac. 294.

Under R. S. 1266, providing that in suits brought on usurious contracts the plaintiff must have judgment for the principal sum less all payments of principal or interest and without interest or cost, it is error to allow an attorney's fee under the stipulations of a mortgage securing a usurious contract in a

suit thereon.—Fidelity Savings Assn. v. Shea, 6 Idaho, 405, 55 Pac. 1022.

Where parties come into this state and loan money to citizens of this state upon real estate situated here, the validity of the contract will be determined by the laws of this state, and our usury laws cannot be evaded by a stipulation in the contract that it shall be tested and its validity determined by the laws of another state.—Fidelity Savings Assn. v. Shea, 6 Idaho, 405, 55 Pac. 1022.

R. S. 1266, directing the kind of judgment to be entered in actions on a usurious contract, does not prescribe any particular action for such contracts.—Portneuf Lodge v. Western Loan etc. Co., 6 Idaho, 673, 59 Pac. 362.

An action may be maintained on a usurious contract for the recovery of the principal sum loaned.—Portneuf Lodge v. Western Loan etc. Co., 6 Idaho, 673, 59 Pac. 362.

Under R. S. 1265, 1266, prohibiting compound interest and prescribing the penalty for usury, interest coupon notes, drawing interest from maturity at the rate of twelve per cent per annum, are usurious.—Cleveland v. Western Loan etc. Co., 7 Idaho, 477, 63 Pac. 885.

A note for \$625, secured by a mortgage, and given in consideration of a premium bid on a loan of \$1,250, secured by a mortgage on the same property, is usurious.—Cleveland v. Western Loan etc. Co., 7 Idaho, 477, 63 Pac. 885.

Under the statutes of Idaho, It is not necessary to set up by plea the defense of usury.—Cleveland v. Western Loan etc. Co., 7 Idaho, 477, 63 Pac. 885.

Where a mortgagor pays the principal of a usurious contract, the mortgage becomes satisfied, and the mortgagor can compel the mortgagee to satisfy the mortgage under R. S. 3364.—Cleveland v. Western Loan etc. Co., 7 Idaho, 477, 63 Pac. 885.

Where a note provides for interest at ten per cent per annum, both before and after judgment, but it does not appear that there was any corrupt intent on the part of the lenders to receive an unlawful rate of interest, the penalty of the statute of usury will not be enforced.—Anderson v. Creamery etc. Mfg. Co., 8 Idaho, 200, 101 Am. St. Rep. 188, 56 L. R. A. 554, 67 Pac. 493.

Under R. S. 1266, prescribing the penalty for usury, the purchaser of mortgaged property, who has assumed and agreed to pay the mortgage, cannot obtain cancellation of the mortgage on the ground of usury in the contract between his grantor and the mortgagee, since the plea of usury is personal to the contracting party and his privies in blood or estate.—Anderson v. Oregon Mortgage Co., 8 Idaho, 418, 69 Pac. 130.

The parties to a usurious contract, secured by deed of trust, cannot by a new agreement purge the original contract of the taint of usury, so as to extend the lien of the trust deed as against a junior mortgagee of the

same premises.—Madsen v. Whitman, 8 Idaho, 762, 71 Pac. 152.

Where premiums are exacted to secure loans and the premiums, added to interest payable under the contract, make a greater rate than that allowed by the statute, the contract is usurious.—Madsen v. Whitman, 8 Idaho, 762, 71 Pac. 152.

Where the premiums exacted to secure a loan plus the contract rate of interest make more than the legal rate of interest, the contract is usurious, and all payments made, whether as a premium for obtaining the loan, or on the interest or principal, are to be credited on the principal of the debt.—Madsen v. Whitman, 8 Idaho, 762, 71 Pac. 152.

A usurious note, secured by mortgage, may be purged of usury by the giving of a new note and mortgage with lawful rate of interest where no usurious interest has been paid under the original contract.—Sanford v. Kunz, 9 Idaho, 29, 71 Pac. 612.

R. S. 1264, as amended by Laws 1899, page 316, provides that parties may agree in writing for the payment of any rate of interest not exceeding twelve per cent per annum and that judgments rendered thereon shall bear seven per cent interest. R. S. 1266 prescribes the penalty for usury and provides that "the plaintiff must have judgment for the principal sum less all payments of principal or interest theretofore made and without interest or costs. R. S. 1263 provides that where there is no express contract in writing, fixing a different rate of interest, interest is allowed at the rate of seven per cent per annum on money due on judgments. Held, that a judgment on a usurious note bears interest at the rate of seven per cent per annum from the date of the judgment.—Finney v. Moore, 9 Idaho, 284, 74 Pac. 866.

The defense of usury may be pleaded by anyone claiming under and in privity with the borrower.—Ford v. Washington Nat. Bldg. etc. Assn., 10 Idaho, 30, 109 Am. St. Rep. 192, 76 Pac. 1010.

The doctrine of estoppel cannot be invoked to prevent a party to a contract from claiming the benefits of the statute of usury.—Ford v. Washington Nat. Bldg. etc. Assn., 10 Idaho, 30, 109 Am. St. Rep. 192, 76 Pac. 1010.

A mortgage providing for the highest legal rate of interest permissible contained a stipulation for the payment of taxes on the mortgage by the mortgagor. R. S. 1425 (since repealed) provided that every contract whereby the debtor agreed to pay taxes on the money loaned was null and void. Held, that such stipulation did not taint the whole contract with usury, the mortgage being void only as to the payment of taxes.—First Nat. Bk. v. Glenn, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

Where a promissory note provides for the payment of interest at the legal rate after judgment, such provision is not usurious under R. C. 1539.—Consolidated Wagon etc. Co. v. Kent, 23 Idaho, 690, 132 Pac. 305.

Editorial Notes.

Notes, when void for usury: 2 Am. Dec. 155.

Sale of negotiable paper, when deemed usurious and when not: 40 Am. Dec. 256.

What is usury, and when available as a cause of action or defense: 55 Am. Dec. 392.

What transactions are usurious: 81 Am. Dec. 736; 46 Am. St. Rep. 178.

Purchase of accommodation paper at discount in excess of legal rate without notice of nature thereof as usury: Ann. Cas. 1912D, 887.

Who besides the principal debtor may urge the defense of usury: 28 Am. Rep. 491.

Place where contract is deemed made within the meaning of the law respecting usury: 55 Am. Rep. 609.

Availability of defense of usury to purchaser of property charged with usurious debt: Ann. Cas. 1912B, 224.

Effect on contract made void by statutory or constitutional provision of subsequent repeal of such provision: Ann. Cas. 1913C, 1398.

Interest on overdue interest as usury: 4 Ann. Cas. 463; 18 L. R. A., N. S., 633.

Agreement for interest after maturity: 49 L. R. A. 550.

II. PENALTIES AND FORFEITURES.

R. S. 1266, prescribing a penalty for usury, does not apply to an action by the state to foreclose a mortgage, securing the payment of a loan made from the permanent school fund of the state.—*State v. Fitzpatrick*, 5 Idaho, 499, 51 Pac. 112.

Where it is ascertained by the court that an action has been brought on a contract which provides for an illegal rate of interest, it is the duty of the court, under R. S. 1266, to render judgment for the penalty therein prescribed, and if it fails to do so, the proper procedure on the part of the state is to apply within six months after the adjournment of the term, under R. S. 4229, to have the judgment modified, and in case the court denies such motion to appeal from the order denying the motion.—*State v. Eves*, 6 Idaho, 144, 53 Pac. 543.

R. S. 1266 provides that if it be ascertained in any suit brought on any contract that an illegal rate of interest has been contracted for, the court must render judgment for ten per cent per annum upon the entire principal of the contract against the defendant in favor of the state for the use of the school fund of the county, etc. Held, that the state is not authorized to maintain a separate suit for the recovery of the penalty prescribed by said section.—*State v. Eves*, 6 Idaho, 144, 53 Pac. 543.

In an action on a usurious contract, judgment was entered on stipulation of the parties in favor of plaintiff, according to the prayer

of the complaint, and defendant appealed. Held, that such judgment contravened R. S. 1266, providing that in actions on usurious contracts judgment must be rendered in favor of the state for the statutory penalty and therefore that the judgment would be reversed with directions to enter judgment for such penalty.—*Ocobock v. Nixon*, 6 Idaho, 552, 57 Pac. 309.

Where a mortgage given to secure the payment of a usurious contract is satisfied by the payment of the principal debt, and the mortgagor sues under R. S. 3364 to compel satisfaction of the mortgage, a contention by defendant that such action defeats the payment of the penalty which the statute fixes for usury cannot be considered, since such penalty is enforceable only in the manner provided by statute.—*Cleveland v. Western Loan etc. Co.*, 7 Idaho, 477, 63 Pac. 885.

R. S. 1266, prescribing the penalty for usury, includes only actions where the lender, or his assignee, is plaintiff and the borrower is defendant and does not include an action to cancel the usurious contract.—*Anderson v. Oregon Mortgage Co.*, 8 Idaho, 418, 69 Pac. 130.

VAGRANCY.

In a prosecution for vagrancy, the following verdict was sufficient to sustain a judgment of conviction, notwithstanding that it was not in the form prescribed by the code: "We, the jury, in the above-entitled cause, find the defendant guilty of being a vagrant at the time charged in the complaint," the form of such verdict not being prejudicial to defendant.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

R. S. 2230, subdivision 31, and Laws 1893, page 116, section 69, subdivision 5, authorize towns and villages to pass by-laws and ordinances for the punishment of vagrants. R. S. 7208 provides, inter alia, that any person who roams about from place to place, without any lawful business, or an idle or dissolute person, who wanders about the streets at late or unusual hours of the night, or a lewd and dissolute person, who lives in and about houses of ill-fame, is a vagrant. Held, that an information for vagrancy alleging that the defendant on a date named and for three weeks prior thereto at a place named, "unlawfully roamed and unlawfully has roamed about from place to place without any lawful business, willfully, and unlawfully was, has been and continues to be, and still is an idle and dissolute person, who wanders and roams about the streets of said city at late and unusual hours of the night, has continued to be and still is an idle and dissolute person who lives and has lived in and about houses of ill-fame there situated," is sufficient.—*State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

Editorial Notes.

Vagrancy, what punishable as: 38 Am. Rep. 643.

Vagrancy, what constitutes and prosecutions therefor: 137 Am. St. Rep. 940.

VENDOR AND PURCHASER.

- I. REQUISITES AND VALIDITY OF CONTRACT.
- II. CONSTRUCTION AND OPERATION OF CONTRACT.
- III. MODIFICATION OR RESCISSION OF CONTRACT.
- IV. PERFORMANCE OF CONTRACT.
- V. RIGHTS AND LIABILITIES OF PARTIES.
 - (A) As to Each Other.
 - (B) As to Third Persons in General.
 - (C) Bona Fide Purchasers.
- VI. REMEDIES OF VENDOR.
- VII. REMEDIES OF PURCHASER.

See Exchange of Property.

Action by purchaser against vendor for fraud. See Fraud.

Conveyance with agreement to reconvey. See Mortgages, I.

Covenants and breach thereof. See Covenants.

Of mining property. See Mines and Minerals, II, (B).

Right of vendor to question right of vendee corporation to hold property. See Corporations, XII, (F).

Of timber and timber lands. See Logs and Logging. Notice to purchaser of conditions in party-wall agreement made by grantor. See Party-walls.

Liability of assignee of purchaser for logs cut. See Logs and Logging.

Retention of title as affecting right of attachment. See Attachment and Garnishment, I.

I. REQUISITES AND VALIDITY OF CONTRACT.

Where the evidence, consisting principally of correspondence between the parties, shows that there was a misunderstanding as to the terms of a real estate contract and that the minds of the parties never met on the price or the title to be conveyed, the court will find that no contract was entered into.—*Phelps v. Good*, 15 Idaho, 76, 96 Pac. 216.

Where an offer to sell real estate is made by telegram, the answer must be within the time specified, and if no time is specified, it must be answered within a reasonable time, and an offer by telegram impliedly requires a quick reply by telegram.—*Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111.

The use of the word "option" in a contract relating to water rights excludes the idea of an absolute agreement to purchase, as an option is simply a contract by which the owner agrees that another shall have the right to buy the property at the price fixed within a certain time, and is nothing more than a continuing offer to sell.—*Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

Where a contract between the owner of real estate and a proposed purchaser provides that the purchaser agrees to buy the undivided one-half interest of three minor heirs, and the contract further provides, "If he shall not buy said interest of said minor heirs for the said sum of \$2,500 upon the terms aforesaid, then this agreement shall be of no effect, and the first party shall be under no

obligation to convey her interest in said property," such provision is a mere option and not a contract of sale, and the contract is void in default of compliance therewith.—*Martin v. Wilson*, 24 Idaho, 353, 134 Pac. 532.

The assumption by the purchaser of real property of a pre-existing mortgage indebtedness as a part of the purchase price of such property constitutes a valuable consideration for the sale and transfer of the property.—*Union Trust & Savings Bank v. Idaho Smelting & Refining Co.*, 24 Idaho, 735, 135 Pac. 822.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

In consideration of the conveyance to him by S. of certain lots in the town of J., defendant agreed to construct a railroad to said town before January 1, 1891, and to erect and construct a depot and sidetracks on the land of S. in said town on or before May 29, 1891. To secure the performance of their contract defendant and another executed to S. their bond conditioned for the performance of said agreement under a penalty of \$6,000. The work was not completed until June 1, 1891. No objection was ever made by S. to the failure to complete within the time specified. In 1893, S. assigned the bond to plaintiff, who sued to recover the \$6,000 as the price of the lots conveyed by S. to defendant, claiming said bond to be an alternative contract for the sale of the land. Held, that the instrument sued on was a bond and not a contract for the sale of the land and that therefore no recovery could be had.—*Julietta Tramway Co. v. Vollmer*, 4 Idaho, 408, 39 Pac. 1115.

An agreement recited that whereas first parties have this day agreed to sell and convey certain lands, describing them, and in consideration of the sum of \$150 cash to them in hand paid by K. as part of the purchase price of said lands, have executed a warranty deed therefor, and it is agreed that the warranty deed shall be left in escrow with the F. bank to be delivered to K. upon the payment of the specified balance of the purchase price before March 1, 1906, and that on failure of each payment on or before said date, the bank should deliver the deed to first parties. The agreement further provided that first parties should furnish to the second party, upon the payment of the balance of the purchase price aforesaid, an abstract of title, showing a clear title. Held, that such contract was merely an option and not a contract to purchase.—*Kessler v. Pruitt* (on rehearing), 14 Idaho, 175, 93 Pac. 965.

An executory contract for the sale of real estate, describing the property to be conveyed as "Lots 11, 12 and 13 in Block 13, Lemp's Addition," and which contract fails to designate the state, county, civil or political district in which the land is situated, and fails to disclose the municipal or other subdivision to which the tract of land is an "addition," is an insufficient and void description and cannot be supplied or aided by parol

evidence.—*Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052.

Editorial Notes.

Nature of interest of vendor or vendee in contract as real or personal property: 57 L. R. A. 643.

III. MODIFICATION OR RESCISSION OF CONTRACT.

Forfeitures. See, also, post, VI, VII.

Where both parties to a contract treat the same as being in force after the time limit fixed by the contract, neither party can rescind or terminate the contract without reasonable notice to the other and an opportunity given for the other party to comply with its provisions.—*Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965.

Where one of the parties to a contract for the sale of real estate recognized the contract after the time limit fixed by the contract, and made an effort to comply therewith, it was error not to permit him to be cross-examined as to acts in reference thereto.—*Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965.

A written contract for the sale of real property may be modified by a subsequent oral agreement, but where it is claimed that an oral agreement modifies the terms of a written contract, the evidence to establish such oral agreement should be clear and satisfactory.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

Where time is made of the essence of a contract for the sale of real property, the vendor will not be required to notify the vendee of his intention to declare a forfeiture unless payments be made in accordance with the provisions of said contract, before said vendor can insist upon and enforce a forfeiture of said contract.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

Where time is made of the essence of a contract for the sale of real property, and the contract fixes the time and place of payment, the fact that a partial payment is made and accepted at a place other than fixed by the contract will not constitute a modification of said contract as to the time and place of future payments.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

Where time is made of the essence of a contract for the sale of real property, and the vendor extends the time within which a partial payment may be made, such fact alone will not amount to a modification of said contract as to future payments, or waive the conditions in said contract as to the time and place of future payments.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

Where a seller receives the entire purchase price of the property sold, and acquiesces in the transaction after he has had full knowledge of all the facts concerning it, he is estopped from a rescission of the contract by

reason of his laches and neglect.—*Keating v. Keating Mining Co.*, 18 Idaho, 660, 112 Pac. 206.

Where an owner has sold and conveyed real estate and has received the purchase price therefor, he can neither legally nor equitably question the capacity of the vendee to take and hold the title.—*Keating v. Keating Mining Co.*, 18 Idaho, 660, 112 Pac. 206.

M. contracted to sell S. a tract of land, and covenanted that he would furnish a good and sufficient deed free of all encumbrances, and at the time of the tendering of the deed and of the making of the final payment of the purchase price a bona fide controversy arose between the parties as to whether or not an easement or right of way for an irrigation canal constituted a breach of the covenant against encumbrances. The deed was not accepted and the final payment was not made, and the question has never been determined by the courts of this state, and each of the parties is supported by authority from the courts of other states, and the parties find their way into court over the question, and the courts of this state finally determine that such easement was not a breach of the covenant contained in the contract. Held, that the vendor will not be allowed to declare a forfeiture of the contract until the question is determined by the court, but will, on the contrary, be required to execute and deliver a deed in compliance with the terms of his contract upon payment of the purchase price, together with interest thereon.—*Schurger v. Moorman*, 20 Idaho, 97, Ann. Cas. 1912D, 1114, 117 Pac. 122.

Plaintiff alleged the execution of a bond for a deed and certain payments made by him thereunder, that thereafter he had agreed to release defendant from all obligations on said bond in consideration of defendant's repaying him the amount paid and other expenditures; that defendant accepted such release and paid part of the amount agreed on. Plaintiff thereafter surrendered the premises to a purchaser from defendant. Held, that the contract for repayment was supported by a sufficient consideration.—*King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292.

Where all the cash payments required to be made under a contract were accepted and retained by the vendor, and all that remained to be done by the purchaser was to execute a valid mortgage to the vendor for the balance of the purchase price, and the vendor could not comply with his contract to execute a good and sufficient deed when the mortgage was tendered, he could not declare a forfeiture of the contract on the ground that one of the payments was not made when due.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

Editorial Notes.

Rescission, vendor's rights upon: 12 Am. Dec. 312.

Forfeiture of vendee's rights: 31 Am. Dec. 278.

Waiver of purchaser's right to rescission: 30 L. R. A., N. S., 872.

IV. PERFORMANCE OF CONTRACT.

Where there has been a part performance of a contract to sell real property, and partial payments have been made, and a forfeiture of all that has been paid is insisted upon, a court of equity will turn to the party insisting upon such forfeiture and inquire whether his conduct was responsible for or led the vendee to refrain from complying with the provisions of said contract, which resulted in the default.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

Where there has been a part performance of a contract, and the failure of full performance was not the fault of the vendor, but was the result of the acts and solicitations of the vendee, and the conduct of the vendor in no way induced or misled the vendee, the mere fact that the vendor and vendee were negotiating with reference to the subject of said contract would not relieve the vendee from complying with the terms of said contract.—*Prairie Development Co. v. Leiberg*, 15 Idaho, 379, 98 Pac. 616.

V. RIGHTS AND LIABILITIES OF PARTIES.**(A) AS TO EACH OTHER.**

Adverse possession of purchaser as against vendor.
See Adverse Possession.

One who accepts a contract to purchase real estate which provides that no timber shall be cut or removed from the ground until the contract has been complied with has no power to sell the timber growing on the land, with permission to remove the same, until the contract is fully completed.—*Gumaer v. White Pine Lbr. Co.*, 11 Idaho, 591, 83 Pac. 771.

A would-be purchaser in possession of land under an executory contract for the purchase of the same is estopped from denying his vendor's title.—*Page v. Bradford-Kennedy Co.*, 19 Idaho, 685, Ann. Cas. 1913C, 402, 115 Pac. 694.

In an action to foreclose a vendor's lien on real estate, a third party, who has purchased the property from the original vendee and taken an absolute deed to the property and holds his title under such deed, cannot maintain that the original conveyance to such third party's vendor was a mortgage and not a deed, and that it did not pass title to the property, since he cannot claim both under and against the same deed.—*Smith v. Schultz*, 23 Idaho, 144, 129 Pac. 640.

Editorial Notes.

Estoppel of purchaser under executory contract of sale to deny his vendor's title: Ann. Cas. 1912C, 404.

(B) AS TO THIRD PERSONS IN GENERAL.

The owner of real estate gave G. an option to purchase, which option expired, and thereafter the owner sold to defendant's grantor. Defendant thereafter gave G. an option to purchase, which option was assigned to Y. Thereafter G. attempted to convey the title

to said land by deed to plaintiffs and to assign said option to them, and plaintiffs attempted to procure title to said land from defendant under said option. In the meanwhile Y. had assigned his option to defendant. Held, that defendant was not required to convey the land to plaintiffs on their offering to comply with the terms of the option.—*Moyses v. Hewitt*, 20 Idaho, 311, 118 Pac. 839.

(C) BONA FIDE PURCHASERS.

A purchaser of real estate taking a quitclaim deed therefor is not a bona fide purchaser without notice, and hence it was erroneous to leave the question of the good faith of such a purchaser to be decided by the jury.—*Leland v. Isenbeck*, 1 Idaho, 469.

A purchaser of real estate who takes a quitclaim deed from the grantor is presumed to have notice of any defects in his grantor's title, and he purchases at his own risk.—*Leland v. Isenbeck*, 1 Idaho, 469.

Where the owner of land executes a contract for the sale thereof and a bond for title, without any forfeiture clause making time of the essence of the contract, one who purchases the land after the time limited in the contract for payment, with knowledge of the contract, is bound by its terms.—*Castleberry v. Hay*, 8 Idaho, 670, 70 Pac. 1055.

It is doubtful whether, under our recording laws, the rule is applicable that one who takes title by quitclaim deed is for that reason chargeable with notice that the title of his grantor is doubtful and is not therefore a bona fide purchaser.—*Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117.

One who has recorded his title may, as a general rule, remain silent and passive in relation to notice thereof to other parties and may rest on the constructive notice which the record of his title imparts, but so soon as he becomes active, his actions, declarations and conduct with reference to the title must not be such as to deceive or mislead a reasonable person, or deter, prevent, or dissuade him from examining the record and learning the true condition of the title.—*Eastwood v. Standard Mines etc. Co.*, 11 Idaho, 195, 81 Pac. 382.

One who has notice or knowledge of a previous sale of real property, or who has notice or knowledge of such facts and circumstances as would lead a reasonably prudent man to discover that a previous sale had been made, is not a purchaser in good faith within the meaning of R. S. 3001.—*Froman v. Madden*, 13 Idaho, 138, 88 Pac. 894.

Under R. S. 3001, one who purchases land without any knowledge or notice that the same has been previously conveyed to another person, and pays a valuable consideration therefor, and duly records his deed prior to the recording of the previously executed deed, takes title to the property.—*Froman v. Madden*, 13 Idaho, 138, 88 Pac. 894.

Where a grantee has duly deposited for record a valid instrument at the proper time, at the proper office and with the proper officer, he has performed his whole duty, and

subsequent purchasers will be charged with constructive notice, notwithstanding the fact that the officer fails to record the instrument. *Oregon Short Line R. R. Co. v. Stalker* (on rehearing), 14 Idaho, 371, 94 Pac. 59.

Where plaintiff took a conveyance of real property and paid a valuable consideration therefor and had no notice of an outstanding unrecorded deed for a ditch and right of way through the property, and recorded her deed prior to the recording of the outstanding deed for ditch and right of way, the unrecorded deed is void as against such subsequent purchaser.—*Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

Where W. imported fruit trees and nursery stock into this state, and sold and disposed of the same in violation of R. C. 1318, which requires every person to make application and procure a certificate from the state board of horticultural inspection before importing and selling such stock, and sold a part thereof to L., for which he received the assignment of a contract to purchase land, and subsequent to such sale the trees were examined by the horticultural inspector and found diseased and infested with pests and were destroyed in accordance with the statute, and there was consequently a total failure of consideration for the assignment of such contract, and where W. thereafter assigned such contract to J. in consideration of the cancellation by J. of a pre-existing indebtedness for money loaned in purchasing and shipping the trees to this state, J. was not an innocent purchaser for value, so as to enable him to successfully defend an action prosecuted by L. to cancel the assignment of the contract for want of consideration.—*Land v. Hea*, 20 Idaho, 250, 118 Pac. 506.

W. sold imported fruit trees to plaintiff in violation of R. C. 1318, receiving in consideration thereof an assignment of a land contract. The trees were subsequently destroyed as diseased by the horticultural inspector. W. thereafter assigned such contract to defendant in consideration of the cancellation of a pre-existing indebtedness. Held, that where plaintiff paid into court all the expense and interest thereon incurred by defendant in making payments on the contract, defendant would be compelled to cancel and surrender the contract.—*Land v. Hea*, 20 Idaho, 250, 118 Pac. 506.

Under R. C. 3159, a recorded conveyance of real property, which has not been acknowledged or proved and certified as required by law, does not impart constructive notice of its contents to subsequent purchasers.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

Under R. C. 3159, in order that a recorded conveyance of real property may impart constructive notice of its contents to subsequent purchasers, it must be "acknowledged or proved and certified" as well as recorded.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

The conveyance of real property, which R. C. 3159 provides shall constitute constructive notice to "subsequent purchasers and mortgagees," is a conveyance made by the person from whom such "subsequent purchaser or mortgagee" is compelled to deraign

his title, and has no reference to and does not include conveyances made by strangers to the record title.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

The "subsequent purchasers" of whom R. C. 3159 speaks are those claiming title under the same grantor, and it is to these only the record is constructive notice.—*Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780.

Editorial Notes.

Bona fide purchaser, notice before payment defeats claim of: 12 Am. Dec. 212.

Bona fide purchaser, what amount paid constitutes: 84 Am. Dec. 401.

Equitable title, purchaser of, whether entitled to protection as a purchaser in good faith without notice: 97 Am. Dec. 433.

Quitclaim deed, holder under, whether a bona fide purchaser: 1 Am. St. Rep. 247; 53 Am. Rep. 749; 29 L. R. A. 33.

Presumption that a subsequent purchaser is a purchaser bona fide: 17 Am. St. Rep. 288.

Extent of constructive notice to purchaser flowing from possession by tenant: Ann. Cas. 1913A, 1214.

Priority between unrecorded conveyances, and effect of recording conveyance after subsequent conveyance is given: Ann. Cas. 1912A, 194.

Right as against subsequent bona fide purchaser to avoid deed: 36 L. R. A., N. S., 537.

VI. REMEDIES OF VENDOR.

Rescission or forfeiture of contract in general. See ante, III, IV.

A vendor's lien cannot be enforced for the purchase money of a tract of land, when the parties have stipulated in the contract for other security.—*Hawkins v. Thurman*, 1 Idaho, 598.

A decree for specific performance in a suit brought to enforce a vendor's lien cannot be upheld.—*Hawkins v. Thurman*, 1 Idaho, 598.

In an action to foreclose a vendor's lien, the vendee is estopped to deny the vendor's title.—*Toulouse v. Burkett* (on rehearing), 2 Idaho, 184, 10 Pac. 26.

The defendant cannot avoid the payment of his promissory notes, given for property, without first surrendering or offering to surrender such property to the party from whom it was purchased.—*Cowen v. Harrington*, 5 Idaho, 329, 48 Pac. 1059.

The owner of mining property made a quitclaim deed thereto and at the same time made a contract, agreeing that the purchaser might sell the property or organize a corporation and in case a corporation was organized, the owner was to receive in lieu of the balance of the purchase price, one-third of the capital stock, to be placed in the hands of a trustee as security for such balance, which balance was to be paid out of the net earnings of the

property sold. The corporation was organized and the stock placed as the contract provided. Held, that by acceptance of such stock as security for the unpaid portion of the purchase price, the vendor forfeited any equitable lien he might have had on the property sold. *Dalliba v. Riggs*, 7 Idaho, 779, 67 Pac. 430.

Where a person purchases property from a married woman and uses and consumes such property, he cannot defend an action for the purchase price by claiming that the contract was not executed according to R. S. 2498, which provides that no sale of the wife's property can be made unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon examination, separate and apart from her husband.—*Karlson v. Hanson etc. Sawmill Co.*, 10 Idaho, 361, 78 Pac. 1080.

Where time was of the essence of a contract to purchase town lots and the evidence shows that the vendors were able to place the purchaser in possession at any and all times since the last payment thereon became due and that the purchaser had failed to make the final payment because of a lease thereon, the lessee testifying that he was ready to deliver possession whenever his lessor asked him to do so, a finding that vendors were not able to give possession of said premises is not supported by the evidence.—*Garret v. Cronin*, 11 Idaho, 214, 81 Pac. 615.

An agreement recited that whereas first parties have this day agreed to sell and convey certain lands, describing them, and in consideration of the sum of \$150 cash to them in hand paid by K. as part of the purchase price of said lands, have executed a warranty deed therefor, and it is agreed that the warranty deed shall be left in escrow with the F. bank to be delivered to K. upon the payment of the specified balance of the purchase price before March 1, 1906, and that on failure of such payment on or before said date, the bank should deliver the deed to first parties. The agreement further provided that first parties should furnish to the second party, upon the payment of the balance of the purchase price aforesaid, an abstract of title, showing a clear title. Held, that the vendors could not enforce payment or declare forfeiture until they tendered the abstract of title showing clear title.—*Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965.

Where the purchaser of real estate is notified at the time he purchases that the land has not been paid for in full, and the original owner of the land is at that time residing on the land, and he also notifies the purchaser that the full purchase price has not yet been paid, such purchaser is chargeable with notice that the original vendor has a lien on the property for the balance of his purchase price and is also chargeable with the duty of investigating and inquiring as to the amount due under such lien.—*Smith v. Schultz*, 23 Idaho, 144, 129 Pac. 640.

That a purchaser of land has paid a mortgage, assumed as part of the price, does not entitle him, on foreclosure of the lien of the vendor of his vendor, to reimbursement of the

amount so paid before satisfaction of the lien. *Smith v. Schultz*, 23 Idaho, 144, 129 Pac. 640.

Where a person sells real estate to a married man and conveys the same by good and sufficient deed and takes as a part of the purchase price promissory notes executed by the vendee and the vendee's wife, the signature of the wife to such notes does not constitute such security as will amount to a waiver of the vendor's lien within the provisions of R. C. 3442.—*Smith v. Schultz*, 23 Idaho, 144, 129 Pac. 640.

Evidence in an action to foreclose a vendor's lien held sufficient to support the findings and judgment that the purchaser of real estate had notice of the existence of a vendor's lien on the property.—*Smith v. Schultz*, 23 Idaho, 144, 129 Pac. 640.

In an action to foreclose a vendor's lien, plaintiff was not entitled to recover attorney's fees.—*Smith v. Schultz*, 23 Idaho, 144, 129 Pac. 640.

Evidence in an action to have a real estate contract declared forfeited, held to support the findings.—*Jarrett v. Prosser*, 23 Idaho, 382, 130 Pac. 376.

The findings in an action to forfeit a real estate contract examined and held to support the judgment.—*Jarrett v. Prosser*, 23 Idaho, 382, 130 Pac. 376.

An escrow agreement disclosed on its face that the depositing of the deed therein mentioned was only one part of the agreement made by the parties with reference to the purchaser's assuming and paying certain mortgages and obtaining a release thereof. Such agreement omitted the time in which such releases were to be obtained. The evidence showed that this omission was due to a mutual mistake or that it was willfully made on the part of defendant and that the parties had agreed that such releases would be obtained within three weeks from the date of the escrow agreement. The trial court found that such agreement was a separate and distinct agreement from the original written contract to convey and did not nullify such contract. Held, that such finding was supported by the evidence.—*Jarrett v. Prosser*, 23 Idaho, 382, 130 Pac. 376.

Editorial Notes.

Lien of vendor, and its waiver of transfer: 12 Am. Dec. 262; 28 Am. Dec. 199; 137 Am. St. Rep. 185.

Lien of vendor against property of married woman: 34 Am. Rep. 614.

Lien of vendor, remedies for enforcing: 17 Am. St. Rep. 232.

Possession of real property, when the former may recover from the latter: 107 Am. St. Rep. 722.

VII. REMEDIES OF PURCHASER.

Rescission or forfeiture of contract in general. See ante, III, IV.

Where the owner of land executes a contract of sale and a bond for title, and the purchaser pays part of the purchase price

and takes possession of the land, equity will not declare a forfeiture of the contract for failure to pay the balance of the purchase price at the time named in the contract, in the absence of any forfeiture clause in the contract or any clause making time of essence of the contract.—*Castleberry v. Hay*, 8 Idaho, 670, 70 Pac. 1055.

Under the forfeiture clause contained in a bond for the sale of real estate, held, that the respondent did not exercise his right of forfeiture, and that he treated the contract or bond for a deed as though the same had not been forfeited.—*King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292.

Where K. made a contract with S. for the purchase of real estate, and in pursuance thereof S. executed a bond for a deed to K., and K. thereafter did not meet the payments for said land as specified in the bond, and S. thereafter undertook to sell the land to other parties, and an oral agreement was entered into between K. and S. that, in case said land could be sold for the contract price between K. and S., S. would pay to K. the amount of money that he had already expended in making payments on said land, and the land was thereafter sold by S., and S. paid to K. \$300 on said last-named contract, it was error for the court to reject evidence tending to show those facts.—*King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292.

VENUE.

Venue and change of venue in criminal action. See Criminal Law, V.

In actions before justices of the peace. See Justices of the Peace.

In action against foreign corporation. See Corporations, VII, (I).

Allowance of attorneys' fees on appeal by wife from order refusing change of. See Divorce, V.

Review of action of lower court. See Appeal and Error, XV, (G), 3; XVI, (F), 2.

The question of changing the place of trial in order that the defendant may have an impartial trial involves an issuable fact, and when an application is made for that purpose upon affidavits, it is proper to admit counter-affidavits to enable the court to judge of the necessity for such change.—*Hyde v. Harkness*, 1 Idaho, 601.

The burden of showing that an impartial trial cannot be had is on the party making the application, and even if there is a slight preponderance of evidence in favor of the application, this court will not reverse the action of the court below for that reason.—*Hyde v. Harkness*, 1 Idaho, 601.

The convenience of witnesses residing in a neighboring state will not entitle a party to a change of the place of trial.—*Shirley v. Nodine*, 1 Idaho, 696.

The mere statement, in an affidavit, that affiant believes that certain witnesses residing in an adjoining state will voluntarily attend the trial, is not sufficient to entitle a party to a change of the place of trial.—*Shirley v. Nodine*, 1 Idaho, 696.

An affidavit stating that a party believes the convenience of witnesses will be promoted by a change of the place of trial is not sufficient without showing upon what grounds such belief is founded.—*Shirley v. Nodine*, 1 Idaho, 696.

The fact that there have been two jury trials without a verdict will not be sufficient ground for a change of venue, unless it be clearly established that a fair and impartial trial cannot be had in the county of defendant's residence.—*Sommercamp v. Catlow*, 1 Idaho, 716.

Defendant in disbarment proceedings is entitled to a change of venue on making proper showing.—*State v. Goode*, 4 Idaho, 730, 44 Pac. 640.

Where a district judge is disqualified from acting as a judge in a case pending in his court, and a motion for a change of venue is made, it is mandatory and not discretionary with the judge to grant such motion under R. S. 4125, 4126.—*Gordon v. Conner*, 5 Idaho, 673, 51 Pac. 747.

Where in an action brought to contest the foreclosure of a chattel mortgage, defendant files a cross-complaint for the foreclosure of a real estate mortgage given to secure the same debt covered by the chattel mortgage, defendant's motion for change of venue on the ground that the real estate described in the mortgage was in another county was properly denied.—*Murphy v. Russell & Co.*, 8 Idaho, 151, 67 Pac. 427.

R. S. 3900, adopted prior to the adoption of the constitution, states the grounds on which a judge is disqualified to try a case, but does not mention "prejudice" of the judge. R. S. 4125, subdivision 4, provides that the court may on motion change the place of trial when from any cause the judge is disqualified from acting. Const., article 1, section 18, provides that right and justice shall be administered without sale, denial, delay or prejudice. Held, that where affidavits are filed for a change of venue on account of the prejudice of the judge before whom the case is pending, such change should be granted.—*Day v. Day*, 12 Idaho, 556, 10 Ann. Cas. 260, 86 Pac. 531.

Where a party moves in the district court for a change of place of trial, on the grounds of the prejudice of the judge, it is not sufficient for him to state that "he has good reason to believe and does believe that he cannot have a fair and impartial trial," etc., but he must state the facts upon which he predicates his charge of prejudice and claims the right of a change of place of trial.—*Bell v. Bell*, 18 Idaho, 636, 111 Pac. 1074.

The prejudice of a judge contemplated by the Const., article 1, section 18, is a prejudice that is directed against the party litigant, and is of such a nature and character as would render it improbable that the presiding judge could or would give the litigant a fair and impartial trial in the particular case pending.—*Bell v. Bell*, 18 Idaho, 636, 111 Pac. 1074.

An application for change of venue ought to be supported by the affidavits of persons who have either been over the county generally, or through large communities thereof, and have heard the citizens generally express themselves in regard to the matter at issue, or by residents of different portions of the county who knew of the sentiment prevailing in their respective communities.—*Gibbert v. Washington Water Power Co.*, 19 Idaho, 637, 115 Pac. 924.

Under the facts disclosed by the affidavits, there was no abuse of discretion in denying an application for change of venue.—*Gibbert v. Washington Water P. Co.*, 19 Idaho, 637, 115 Pac. 924.

Editorial Notes.

Change of venue: 74 Am. Dec. 241.

Constitutional right of party defendant to be sued in county of his residence: Ann. Cas. 1912C, 614.

WAREHOUSEMEN.

A complaint for damages under Laws 1891, page 12, governing the storage of grain, etc., alleged the delivery of certain wheat to defendant for storage, and the giving of defendant's receipts therefor; that plaintiff became the owner of said receipts and presented them to defendant, paid all charges due thereon, and demanded possession thereof in accordance with the terms of the receipts, but that defendant, in fraud of plaintiff's rights, refused and neglected to deliver the wheat called for by the receipts, but in lieu thereof delivered a large amount of damaged wheat, to plaintiff's damage, etc. Held not demurrable.—*Haskins v. Curran*, 4 Idaho, 573, 43 Pac. 559.

Where a party is charged with the unlawful sale of grain stored in his warehouse, he should not be heard in his defense to urge that a warehouse receipt issued by him for grain received and stored is not in form and substance as required to be issued by the provisions of the statute.—*State v. Henzell*, 17 Idaho, 725, 27 L. R. A., N. S., 159, 107 Pac. 67.

Where B. stored grain in a warehouse controlled and operated by H., and received a warehouse receipt therefor and thereafter transferred such receipt by indorsement, and the purchaser of the receipt presented the same to H. at his warehouse, and demanded the grain, and delivery was refused on the ground that the grain was not in the warehouse, on a prosecution for the sale of such grain in violation of R. C. 1490, it is not permissible for H. to show that prior to the receipt of the grain in his warehouse and the delivery of the warehouse receipt therefor he had contracted with B. to purchase such grain, and that he thereafter sold the grain under the belief that he had a right to sell it as his own grain.—*State v. Henzell*, 17 Idaho, 725, 27 L. R. A., N. S., 159, 107 Pac. 67.

Under R. C. 1490, regulating the duties and obligations of warehousemen and pre-

scribing the penalty for the violation of such duties, it is made a felony for anyone operating a warehouse to sell any grain stored therein without first obtaining the written consent of the owner and holder of the warehouse receipt which has been issued for such grain; and in a prosecution for a violation of the statute the act itself of selling the grain constitutes the crime, and the motive or intent with which the sale was made is immaterial and constitutes no defense.—*State v. Henzell*, 17 Idaho, 725, 27 L. R. A., N. S., 159, 107 Pac. 67.

Editorial Notes.

Liability of warehousemen, and who liable as: 24 Am. Dec. 245.

Receipts of warehousemen, and their transfer and negotiability: 84 Am. Dec. 752.

Receipts of warehousemen, whether conclusive against them on the question of quality: 100 Am. Dec. 243.

Warehousemen, bailment of cereals in custody of: 94 Am. St. Rep. 220.

Effect as to warehousemen of recitals in their receipts: 19 L. R. A. 302.

WATERS AND WATERCOURSES.

I. NATURE, OWNERSHIP AND CLASSIFICATION.

- (A) Nature, Classification and Private Ownership.
- (B) Title of State to Waters and Water Rights.
- (C) Governmental Authority and Control.

II. NATURAL WATERCOURSES.

- (A) Riparian Rights in General.
- (B) Obstruction and Detention.
- (C) Pollution.
- (D) Diversion.
- (E) Bed and Banks of Stream.

III. SUBTERRANEAN AND PERCOLATING WATERS.

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- (C) Mining, Mechanical and Manufacturing Purposes.

X. ICE.

- Condemnation for purpose of improving streams for logging purposes. *See* Eminent Domain.
- Dedication of water to streets and alleys on townsite. *See* Dedication.
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- Extent of ownership of lands under water. *See* Navigable Waters, II.
- Riparian and littoral rights in navigable waters. *See* Navigable Waters, III.
- Functions of state engineer not judicial in contravention of constitution. *See* Constitutional Law, III, (C).
- Laws relating to irrigation as deprivation of property without due process of law. *See* Constitutional Law, XI.
- Liens for work on canals or ditches. *See* Mechanics' Liens.
- Private fish-ponds. *See* Fish and Game.
- Reservation of right of way for ditches or canals constructed by the United States. *See* Public Lands, II, (D).

Specific performance of agreement apportioning water rights as against subsequent purchaser. See Specific Performance, I.

Specific performance of oral agreement to enlarge ditch. See Specific Performance, II.

I. NATURE, OWNERSHIP AND CLASSIFICATION.

Riparian rights in general. See post, II, (A).

(A) NATURE, CLASSIFICATION AND PRIVATE OWNERSHIP.

Easements and rights appurtenant to other property. See post, VII, (B).

One may own a ditch, or a ditch and land, independent of a water right.—*Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891; *Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045; *Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

Under R. S. 2825, ditches and water rights are real estate.—*Ada County Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990; *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19; *Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

So long as water continues to flow in its natural channel, it cannot be made the subject of private ownership except in so far as it is regarded as a part of the land by or through which the stream flows.—*Boise Irrigation etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

A water right is real property appurtenant to the land to be irrigated thereby.—*Taylor v. Hulett*, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37; *Nielson v. Parker*, 19 Idaho, 727, 115 Pac. 488.

The right to use water for a beneficial purpose is a property right.—*Montpelier Mill. Co. v. City of Montpelier*, 19 Idaho, 212, 113 Pac. 741.

Editorial Notes.

Property in water: 7 Am. Dec. 531.

(B) TITLE OF STATE TO WATERS AND WATER RIGHTS.

The title to the public waters of the state is vested in the state for the use and benefit of all the people of the state under such rules and regulations as may be prescribed from time to time by the law-making power of the state, and such title is held by the state in its sovereign capacity as the representative of all the people.—*Walbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 812.

Under Const., article 15, section 1, and R. C. 3240, all the waters of the state, when flowing in their natural channels, including the waters of all natural springs or lakes within the boundaries of the state, are declared to be the property of the state.—*Walbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 812.

The state of Idaho has not granted the right to appropriate and divert the waters of this state for application to any beneficial use

beyond the confines of the state.—*Walbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 813.

(C) GOVERNMENTAL AUTHORITY AND CONTROL.

The state has control of the public waters of the state, and may prescribe rules and regulations whereby they may be appropriated and applied to a beneficial use.—*Idaho etc. Transp. Co. v. Stephenson*, 16 Idaho, 418, 101 Pac. 821.

Under Const., article 15, sections 1, 3, the right is reserved to the state to regulate and control the manner and means of appropriating the unappropriated waters of the state.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

The state has a right to forbid and prohibit the appropriation and diversion of its public waters for application and use beyond the confines of the state and within the jurisdiction of another state.—*Walbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 813.

II. NATURAL WATERCOURSES.

Acquisition of rights by appropriation and prescription. See post, VI.

Private ownership and title of state in waters. See ante, I.

Riparian and littoral rights in navigable waters. See Navigable Waters, III.

(A) RIPARIAN RIGHTS IN GENERAL.

Appropriation of water by riparian owner. See post, VI.

Rights against trespasser entering on land for purpose of appropriating water. See post, VI, (A).

Dams, cribbing and breakwaters for protection of banks. See post, VIII, (B).

Ownership of bed of stream. See post, II, (B).

Priority of appropriation. See post, VI, (I).

Right of ingress and egress to and from land of riparian owner. See Navigable Waters, III.

All waters in the state running in the natural channel of the stream are public waters; and private rights thereto are simply rights to the use thereof and not an ownership in them, so long as such waters are running in their natural channel.—*Boise Irrigation etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Where a complaint alleges that defendants, as mining partners, cast tons of waste material and poisonous substances into a stream ten miles above the lands of plaintiffs, polluting and defiling the stream, and that by the natural flow of the waters waste material had been deposited in a river on which plaintiffs' lands were located, causing the waters of the stream to deposit such waste material over portions of plaintiffs' lands to their great injury, rendering the water unfit for use and killing vegetation, it states a cause of action. *Hill v. Standard Min. Co.*, 12 Idaho, 223, 85 Pac. 907.

A riparian owner's right to use the water of a stream for domestic and culinary purposes and watering his stock, and to have the water flow by or through his riparian prem-

ises, is such a right as the law recognizes as inferior to a right acquired by appropriation and superior to any right of a stranger to or intermeddler with the waters of such stream. *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

The rights of a riparian proprietor exist and may be maintained as against a stranger who does not claim or assert his right to interfere with or disturb the waters of a natural stream by or on account of an appropriation to a beneficial use. In such case the rights of a riparian proprietor are superior and paramount to the rights of a stranger or intermeddler who does not assert or establish any right to the use of the water by appropriation.—*Hutchinson v. Watson Slough Ditch Co.*, 164 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

The common-law doctrine of riparian rights, in so far as those rights conflict with the right of an appropriator of the waters of a stream, is repugnant to, and in conflict with, the constitution and statutes of this state, and to that extent has been abrogated thereby. *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

Riparian rights exist in the state of Idaho only to the extent that they do not come in conflict with the superior and paramount right of one who has appropriated the waters for a beneficial use in conformity with the constitution and statutes of the state.—*Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

Evidence in this case examined and held sufficient to sustain the finding that Watson slough, in Bingham county, is a natural watercourse.—*Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

A riparian proprietor has a right to build cribbing, stockades, or riprapping along the natural bank of the stream in order to protect the banks and the abutting lands.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

The general rule applicable to flowing streams of a permanent character and well-defined banks and channel or bed is subject to many exceptions in case where a stream is vagrant and constantly changing in its course and channel and flows through a level, sandy and gravelly formation and is constantly filling in on one side and cutting out on the opposite side and thus damaging riparian proprietors.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

Editorial Notes.

Nature of riparian rights, and lands to which they attach: Ann. Cas. 1913E, 709; 11 L. R. A., N. S., 1062.

Nature of riparian rights and lands to which they attach: 9 Ann. Cas. 1235.

Correlative rights of upper and lower proprietors generally: 41 L. R. A. 737.

Division of water between opposite riparian owners: 26 L. R. A. 284.

(B) OBSTRUCTION AND DETENTION.

Dams and breakwaters for protection of banks. See, also, post, VIII, (B).

Of navigable waters. See Navigable Waters.

Boom companies and booms in general. See Logs and Logging.

Injuries to riparian owners by booms in navigable waters. See Navigable Waters.

Obstruction of navigation by booms. See Navigable Waters.

A prior appropriator of water may divert and use the amount of water to which he is legally entitled, but when he has done so, he may not dam the stream below him so as to hinder or impede the flow of the remaining waters of the stream to the injury of the next appropriator.—*Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Van Camp v. Breyer*, 13 Idaho, 209, 89 Pac. 754.

Editorial Notes.

Surface waters, right of lower proprietors to obstruct the flow of: 16 Am. St. Rep. 710.

(C) POLLUTION.

Duty of city to protect from pollution. See post, IX, (A), 7.

Deposit of mining waste and tailings on lands of riparian owner. See ante, II, (A). See, also, post, VI, (O), 2.

(D) DIVERSION.

Change in place or manner of diversion. See post, VI, (M).

Diversion as an element of appropriation. See post, VI.

Effect of contract between appropriations as to rights of diversion. See post, VII, (D).

Sufficiency of evidence to show injury from diversion in suit to determine priorities. See post, VI, (O), 7.

Liability of municipality for injuries due to diversion of stream from natural channel. See Municipal Corporations, XII, (D).

(E) BED AND BANKS OF STREAM.

Extent of ownership of lands under waters. See Navigable Waters, II.

Construction of deeds and grants as to boundaries. See Boundaries.

A riparian proprietor on a fresh-water stream, whether navigable or non-navigable, takes title to the thread of the stream.—*Latig v. Scott*, 17 Idaho, 506, 107 Pac. 47; reversed, 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.

III. SUBTERRANEAN AND PERCOLATING WATERS.

Whether subject to appropriation. See post, VI, (O).

Right to appropriate waters of spring where stream fed thereby has been wholly appropriated. See post, VI, (I).

Change in place of diversion or appropriation depriving subsequent appropriator of waste and percolating waters. See post, VI, (M).

IV. NATURAL LAKES AND PONDS.

Private fish-ponds. See Fish and Game.

Navigable lakes. See Navigable Waters.

As subject to appropriation. See post, VI, (C).
 Right of ingress and egress to and from land of riparian owner on navigable lake. See *Navigable Waters*, III.

V. SURFACE WATERS.

As subject to appropriation. See post, VI, (C).

VI. APPROPRIATION AND PRESCRIPTION.

(A) APPROPRIATION AND PRESCRIPTION IN GENERAL.

See, also, post, VI, (D).

Priorities. See post, VI, (I).

Under the rule that the largest duty and the greatest use must be had from every inch of water, a stream may not be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper application.—*Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Van Camp v. Breyer*, 13 Idaho, 209, 89 Pac. 754.

Evidence in an action to quiet title to the waters of a certain spring held sufficient to show an actual location and diversion of the waters and the application thereof to a beneficial use.—*City of Pocatello v. Brass*, 15 Idaho, 1, 96 Pac. 120.

Riparian owners who desire to appropriate public waters for a beneficial use must comply with the provisions of the law the same as those who are not riparian owners.—*Idaho etc. Transp. Co. v. Stephenson*, 16 Idaho, 418, 101 Pac. 821.

A showing by a riparian proprietor that he has been for more than seventeen years using the waters of a stream for "domestic, culinary and household purposes and for the use of his livestock," and that the water of the stream has continuously flowed through his land, "moistening the same," does not amount to an appropriation of any of the water of the stream within the meaning of the constitution and statute of this state.—*Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

The contest authorized by the irrigation statute, Laws 1903, page 223, is a contest against a permit issued under such statute, and is not against a right to the use of water by appropriation independent of the statute.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

Const., article 15, section 3, declares that an appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the particular use, and clearly recognizes an appropriation for domestic use as superior to appropriations for other uses, when the waters of any natural stream are not sufficient, for all those desiring the same; and that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property for public and private use as are referred to in Const., article 1, section 14.

Montpelier Mill. Co. v. City of Montpelier, 19 Idaho, 212, 113 Pac. 741.

Under Const., article 15, section 3, it was the intention of the framers of the constitution to provide that waters previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor; but it was not the intention to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes.—*Montpelier Mill. Co. v. City of Montpelier*, 19 Idaho, 212, 113 Pac. 741.

Where defendant owns all the lands on both sides of the channel of water from the place the water comes from the rimrock until the channel ends and the water empties into another stream, it is the right of defendant, by reason of its ownership of the land, to have exclusive possession of said land, and such owner is protected against any right that is attempted to be acquired by trespass on such land in the way of an attempt to appropriate the waters running across said land.—*Marshall v. Niagara Springs Orchard Co.*, 22 Idaho, 144, 125 Pac. 208.

The constitution and laws of this state specifically recognize the right to divert and appropriate the unappropriated waters of any natural stream to a beneficial use, and that such right shall never be denied; but this does not mean that a person is given the right to go upon private property of another for the purpose of making an appropriation, without the license or consent of the owner, or before such right is acquired by proceedings for condemnation.—*Marshall v. Niagara Springs Orchard Co.*, 22 Idaho, 144, 125 Pac. 208.

The entry upon private property for the purpose of investigation, inspection and the making of surveys, plans and specifications for the purpose of making application for a permit does not necessarily result in the permanent taking of the real property of the owner, but it necessitates the entry upon such land, and the right to enter upon such land must be secured either by agreement of the parties or by condemnation proceedings, and, without such remedy being pursued, the entry, if made, is a trespass.—*Marshall v. Niagara Springs Orchard Co.*, 22 Idaho, 144, 125 Pac. 209.

Editorial Notes.

Appropriation of water, what constitutes:
 60 Am. St. Rep. 799.

Right of prior appropriator of water:
 30 L. R. A. 665.

(B) CONSTITUTIONAL AND STATUTORY PROVISIONS.

Law regulating appropriation and diversion of water not local or special law. See *Statutes*, II.

Functions and powers of state engineer not judicial in contravention of constitution. See *Constitutional Law*, III, (C).

R. S. 4552-4556, giving right of action to recover public lands not inclosed and culti-

vated, do not apply to an action to settle the priority of water rights, to which R. S. 4041 is applicable.—Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19.

Sess. Laws 1899, page 380, providing for the appropriation and distribution of water, is not retroactive and does not require former appropriators of water to file new location notices to prevent forfeiture of their vested rights.—Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19.

Laws 1903, page 223, section 37, providing that in suits to determine water rights the maps, surveys, etc., of the state engineer ordered by the court in such proceeding shall be received as evidence, is a valid exercise of legislative power, since the legislature has general control over the rules of evidence and may change them at its pleasure.—Boise Irrigation etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321.

Laws 1903, page 223, section 37, prescribing certain procedure in suits for the settlement of water rights, is applicable to suits pending at the time the law went into effect, since there can be no vested right to any particular mode of procedure for the enforcement or defense of one's rights.—Boise Irrigation etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321.

The legislature has the power to prescribe the methods and means by which water may be diverted, appropriated and applied to a beneficial use and is not prohibited from so doing by Const., article 15, section 3, providing that the right to divert and appropriate the unappropriated waters of a stream to beneficial uses shall never be denied.—Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365.

U. S. Rev. Stats. 2339 (U. S. Comp. Stats. 1901, p. 1437) provides for protecting such rights to the use of water as vest and accrue by a priority of possession and such as are recognized and acknowledged by local customs, laws, and decisions of the courts.—Crane Falls etc. Irr. Co. v. Snake River Irr. Co. (on rehearing), 24 Idaho, 63, 133 Pac. 655.

(C) WATERS AND RIGHTS SUBJECT TO APPROPRIATION.

See, also, post, VI, (N).

Priorities. See post, VI, (I).

Quantity of water. See post, VI, (J).

Right to appropriate waters of spring where waters formed thereby have been appropriated. See post, VI, (I).

Under Laws 1903, page 223, section 1, providing for the appropriation and diversion of the waters of any natural streams, springs or seepage waters or lakes or other public waters, and U. S. Rev. Stats., section 2339, protecting and reserving such vested rights in public waters located on the public domain, it can make no difference that the waters collecting and forming what is known as a spring are seepage and percolating waters, rather than from a well-defined subterranean stream, so long as such waters gravitate to and collect at a certain definite point and

there form a spring.—Le Quime v. Chambers, 15 Idaho, 405, 21 L. R. A., N. S., 76, 98 Pac. 415.

At such times as an appropriator is not using the water under his appropriation, and is not applying the water to a beneficial use, such water must be considered and treated as unappropriated public water of the state, and for such period of time is subject to appropriation and use by others.—Hutchinson v. Watson Slough Ditch Co., 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

Const., article 15, section 3, confers and protects the right to "divert and appropriate the unappropriated waters of any natural stream to beneficial uses," but does not purport to deal with private waters, such as private ponds, artificial lakes, or wells owned by private persons and formed by collecting and impounding surface water.—King v. Chamberlin, 20 Idaho, 504, 118 Pac. 1099.

(D) PROCEEDINGS TO EFFECT APPROPRIATION.

Fee of state engineer for certificate of completion of works. See States, II, (G).

A person desiring to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice and commencing and prosecuting his work within the statutory time.—Sand Point Water etc. Co. v. Panhandle Dev. Co., 11 Idaho, 405, 83 Pac. 347.

The only difference between an appropriation initiated by posting notice and one initiated by diversion and application of the waters, is that the appropriator who claims under notice is allowed the extra sixty days within which to commence his work and reasonable time thereafter in which to complete the same.—Sand Point Water etc. Co. v. Panhandle Dev. Co., 11 Idaho, 405, 83 Pac. 347.

Under R. C. 3253 et seq., prescribing the method and procedure of appropriating public waters for useful and beneficial purposes, the state engineer first issues a permit to the applicant on his complying with certain provisions and then on proper proof of the completion of the contemplated works and approval thereof by said engineer, he issues a certificate of the completion of said works to the holder of the permit or his assigns, setting forth therein certain facts required by the statutes to be set forth; and thereafter, upon proper proof of the application of the water to a beneficial use, he issues a license confirming the right to use such water for the specified beneficial use.—Idaho etc. Transp. Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821.

Where the statute provides that an applicant for a water permit must state in the application the last known postoffice address, notice sent to such postoffice address is sufficient in the absence of a showing that the same has been changed.—Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365.

The permit authorized by the irrigation law (Laws 1903, p. 223) is not an appropri-

tion of the public waters of the state, nor is it real property under the statute.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

The permit prescribed by the irrigation act (Laws 1903, p. 223) merely gives the applicant an inchoate or contingent right which may ripen into a complete appropriation or may be defeated by the failure of the holder to comply with the requirements of the statute.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

Where one actually diverts the water of a stream and applies the same to a beneficial use in the irrigation of his growing crops, although he has never applied to the state engineer for a permit to do so, and has never procured either a permit or a license from the state engineer, still his right is superior and paramount to any right that a subsequent appropriator can procure, even though the latter secures a permit from the state engineer to appropriate and divert the water of the stream.—*Nielson v. Parker*, 19 Idaho, 727, 115 Pac. 488.

Where one enters land, under the desert land laws of Congress, on which is situated a spring and an artesian well, which well was constructed, prior to the entry of such land, for the purpose of increasing the flow of the water, and the water was used for watering stock, and the one who made the well thereafter sold his interest in said well to the entryman, and she made application of the water to the desert land so entered by her for growing crops therein, her appropriation is as valid as though she had made application to the state engineer for a permit to appropriate the same.—*Youngs v. Regan*, 20 Idaho, 275, 118 Pac. 499.

A permit issued by the state engineer to appropriate water from the public waters of the state is the consent given by the state that the applicant may proceed under the law and make an appropriation of the public waters. It is the initiation of the appropriation, but of itself is not an appropriation.—*Marshall v. Niagara Springs Orchard Co.*, 22 Idaho, 144, 125 Pac. 208.

An application for a permit to appropriate water under R. C. 3253 makes it necessary for a person intending to make an appropriation in accordance with the statute to go upon the ground immediately surrounding the point at which the diversion from the natural channel is to be made, for the purpose of securing and preparing data and plans and maps required by such application.—*Marshall v. Niagara Springs Orchard Co.*, 22 Idaho, 144, 125 Pac. 208.

Under R. C. 3253 an application to the state engineer for permit to appropriate water is required to state facts which can only be secured by entrance to the place where the appropriation is made, and a survey of the premises and surroundings at the point of diversion and place of improvement, and also a survey of the realty to be taken for dams and ditches to be used in appropriating the water to a beneficial use.—*Marshall v. Niagara Springs Orchard Co.*, 22 Idaho, 144, 125 Pac. 208.

Where a permit to appropriate public water upon lands belonging to the state is issued by the state engineer, such permit is an inchoate right, which may ripen into a legal and complete appropriation only upon the completion of the work and the application of the water to a beneficial use, and confers upon the person to whom the permit is issued no right under such permit against a stranger who subsequently secures from the state a better and higher right than is vested by virtue of the permit.—*Tobey v. Bridgewood*, 22 Idaho, 566, 127 Pac. 178.

In order to initiate the right to appropriate public waters of the state at a point upon land belonging to the state, it is necessary for the applicant to enter upon land owned by the state of Idaho for the purpose of making the necessary examination and surveys, maps, and plans required in order to make a proper application to the state engineer for a permit, and the entering upon the state lands for the purpose of making appropriation without having the right to make such entry, either by purchase or condemnation proceedings, as provided by law, would be a trespass upon said lands, under R. C. 1578.—*Tobey v. Bridgewood*, 22 Idaho, 566, 127 Pac. 178.

Under the constitution and laws of this state, a person desiring to appropriate the water of a stream within this state may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice and commencing and prosecuting his work within the statutory time, and, to make an appropriation under the constitution and statute, an appropriation may be made and completed, although a permit to make such appropriation is not secured from the state engineer by the person desiring to make such appropriation.—*Furey v. Taylor*, 22 Idaho, 605, 127 Pac. 676.

Water rights may be acquired either by following the statutory procedure and filing an application for water with the state engineer or by diverting unappropriated water and applying it to a beneficial use.—*Crane Falls etc. Co. v. Snake River Irr. Co.* (on rehearing), 24 Idaho, 63, 133 Pac. 655.

(E) DILIGENCE IN APPLICATION OF WATER TO USE.

Quantity of water appropriable. See post, VI, (J), 2.

Where, in a suit to determine water rights, plaintiff's testimony shows that, fourteen years after posting his appropriation notice, claiming water for power purposes, he had not erected or put into operation the sawmill to run which he made the appropriation, a judgment based on the theory that plaintiff had not exercised reasonable diligence is proper.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189.

Notice of appropriation of the waters of a stream was posted December 16, 1902. On January 14, 1903, work was commenced on roads, surveys, etc., preparatory to constructing the diverting works. Work was continu-

ously prosecuted from that time, with at least one man on the ground all the time and more than \$1,700 expended up to February 8, 1904. A mile of road had been built and a flume 3,400 feet in length. The county was rough and mountainous and the snowfall heavy. Held, that the work had been prosecuted with reasonable diligence as required by Laws 1899, page 381, section 6.—*Sand Point etc. Light Co. v. Panhandle Dev. Co.*, 11 Idaho, 405, 83 Pac. 347.

Where it is shown that in a period of twenty-four years the owner of a one hundred and sixty acre tract had only placed in cultivation about seventy acres thereof, an award of two hundred and ten inches of water therefor will not be upheld.—*Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

Evidence held to show that various appropriators had not reclaimed sufficient land within a reasonable time so as to entitle them to the quantity of water awarded by the trial court.—*Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

An appropriator of water for irrigation purposes has a reasonable time in which to apply water to his land after conducting it to the point of intended use.—*Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

In a suit to determine water rights, held that the respondents have proceeded with reasonable diligence to reclaim the land for which water has been decreed to them.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

(F) EXCLUSIVE APPROPRIATION AND USE.

Where water is diverted and appropriated for an entire tract of land by two persons owning separate portions thereof, the use of such water is a use in common, and the use by one tenant in common preserves the common estate for the benefit of his cotenant.—*Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.

Where all the water of a stream has been appropriated and put to a beneficial use, the state engineer cannot legally deprive the prior appropriator of such water by granting another and subsequent applicant a license to use the same to the injury of the first appropriator.—*Lockwood v. Freeman*, 15 Idaho, 395, 98 Pac. 295.

(G) ADVERSE CHARACTER OF APPROPRIATION OR USE.

To bar the claim of a prior appropriator of water on the ground of continuous adverse uses by a junior appropriator, the prior appropriator must have been excluded from such use, and where both have used the water continuously, no claim of adverse user can stand.—*Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031.

A title to water rights by prescription cannot be obtained by permissive use and occupation.—*Davis v. Devanney*, 7 Idaho, 742, 65 Pac. 500.

A prescriptive right to the use of water by adverse user can be obtained only by a

use adverse to the rights of the owner, and the claimant must have used such water continuously, uninterruptedly and adversely for a period of five years.—*Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.

Editorial Notes.

Prescriptive title to water: 93 Am. St. Rep. 711.

(H) TIME OF VESTING OF RIGHTS UNDER APPROPRIATION.

Priorities. See post, VI, (I).

Where a settler on public lands appropriates water for the reclamation thereof and diverts such water to and upon such lands, prior to filing or entering on the same, his water right, after entry, dates from the actual appropriation.—*Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.

Where one who appropriates water fails to post and file notice of location of water right, his right dates from the actual application of the water to the land.—*Pyke v. Burnside*, 8 Idaho, 487, 69 Pac. 477.

Where the owner of land builds a ditch to conduct water on his land and permits the water to spread out over his land for the purpose of growing wild hay, he thereby secures the right to the use of sufficient water to irrigate such land from the date of the first application of the water to that purpose.—*Pyke v. Burnside*, 8 Idaho, 487, 69 Pac. 477.

An appropriation of water under Laws 1899, page 380, is initiated by the posting of notice, and an inchoate right thereby arises which may ripen into a legal and complete appropriation upon the final delivery of the waters to the place of intended use.—*Sand Point etc. Light Co. v. Panhandle Dev. Co.*, 11 Idaho, 405, 83 Pac. 347.

When one posts and records notice of intention to appropriate waters under Laws 1899, page 380, and within sixty days thereafter commences work on his proposed diverting works and prosecutes such work with reasonable diligence, his appropriation dates from the posting of his notice and the right thus acquired is prior to the rights of any subsequent appropriator claiming either by posting of notice and compliance with the statute or by an actual diversion and application of the water.—*Sand Point etc. Light Co. v. Panhandle Dev. Co.*, 11 Idaho, 405, 83 Pac. 347.

Where a settler on unsurveyed public land opened an old ditch which had been constructed and used by a previous settler, and put in a headgate and conveyed the waters of a stream one hundred and fifty feet to and upon the lands claimed by him, and in the following year extended the ditch so as to better distribute the water over his claim, and this in turn was followed by cultivation of a larger acreage of the claim, there is an actual appropriation which dates from the time the water was originally diverted and appropriated.—*Brown v. Newell*, 12 Idaho, 166, 85 Pac. 385.

Where a water right notice was dated April 8, 1885, and there is evidence to show an

actual diversion in May, 1885, and that a crop was raised on the land during that year, the water right would relate back to the date of the notice.—*Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

Where a party has constructed his ditches and diverted water and irrigated his land for a number of years, and thereafter posts and files for record location notices, his right dates from the time of his appropriation, and not from the date of posting such notices.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

(I) SUCCESSIVE APPROPRIATIONS AND PRIORITIES THEREOF.

Time of vesting of rights. See ante, VI, (H).

The first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld.—*Malad Valley Irr. Co. v. Campbell*, 2 Idaho, 411, 18 Pac. 52; *Drake v. Earhart*, 2 Idaho, 750, 23 Pac. 541; *Geertson v. Barrack*, 3 Idaho, 344, 29 Pac. 42; *Kirk v. Bartholomew*, 3 Idaho, 367, 29 Pac. 40; *Dunniway v. Lawson*, 6 Idaho, 28, 51 Pac. 1032; *Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031; *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059; *Nielson v. Parker*, 19 Idaho, 727, 115 Pac. 488; *Brose v. Board of Directors etc. Irr. Dist.*, 20 Idaho, 281, 118 Pac. 504.

Rights cannot be acquired to the waters of springs situate along the channel of a stream, and which constitute its direct source of supply, by entering upon, cleaning out and thereby increasing the supply, as against prior appropriators in good faith of the whole of the waters of the stream.—*Malad Valley Irr. Co. v. Campbell*, 2 Idaho, 411, 18 Pac. 52.

A riparian proprietor's claim to the use of water of a stream flowing through his land not based upon appropriation under the territorial laws is inferior to that of a prior appropriator.—*Drake v. Earhart*, 2 Idaho, 750, 23 Pac. 541.

Where the evidence shows that plaintiff and his grantors had appropriated all the waters of a certain creek and had continuously used the same for the purpose of irrigating plaintiff's lands, plaintiff is entitled to all of said waters to the extent of the capacity of his ditches necessary to the proper irrigation of his said lands as against subsequent locators, under R. S. 3159, providing that "as between appropriations, the one first in time is first in right."—*Hillman v. Hardwick*, 3 Idaho, 255, 28 Pac. 438.

Where a land owner has appropriated and diverted water from a natural stream for the irrigation of his land and thereafter enters into an agreement with an irrigation company whereby he consents and agrees to relinquish and waive his water right from the stream and allow the irrigation company to collect the waters of the stream into reservoirs, and the company agrees in consideration thereof to deliver water to such land owner from the reservoirs and canal system, the priority of the original appropriator should properly date from the time of his first

appropriation, diversion, and application of the water to a beneficial use.—*Mellen v. Great Western etc. Sugar Co.*, 21 Idaho, 353, Ann. Cas. 1913D, 621, 122 Pac. 30.

One who actually settles upon or improves land lying under a canal or irrigation ditch with a view to receiving water therefrom for agricultural purposes is entitled to a priority over one who has previously purchased a water right from such canal company, but who has failed to either settle upon or improve the land as required by Const., article 15, section 5.—*Mellen v. Great Western etc. Sugar Co.*, 21 Idaho, 353, Ann. Cas. 1913D, 621, 122 Pac. 30.

The "settlement" or "improvement" upon land with a view to receiving water for agricultural purposes, as provided for in Const., article 15, section 5, means an actual settlement or an actual improvement thereon, and a constructive settlement will not meet the purpose or requirements of the constitution.—*Mellen v. Great Western etc. Sugar Co.*, 21 Idaho, 353, Ann. Cas. 1913D, 621, 122 Pac. 30.

Where an association procures the right of other appropriators on a stream and diverts the water at the mouth of a canyon into a reservoir, it is bound to permit sufficient water to pass down the stream to give each of the prior appropriators at the head of the ditch the amount of water awarded to them. *Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

Where a decree is entered in the district court determining the priorities of appropriations by the parties to such suit, and in such decree F. is awarded five hundred and ninety inches of the waters of Big Lost river and one hundred and thirty inches of the waters of Pass creek, a tributary of Big Lost river, and after such decree is rendered F. is unable to secure the water adjudged him by reason of others taking such property, and by reason of being unable to conduct the same through the ditches of F., and F. makes an appropriation of three hundred and fifty inches additional water from Pass creek, and such water so appropriated by F. was surplus water in said creek and unappropriated by any other person, and such water so appropriated is applied to a beneficial use upon the lands of F. upon which he was adjudged the priority in the case adjudicated, and F. uses said water because he is unable to get any other water upon his said land continuously after such appropriation for the period of four years, such water becomes an appurtenance to his land, and is not subject to appropriation by a subsequent appropriator who attempts to appropriate the same out of Pass creek.—*Furey v. Taylor*, 22 Idaho, 605, 127 Pac. 676.

Editorial Notes.

Appropriators and riparian owners, respective rights of: 43 Am. Dec. 269.

(J) NATURE AND EXTENT OF RIGHTS ACQUIRED.

1. In General.

A permit to appropriate the public water at a point upon state lands, issued by the

state engineer, is not a lease of the land where the location is made, neither is it a deed of sale of the land at a point where the water is to be taken.—*Tobey v. Bridgewood*, 22 Idaho, 566, 127 Pac. 178.

2. Quantity of Water.

Water that is appropriated for irrigation purposes must be measured to the claimant at the point of diversion.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189; *Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty.—*Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254; *Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481.

In determining the amount of water appropriated for useful or beneficial purposes, the number of acres of land claimed or owned by each party to the suit, and the amount of water necessary to the proper irrigation thereof, should be taken into consideration. *Kirk v. Bartholomew*, 3 Idaho, 367, 29 Pac. 40.

Appropriators of water for irrigation purposes, after conducting the water to the point of intended use, have a reasonable time in which to apply it to the use intended; and they may add to the acreage of cultivated land from year to year and make application of water thereto for irrigation, as their necessities demand or as their abilities may permit, until they shall have put to a beneficial use the entire amount of water at first diverted by them; provided, that that amount is needed for the reasonable irrigation of the land.—*Conant v. Jones*, 3 Idaho, 606, 82 Pac. 250.

In 1863, plaintiffs' grantors appropriated one hundred and twenty-five inches of the waters of Elk creek and utilized the same for placer mining. In December, 1863, defendants' predecessors located and appropriated all the surplus water in Elk creek and its tributaries and used the same for mining purposes through a ditch constructed in 1864. In 1865 plaintiffs' grantors constructed a second ditch with a capacity of five hundred inches and connected this with their original ditch, which was also enlarged so as to have a capacity of five hundred inches. Held, that, as against defendants, plaintiffs could only claim priority for one hundred and twenty-five inches of the water of Elk creek.—*Branstetter v. Williams*, 6 Idaho, 574, 57 Pac. 433.

A & B, copartners, owning two adjoining tracts of land, diverted five hundred inches of water for the cultivation thereof as a partnership enterprise. Two hundred acres of A's land were reduced to cultivation, and for fourteen years thereafter the copartners diverted five hundred inches of water during each season, the greater part thereof being used on the cultivated portion and the water not so applied flowing upon B's land. At the end of fourteen years, the partnership was dissolved, the land and water right being divided equally, A getting the cultivated land

and B the remainder. For twelve years after such division the parties and their successors in interest divided the water equally. Held, that the right to the use of water for all the land dated from the first appropriation thereof and that B's successor in interest was entitled to the use of sufficient water up to two hundred and fifty inches to irrigate his portion of the four hundred and eighty acre tract.—*Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.

Where one constructs a ditch and conducts water upon his land year after year, and permits it to spread out over wild hay land, for the purpose of making hay or for pasturage, he secures the right to the use of sufficient water to irrigate such land, provided the amount so used is sufficient for that purpose. *Pyke v. Burnside*, 8 Idaho, 487, 69 Pac. 477.

Where prior appropriation and right of use in water is established, the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted.—*Moe v. Harger*, 10 Idaho, 302, 77 Pac. 645.

When an appropriator is not using water under his appropriation and during the season not covered by his appropriation, he must allow the water to flow down the bed of the natural channel.—*Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use and application of water, and this economy should be as rigidly demanded of a water user who has a prior and superior water right as of any other person.—*Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481.

The amount of water that a water user and consumer has been in the habit of using and applying to his lands cannot be accepted as the true test of the duty of water, but the question to be determined in such case is the amount actually necessary for the useful or beneficial purpose to which the water is to be applied.—*Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481.

The quantity of water decreed to an appropriator, in an action wherein the priority of appropriation is the issue, should be upon the basis of cubic feet per second of time of the water actually applied to a beneficial use, and should be definite and certain as to the quantity appropriated and necessarily used by the appropriator.—*Lee v. Hanford*, 21 Idaho, 327, 121 Pac. 558.

3. Canals, Ditches, Pipes and Flumes.

See, also, post, IX, (B), 7.

Ditch or canal across public highway constituting a nuisance. See Nuisance.

Abandonment or forfeiture of rights. See post, VI, (L).

Artificial ponds, reservoirs, and channels, dams and sewage. See post, VIII.

Condemnation for canal or ditch. See Eminent Domain.

Irrigation canals, condemnation for. See Eminent Domain.

Easement for ditch by adverse possession, extent determined by use and not by calls of unrecorded deed. See Adverse Possession.

Exemption from taxation of irrigating ditches and water rights. See Taxation, III, (D).

Easement for irrigation canal not breach of covenant. See Covenants, III.

Grant of right to use water from canal. See post, VII, (C).

Contract giving right to use water from ditch. See post, VII, (D).

Liens for work on canals or ditches. See Mechanics' Liens.

Reservation of right of way for ditches or canals constructed by the United States. See Public Lands, II, (D).

The ownership of a ditch and the ownership of a water right for waters to flow through such ditch may be in different persons.—*Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891; *Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045; *Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

Under U. S. Rev. Stats. 2339, a right of way for a mining ditch on unoccupied public lands of the United States vests in the owners of such ditch when they accept the offer of donation made by the government in said section by constructing such ditch, and under U. S. Rev. Stats. 2340, a patent subsequently issued to the lands traversed by the ditch is subject to such right of way.—*Welch v. Garrett*, 5 Idaho, 639, 51 Pac. 405.

Possessory rights to ditches and to the use of water may each have an existence independent of the other; a ditch may be conveyed, reserving the water right, or the water right may be conveyed, reserving the ditch.—*Ada County etc. Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990.

In an action to recover possession of a certain right of way for an irrigating ditch, the complaint alleged the location of a water right, the water appropriated thereby to be used in irrigating certain described lands; that within sixty days after posting the location notice, the construction of a canal was begun, by surveying, laying out and staking off a right of way; that plaintiff took possession of said right of way and diligently proceeded with the construction of a canal upon said right of way; that defendants forcibly ejected plaintiff therefrom and took possession thereof. The evidence showed that at the date of the location of the water right and right of way claimed by plaintiff, said right of way and a partially completed canal were owned by defendant's assignor, who had to take the canal system over in payment for his work done as a contractor in constructing such system. The evidence further showed that this company had begun the construction of such system more than six years prior to the date of plaintiff's location and had ex-

pended more than \$300,000 thereon, then becoming insolvent; that the canal could be used, independently of the water right of plaintiff; and that defendant's assignor had not abandoned or forfeited his right thereto. Held, that defendant was the owner of said right of way and entitled to the possession of the same.—*Ada County etc. Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990.

Where a settler on a part of the unsurveyed public lands of the United States has peaceable possession thereof, and constructs a ditch across the land, he secures the right of way therefor, although such land, when surveyed, is found to be within the grant to the railroad company.—*Childs v. Sharai*, 8 Idaho, 378, 69 Pac. 111.

The fact that a party has located a water right and filed his notice thereof in accordance with law does not give him a right to build ditches and canals across the lands of others until he has acquired an easement or right of way therefor, either by purchase or condemnation.—*Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 353, 98 Pac. 297.

An appropriator of water may adopt as his ditch, or a part thereof, a depression or slough, where it is feasible, and thus save the cost of the construction of a ditch.—*Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

The statutes of this state clearly grant the right of way over and upon any and all lands owned or controlled by the state to all persons for the purpose of constructing and maintaining any ditch, canal, conduit, or other works for the diversion or carrying of water for any beneficial purpose, and provide that no property shall be taken for such purpose until just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for a public use.—*Tobey v. Bridge-wood*, 22 Idaho, 566, 127 Pac. 178.

(K) TRANSFER OF RIGHTS.

Transfer of property, easements or rights in general.

See post, VII, (A), (C).

Conveyances and contracts. See post, VII; *Frauds, Statute of*.

Where one settling on the public lands of the United States acquires a right to the use of water for the irrigation of land taken by him, such water right may be conveyed by him, independent of the land, or, in case of his death such right may descend to his heirs, since such right is real estate under R. S. 2825.—*Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.

One claiming a water right under R. S. 3163, as amended by Laws 1899, page 381, may sell the right to use such waters and the purchaser may transfer it to other lands susceptible of irrigation from such ditch if others are not injured thereby.—*Hard v. Boise City Irr. etc. Co.*, 9 Idaho, 589, 65 L. R. A. 407, 76 Pac. 331.

A and B, copartners, owning two adjoining tracts of land, diverted five hundred inches of water for the cultivation thereof as a partnership enterprise. Two hundred acres of A's land were reduced to cultivation, and for fourteen years thereafter the copartners diverted the full quantity of water during each season, the greater part thereof being used on the cultivated portion and the water not so applied flowing upon B's land. At the end of fourteen years, the partnership was dissolved, the land and water right being divided equally, A getting the cultivated land and B the remainder. For twelve years after such division the parties and their successors in interest divided the water equally. Held, that the right to use water sufficient to irrigate the land not actually cultivated became appurtenant thereto, and was transferred by deed conveying such land and its appurtenances.—*Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.

One who purchases a water right from a canal or ditch company that has made its appropriation for the purposes of sale, rental, or distribution thereof, acquires no priority until he complies with Const., article 15, section 5, and settles upon or improves the land with a view of receiving water for agricultural purposes, and when he does so settle upon land or improve it with diligence and good faith, he is entitled to have his priority date from the time of making such settlement or beginning such improvement.—*Mellen v. Great Western etc. Sugar Co.*, 21 Idaho, 353, Ann. Cas. 1913D, 621, 122 Pac. 30.

(L) ABANDONMENT OR FORFEITURE OF RIGHTS.

The nonuser of a ditch or any part thereof, during that portion of the time that its use was prevented by circumstances over which the plaintiff had no control, is not evidence of abandonment of, or intention to abandon, such ditch.—*Welch v. Garret*, 5 Idaho, 639, 51 Pac. 405.

A ditch constructed for mining purposes on unoccupied public lands of the United States is held by grant and the owner of such ditch does not forfeit his right thereto merely by nonuser.—*Welch v. Garret*, 5 Idaho, 639, 51 Pac. 405.

The loss of the right to divert water under a specific location does not necessarily forfeit the right to an irrigation canal or right of way for one.—*Ada County etc. Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990.

The owner of a ditch on public lands of the United States does not forfeit the same merely by nonuser.—*Ada County etc. Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990.

The right of a prior appropriator of water cannot be defeated to any portion thereof, on the ground that he has by reason of a mistake as to his boundary lines used a portion of such waters on lands other than his own.—*Mahoney v. Neiswanger*, 6 Idaho, 750, 59 Pac. 561.

Where a pre-emption claimant of government lands is wrongfully ejected therefrom, the interruption of his possession is not evidence of the abandonment or nonuser of a water right connected therewith.—*McGinness v. Stanfield*, 7 Idaho, 23, 59 Pac. 936.

Evidence held sufficient to support a finding that certain appropriators of water from a natural stream had abandoned their water rights and ceased to use and apply the water to a beneficial use.—*Mellen v. Great Western etc. Sugar Co.*, 21 Idaho, 353, Ann. Cas. 1913D, 621, 122 Pac. 30.

(M) CHANGE IN PLACE, MANNER OR PURPOSE OF DIVERSION, APPROPRIATION OR USE OF WATER.

Effect of contract between appropriators as to rights of diversion. See post, VII, (D).

Where a decree fixes the point of diversion of water and thereafter in another suit, wherein the parties in the first decree are parties with others, the quantity of water awarded to the parties in the prior suit is scaled down but the point of diversion thereof is not changed, an injunction will lie to prevent the changing of such point of diversion to the injury of the successors in interest of some of the parties to the prior actions.—*Walker v. McGinness*, 8 Idaho, 540, 69 Pac. 1003.

Where one claiming the right to the use of the waters of a stream has made his appropriation and diversion on one branch or fork of the stream, and a subsequent appropriator makes his appropriation and diversion lower down the stream and below the forks of the stream, such subsequent appropriator cannot be injured, and has no cause of complaint on account of the prior appropriator conveying the waters of the fork or branch of the stream on which he made his appropriation to the other branch of the stream for use on his placer mines, for the reason that the subsequent locator gets the full benefit of all the waters left after they have been used by the prior appropriator.—*Saunders v. Robison*, 14 Idaho, 770, 95 Pac. 1057.

Under R. S. 3157, a person entitled to the use of water may change the place of diversion, if others are not injured thereby.—*Bennett v. Nourse*, 22 Idaho, 249, 125 Pac. 1038.

E. & E. appropriated four hundred and eighty inches of water of a certain creek and diverted the same from the creek in 1872, and applied the same to their lands, and thereafter in 1876 constructed another ditch lower down the creek for the purpose of diverting a part of their appropriation from said creek, and did so divert after 1876, and thereafter in 1879 H. made an appropriation of water from said creek, and diverted it below E. & E.'s 1876 diversion, and thereafter E. & E. sold their land and water rights to other persons, among them B. B. thereafter conducted about half of the water awarded to him through said ditch of 1876 and about half through a ditch constructed in 1886 and thereafter in 1899 an action was brought to determine the priorities and amounts of said and

other users of water from said creek, and the priorities and amounts were determined by the decree in said action, B. being given a priority as of 1872 for 238 inches, and H. a priority as of 1879 for 150 inches, and B. continued to divert about one-half of said 238 inches through his 1876 ditch, held, that H. is not entitled to an injunction restraining B. from so diverting his water.—*Hall v. Blackman*, 22 Idaho, 539, 126 Pac. 1045.

A change of the place of use of the waters will not be permitted where to do so will damage another appropriator.—*Hall v. Blackman*, 22 Idaho, 556, 126 Pac. 1047.

Where B. had certain water rights decreed to a specific tract of land, and H., a subsequent appropriator lower down the stream, had certain subsequent rights decreed to him, B. will not be permitted to thereafter carry a part of his appropriation beyond the lands formerly irrigated, and irrigate other and additional new lands, where in so doing he deprives H. of the benefit of the use of the seepage, waste and percolating waters which he formerly received from the use of the waters on the tract of land to which they were decreed.—*Hall v. Blackman*, 22 Idaho, 556, 126 Pac. 1047.

Under R. C. 3247, a person entitled to the use of water may change the point of diversion, if others are not injured by such change; and such change does not work a forfeiture or is not an abandonment of such right.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

(N) EFFECT OF APPROPRIATION.

See, also, ante, VI, (O).

Where one person enters upon a tract of land claimed and held by a homestead entryman and without objection of such entryman appropriates and diverts the waters of a spring thereon in accordance with the provisions of Laws 1903, page 223, and conveys the same by means of a pipe to other lands, and thereafter such entryman's entry is canceled on a contest and the contestant enters such land as a homestead, the latter entryman takes the land subject to the burden and servitude of such water appropriation and easement, and under the foregoing statute and U. S. Rev. Stats. 2339, such water right and easement will be protected by the courts. *Le Quime v. Chambers*, 15 Idaho, 405, 21 L. R. A., N. S., 76, 98 Pac. 415.

The state engineer has no right, power, or authority to interfere with vested rights, or to grant a permit for the appropriation and diversion of the water of a stream, where the same has already been diverted and applied to a beneficial use.—*Nielson v. Parker*, 19 Idaho, 727, 115 Pac. 488; *Youngs v. Regan*, 20 Idaho, 275, 118 Pac. 499; *Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

Under the laws of this state, a water right is "real property," and one who has actually diverted the water of a stream and applied the same to a beneficial use is in the actual possession of such real property, and this possession constitutes actual notice to any sub-

sequent appropriator of the water of the same stream, or to any person who subsequently applies to the state engineer for a permit to appropriate and divert the water of the same stream.—*Nielson v. Parker*, 19 Idaho, 727, 115 Pac. 488.

(O) ACTIONS TO DETERMINE, ESTABLISH AND PROTECT RIGHTS.

See, also, post, VII, (E); IX, (B), 8.

Law prescribing procedure, effect on pending suits.

See ante, VI, (B).

Constitutionality of law authorizing maps and surveys of state engineer to be received in evidence.

See ante, VI, (B).

1. Form of Remedy.

An action to ascertain, determine and decree the extent and priority of a water right partakes of the nature of an action to quiet title to real estate.—*Taylor v. Hulett*, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37.

2. Rights of Action and Defense.

In an action to restrain defendant from running placer mining debris into plaintiff's irrigating ditch and on his land, plaintiff need not establish a prior and superior right to the waters of the ditch in order to justify the relief asked.—*Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891.

Plaintiff appropriated, diverted and used for the irrigation of their certain lands two hundred and twenty inches of the water of S. creek, and continuously used same from May 1, 1870, to the commencement of the action, July 25, 1893. Defendant appropriated one hundred and fifty inches of water from said stream May 1, 1880, and continuously used same for irrigating his land up to the time of the commencement of the action, but did not deprive the plaintiffs of the possession and use of the water claimed by them. Held, that plaintiffs were not bound by limitation from asserting prior rights to the use of said stream against the defendant.—*Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031.

Laws 1903, page 223, section 34, authorizing the water-master to bring an action against all persons claiming water rights, whose rights have not been adjudicated and allotted under the preceding provisions of the act, violates the statutory provision which requires suits to be brought in the name of the real party in interest.—*Bear Lake County v. Budge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

The action of the state engineer, in deciding to cancel or in refusing to cancel a permit to appropriate waters, is not conclusive upon the parties, and may be reviewed in the district court upon appeal or may be questioned in a direct proceeding in the district court, and the court in considering such matter is in no way controlled or concluded by the action of the state engineer.—*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365.

3. Injunction.

An action to determine the right to waters flowing in a public stream in this state

wherein the facts alleged show that the plaintiff appropriated such water and applied the same to a beneficial use prior in time to the alleged diversion and appropriation of the defendant, states a cause of action, and entitles the plaintiff to an injunction restraining further appropriation on the part of defendant.—*Montpelier Mill. Co. v. City of Montpelier*, 19 Idaho, 212, 113 Pac. 741.

4. Jurisdiction and Venue.

An action to ascertain, determine and decree the extent and priority of a water right should be maintained in the jurisdiction in which the res or subject matter is located.—*Taylor v. Hulett*, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37.

The courts of this state in ascertaining, decreeing and protecting property rights in water appropriations within the jurisdiction of this state, may at the same time and for that purpose inquire into and determine rights and priorities of the same stream that are located higher up the stream and beyond the state line, in order to fully and finally determine the relative rights of the parties, and decree the extent of title and rights of possession of the subject matter located within this state.—*Taylor v. Hulett*, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37.

The jurisdiction of the courts of Idaho to ascertain and determine water appropriations within this state is not ousted or defeated by the fact that a defendant sets up in his answer that he has an appropriation of the waters of the stream in controversy, and that he diverts the waters from such stream in the state of Wyoming for use and application in irrigating lands situated within that state.—*Taylor v. Hulett*, 15 Idaho, 265, 19 L. R. A., N. S., 535, 97 Pac. 37.

5. Parties.

Under R. S. 4101, 4102, providing who may be joined as plaintiffs and who as defendants, all appropriators and users of water from a common source have such a common interest in having the rights of the respective appropriators determined and quieted that they may join as plaintiffs in an action to enjoin interference therewith against any and all appropriators obstructing their rights or diverting the water.—*Frost v. Alturas Water Co.*, 11 Idaho, 294, 81 Pac. 996.

In a suit between the appropriators of the waters of a stream involving the rights and priorities of the several appropriators, the users and consumers of water under a canal that has appropriated water for the purpose of sale, rental or distribution are not necessary and indispensable parties to the action, and a decree in such a case is valid and binding as between all the parties to the action. *Farmers' etc. Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho, 450, 94 Pac. 761; *Farmers' etc. Ditch Co. v. Riverside Irr. Co.*, 14 Idaho, 462, 94 Pac. 765; *Farmers' etc. Ditch Co. v. Riverside Irr. Co.*, 14 Idaho, 463, 94 Pac. 764; *Farmers' etc. Ditch Co. v. Riverside Irr. Co.*, 14 Idaho, 464, 94 Pac. 764.

In an action to adjudicate the priorities of appropriation of the waters of a stream, where there are a large number of plaintiffs and defendants, and much time has been consumed and large expense incurred in taking the testimony in said cause, and, after the close of such evidence and the decree is in preparation, the court makes an order requiring new parties to be brought in as defendants, and such defendants appear and file an answer and cross-complaint, and motion is made by other defendants to set aside and vacate the order of the court making such new defendants parties, and the court is of the opinion that the bringing in of such parties would require a retrial of said cause, and put the plaintiffs and defendants to the expense of going over the ground which had already been gone over in the evidence, and that said order had been made inadvertently, it is not error to sustain the motion to set aside and vacate the same, and to strike the answer and cross-complaint of said defendants from the files.—*Frost v. Idaho Irr. Co.*, 19 Idaho, 372, 114 Pac. 38.

In an action to determine the priority of rights of appropriation from a stream of water, all parties claiming right of appropriation should be made either parties plaintiff or defendant; but the failure to make all such parties who claim a right of appropriation parties to said suit will not affect the rights and interests as adjudicated between the parties to such action and determined by the court.—*Frost v. Idaho Irr. Co.*, 19 Idaho, 372, 114 Pac. 38.

6. Pleading.

Sufficiency of complaint for injunction. See ante, VI, (O), 3.

Where a complaint alleged prior appropriation of water by plaintiffs fixing the year 1862 as the time of such appropriation, and also alleged, on information, appropriation of water from the same stream by defendants in the year 1863 and the latter date is admitted by the answer, and the proof and findings show that plaintiffs established a right to date from June, 1864, and the defendant from 1865, a judgment for plaintiff will not be disturbed on the ground of variance between the pleading and proof.—*Branstetter v. Williams*, 8 Idaho, 257, 67 Pac. 800.

Each party, by way of complaint or cross-complaint, is required to set up the ultimate facts upon which his claim of right is based, and it is the duty of the court to make its finding of facts upon the evidence; and if the allegations of the pleadings do not conform to the proof offered the court may direct the pleadings to be amended to conform to such proof.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

Where it is alleged by one cross-complainant that it requires four hundred inches of water to properly irrigate her land, that being about four inches to the acre, and another cross-complainant alleges that it requires only five-eighths of an inch to properly irrigate such land, the amount actually required

is put in issue by such pleadings.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

7. Evidence.

Sufficiency of evidence to show dedication of water by user. See *Dedication*.

In an action for an injunction and for damages to plaintiff's water right, the answer averred a right to the prior use of all the waters of said creek by adverse user for a period of ten years, but did not aver that defendant had acquired such right by prior location and appropriation. Held, that a deed purporting to convey the water rights in question, dated twelve years before the filing of the answer, was properly excluded.—*Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891.

To settle pending litigation, three claimants to certain water rights agreed to an equal division thereof. The contract was not acknowledged so as to be entitled to record, but was recorded. The land and appurtenant water rights of each of the parties to the agreement was transferred to other persons. One of such persons attempted to appropriate the water to the exclusion of the other claimants. Held, that the agreement was admissible as a declaration against interest against the parties and those claiming under them.—*Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442.

In a suit to determine water rights, it was shown that a stream disappeared for a distance of from eight to fourteen miles above a point called the "Narrows," reappearing at the "Narrows" and flowing out through that point in a perpetual stream of about the same volume flowing in the channel above the point where it sank. Defendants lived in the valley above the point where the stream disappeared and plaintiff, whose rights to the use of the water were prior in point of time to those of defendants, resided below the point where the stream reappeared. Defendants claimed that the taking of water from the stream above the point where it sank and irrigating the lands above the "Narrows" did not in any manner lessen the flow of water at that point, their theory being that the spring floods filled up the entire valley, which served as a natural reservoir, storing a sufficient water supply to cause a continuous and uniform flow of the stream through the "Narrows." There was evidence to show that in the ordinary irrigation of the lands in that valley about seventy-five per cent of the water spread upon the land was lost by evaporation and absorbed by plant and vegetable life. Held, insufficient to show that plaintiffs were not injured by defendants' diversion of the waters.—*Moe v. Harger*, 10 Idaho, 302, 77 Pac. 645.

Evidence of expert and nonexpert witnesses with reference to the theory of the formation of a natural reservoir along the course of a stream examined, and held insufficient to justify a court in departing from the uniform and well-established doctrine that the first appropriator has the first right.—*Moe v. Harger*, 10 Idaho, 302, 77 Pac. 645.

Where the evidence in an action to quiet title to water appropriated from a public stream shows that the flow thereof varies between four and one thousand inches, according to the seasons of the year, and that the appropriator has only about fifty or sixty acres under irrigation, findings and decree which give to such appropriator all the waters thereof will be set aside as giving to such appropriator more water than is necessary for his beneficial use.—*Lee v. Hanford*, 21 Idaho, 327, 121 Pac. 558.

8. Damages.

(No paragraphs.)

9. Trial or Hearing and Reference.

Power of court to appoint referee in action to determine water rights. See *Reference*.

In an action to determine water rights, the court must find the date and amount of each appropriation and from these facts determine the priority of right, as between the parties. *Geertson v. Barrack*, 3 Idaho, 344, 29 Pac. 42; *Kirk v. Bartholomew*, 3 Idaho, 367, 29 Pac. 40.

Where the pleadings raise no issue as to the priority of claimants to water rights, the trial court does not err in failing to find as to priority.—*Kent v. Richardson*, 8 Idaho, 750, 71 Pac. 117.

Where it is stipulated that a finding as to the amount of the cost of construction of a ditch is immaterial, and the court finds as to such cost, the parties will be estopped to question the correctness of such finding.—*Kent v. Richardson*, 8 Idaho, 750, 71 Pac. 117.

Laws 1903, page 223, section 37, requiring that in suits to determine water rights thereunder "the judge of said court shall request the state engineer to make an examination of such stream," etc., is directory and it is left to the sound discretion of the judge whether such request shall be made or not.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

The findings in this case show that the respondent, and its predecessors in interest, made an appropriation of ten second-feet of the waters flowing in Montpelier creek, in the year 1891, and applied the same to a beneficial use, and continuously used the same until interfered with by the appellant, and that such appropriation was prior in time to any right of the appellant, and support the judgment.—*Montpelier Mill. Co. v. City of Montpelier*, 19 Idaho, 212, 113 Pac. 741.

In an action to quiet title to water appropriated from a public stream in this state, where the issue joined is one of priority, the court should find the actual appropriation made by each appropriator, giving the time the appropriation was made and the quantity of water appropriated to a beneficial use by each appropriator.—*Lee v. Hanford*, 21 Idaho, 327, 121 Pac. 558.

Held, that the trial in this case was conducted as is customary in water suits, and

upon the theory that all parties submitted to the court evidence of the dates of the appropriation of water and of the amounts to which they were entitled.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

10. Judgment or Decree and Relief Awarded.

Where a decree has been entered settling the rights of various parties to the waters of a stream and enjoining the use of such waters except as provided in the decree, a bill to enforce the decree will not lie for violation thereof in the absence of a change of parties, conditions or interests.—*Raft River Land etc. Co. v. Langford*, 5 Idaho, 62, 146 Pac. 1024.

In an action to settle water rights, the district court, after establishing the priorities of the various appropriators, proceeded to declare the amount to be used on each several tract and the time when the same might be used. Held, error, since each appropriator, and not the court, is the judge, within the limits of his appropriation, of the times when and the place where the water shall be used.—*McGinness v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020.

In an action to settle water rights, some of the defendants, in addition to their answers, filed cross-complaints asking affirmative relief against plaintiffs and some of their codefendants. On motion of all the defendants, plaintiffs were nonsuited. Held, that it was error to dismiss the cross-complaints, the rule being that where the cross-bill sets up additional facts and asks affirmative relief against complainant in a matter which is the subject of the original bill, the dismissal of the original bill does not dispose of the cross-bill.—*Taylor v. Bartholomew*, 6 Idaho, 500, 56 Pac. 325.

Under R. S. 4353, providing that where an answer is filed the court may grant any relief consistent with the case made by the complaint and embraced within the issue, the court may fix plaintiff's prior right to water as alleged in the complaint in an action to enjoin interference therewith, praying for damages and for general relief.—*Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891.

Where an action to restrain a trespass is treated both by court and counsel as an action to quiet title to the waters of an irrigation ditch and both the complaint and answer pray for general relief, the trial court, having jurisdiction of the subject matter and all the parties thereto, commits no error in disposing of the whole matter in controversy by a decree settling the rights of all the parties.—*Feeney v. Chester*, 7 Idaho, 324, 63 Pac. 192.

Where a decree was entered adjudicating the water rights of defendants and plaintiff's predecessors, and, in an action by plaintiff to enjoin the defendant from changing the point of diversion fixed by the decree, the supreme court has remanded the case with instructions to grant the plaintiff the relief demanded, a modified judgment in accordance with such mandate which orders that

the defendant "be enjoined and restrained from in any manner changing his point of diversion of the waters of Cold Spring creek . . . to any point on said creek below his former point of diversion," which latter point was described, is sufficient.—*Walker v. McGinness*, 9 Idaho, 162, 72 Pac. 885.

Where the decree in an action to determine water rights fixes the time from which each appropriator is entitled to have his water right date and the number of inches to which he is entitled, it is proper to incorporate into the decree an order in the nature of cross-injunctions restraining each and every party thereto from in any wise interfering with the use of water by any other party thereto as fixed and established by the decree.—*Moe v. Harger*, 10 Idaho, 302, 77 Pac. 645.

Where a water decree upon its face is explicit as to the stream from which the waters are to be distributed, the water-master cannot go beyond the decree to ascertain whether the same is supported by the findings or to determine whether there be a conflict between the findings and the decree.—*Stethem v. Skinner*, 11 Idaho, 374, 82 Pac. 451.

A judgment and decree adjudicating rights and priorities to the use of the waters of a stream carries with it and adjudicates and decrees the rights and priorities to the waters of the tributaries to such stream above the respective places and points of diversion.—*Josslyn v. Daly*, 15 Idaho, 137, 96 Pac. 568.

In an action to determine and settle the priorities and amount of water to which each party to a suit is entitled from a certain stream, it is left to the court to determine from the evidence such priorities and amounts.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

The respondents *Joyce* acquired title to certain land, formerly owned by their father, who had appropriated water for the irrigation of such land; and, where they do not ask in their complaint to have the water to which they are entitled allotted to each separately, it is not error for the court to decree to them jointly the entire amount of water necessary for the irrigation of their land.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

In a suit to determine water rights, held, that the respondents *Joyce* are entitled only to such amount at the head of their ditch as will be necessary to irrigate their land after first applying the waters of certain springs on their land to irrigation purposes.—*Joyce v. Rubin* (on rehearing), 23 Idaho, 296, 130 Pac. 793.

In a suit to determine water rights, held, that the decree must provide that when the natural flow of the stream is not sufficient to furnish the respondents with the full amount of water awarded to them they should have only the amount furnished from the natural flow of the stream, each taking according to the priority of his right.—*Joyce v. Rubin*, 23 Idaho, 296, 130 Pac. 793.

11. Appeal and Review.

Where the court finds, as matter of fact, that the plaintiffs are entitled, as prior locat-

ors, to all the waters of a certain creek, and then proceeds to apportion to the defendants absolutely a certain amount of said water, and makes such apportionment to defendants coequal with the right of the plaintiffs, the judgment will be modified with respect to the apportionment to the defendants.—*Dunniway v. Lawson*, 6 Idaho, 28, 51 Pac. 1032.

A decree distributing water which fails to specify that the water is to be measured at the point of diversion will be modified on appeal in that respect.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189; *Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442.

A decree settling the water rights of the parties to an action, but omitting to designate the point of diversion as the place where the waters allotted the different parties shall be measured, should be modified so as to show such place of measurement.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189.

A finding that an appropriation of water was made by one of defendants at a date earlier than he claims in his pleadings and a decree based thereon will be modified on appeal.—*Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189.

In an action to quiet title to water appropriated, when the issue to be determined is as to the priorities of different appropriations, and the trial court makes a finding in said cause that "L. has appropriated all the water flowing in the stream," such finding will be set aside upon appeal because of its indefiniteness and uncertainty, and the trial court will be directed to make new findings as to the appropriation of each appropriator, describing the water appropriated by each appropriator in cubic feet per second of time, and to enter a decree in accordance with such finding.—*Lee v. Hanford*, 21 Idaho, 327, 121 Pac. 558.

Where it is alleged that it requires one thousand inches of water to irrigate a tract of land consisting of three hundred and twenty acres, and the court finds that the party is not entitled to water for more than one hundred and sixty-two and sixty-five hundredths acres, and awards six hundred and ten inches, or about four inches to the acre therefor, and the court further finds that it requires approximately three inches per acre to properly irrigate such land, the action of the trial court will be modified so as to allow only four hundred and eighty-eight inches.—*Joyce v. Rubin* (on rehearing), 23 Idaho, 296, 130 Pac. 793.

12. Costs.

Where the state engineer makes an examination and prepares maps, statements and reports on request of the judge of a court in which a suit to determine water rights is pending, the request for such examination being made under Laws 1903, page 223, section 37, the parties to the action are required

to pay the costs and expenses of such examination.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Laws 1903, page 223, section 33, making it the duty of the state engineer to make an examination of the streams of the state and the works diverting water therefrom, such work to be at the cost of the state, is a valid exercise of the legislative power.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Where the maps and plats, made by the state engineer under Laws 1903, page 223, section 37, are incorrect as to the rights of any of the parties to the action, such parties should not be required to pay any part of the costs thereof.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Under Laws 1903, page 223, section 33, making it the duty of the state engineer to make an examination of the streams of the state and the works diverting water therefrom for the purpose, among others, of making a permanent record of the water appropriations and rights to the use thereof, such work must be paid for by the state.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Laws 1903, page 223, section 37, providing that the costs of survey, maps, etc., made by the state engineer on request of the judge of a court in which suit to determine water rights is pending shall be prorated against the persons whose rights are adjudicated in such suit, is not in conflict with any constitutional provision, though applicable only to water cases.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

Under Laws 1903, page 223, section 37, providing that the costs of survey, maps, etc., made by the state engineer on request of the judge of a court in which suit to determine water rights is pending shall be prorated against the persons whose rights are adjudicated in such suit, the state engineer is only entitled to recover the actual and necessary costs of such work and any party to the suit may contest his right to recover the sum claimed by him.—*Boise Irr. etc. Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

The expenses incurred in making surveys, maps and plats by the state engineer under the irrigation law and in obedience to an order of the trial court is a proper expense to be taxed up against the appropriators and claimants of water who are litigants in the case, and this may be done, even though the maps, plats and reports be not introduced in evidence.—*Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481.

VII. CONVEYANCES AND CONTRACTS.

Specific performance of oral agreement to enlarge ditch. See *Specific Performance*, I.

Application of statute of frauds. See *Frauds*, Statute of.

(A) TRANSFER OF PROPERTY, EASEMENTS OR RIGHTS IN GENERAL.

Transfer of water rights. See ante, VI, (K).

Under Const., article 15, sections 4, 5, guaranteeing the annual use of water for domestic and irrigating purposes to the users thereof on certain conditions and determining and regulating the priority of rights thereto, and under R. S. 3157, providing that the person entitled to the use of water may change the place of diversion if others are not injured by the change, the user of water from a company ditch, claiming a water right under R. S. 3163, as amended by Laws 1899, page 381, has the right to change the place of use of the water to other lands susceptible of irrigation from such ditch if others are not injured thereby.—*Hard v. Boise City Irr. etc. Co.*, 9 Idaho, 589, 65 L. R. A. 407, 76 Pac. 331.

A corporation, whether private or public, that purchases water rights, ditches and a canal system, must necessarily take them subject to all the duties and burdens of which it has notice, that existed against the grantor.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81.

(B) EASEMENTS AND RIGHTS APPURTENANT TO OTHER PROPERTY.

Where water was appropriated sufficient to irrigate a large tract of land, but only about one-half was cultivated, the right to use water sufficient for the irrigation of land not actually cultivated became appurtenant thereto, and was transferred by deed conveying the land and its appurtenances.—*Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.

Water applied to a desert entry for the purpose of reclaiming the same does not become inseparable therefrom, and may be conveyed separate and apart from the conveyance of the land.—*Village of Hailey v. Riley*, 14 Idaho, 481, 17 L. R. A., N. S., 86, 95 Pac. 686.

A water right is an appurtenance to the land on which it is used, and a deed to the land, "together with appurtenances," carries with it the water right appurtenant to the land at the time of the conveyance, unless the same is excepted from the grant.—*Russell v. Irish*, 20 Idaho, 194, 118 Pac. 501.

A division of a tract of land to which a water right is appurtenant by the sale of a portion thereof, without segregating or reserving the water right, works a division of the water right in proportion as the land is divided by the conveyance.—*Russell v. Irish*, 20 Idaho, 194, 118 Pac. 501.

Under R. C. 3111, a transfer of a tract of land on which the waters obtained by water right have been partially applied in the irrigation and cultivation of the same, and such water right had been "obviously and permanently" used by the person whose estate is transferred for the benefit of the portion transferred, the purchaser acquires the right to continue the use and enjoyment of such water right as the same had been previously

used and enjoyed by the owner thereof.—*Russell v. Irish*, 20 Idaho, 194, 118 Pac. 501.

Where it is shown that a water right is acquired by the owner of land by deed of conveyance, and that such water right, after purchase, is used by the purchaser upon the land for a beneficial use, such water right becomes an appurtenance to such land; and where, after such use, such land is conveyed, and in the deed of conveyance said land is described, and the deed further provides, "together with the appurtenances," such deed of conveyance not only conveys the land, but the water rights appurtenant to said land.—*Paddock v. Clark*, 22 Idaho, 498, 126 Pac. 1053.

Where a deed conveys certain described real property, together with the water and water rights used in connection therewith, being the right to demand and receive upon the terms and under the rules and regulations prescribed therefore thirty-five inches of the water of the Nampa and Meridian irrigation ditch canal, formerly known as the Ridenbaugh canal, together with one hundred ninety-two shares of the paid-up water stock of the New York Canal Company, Ltd., aggregating one hundred eighty-eight and six-hundredths inches of the said water," and said deed also contains the following provision, "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, . . . to have and to hold all and singular the above-mentioned and described premises together with the appurtenances unto the party of the second part," such deed clearly shows the intent of the parties to convey the water rights used in connection with said land and described in the conveyance, and that such description does not include other water rights appurtenant to said land, and not described.—*Paddock v. Clark*, 22 Idaho, 498, 126 Pac. 1053.

Under the constitution and statutes of this state, a water right is "real property," and is an appurtenance to the land irrigated by the use of such water.—*Paddock v. Clark*, 22 Idaho, 498, 126 Pac. 1053.

(C) GRANTS AND RESERVATIONS OF EASEMENTS AND RIGHTS TO USE OF WATER.

Possessory rights to rights of way for irrigating ditches, and the right to the use of water, may each have an existence independent of the other, and either may be conveyed reserving the other.—*Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990.

A grant of a tract of land containing the clause "including all right, title, claim and interest in and to the waters of Seaman's creek and the irrigating ditches appurtenant thereto," carries with it all the waters and water rights that were appurtenant to the particular tract of land conveyed at the time of the execution and delivery of the conveyance, and the determination as to the amount of water and the extent of the water

right so conveyed must depend wholly upon the extent of the appurtenant rights at the time of the conveyance.—*Josslyn v. Daly*, 15 Idaho, 137, 96 Pac. 568.

Where a land owner conveys land lying under his canal and susceptible of irrigation therefrom, and grants "the free and perpetual use of water" from the grantor's canal sufficient to irrigate the land conveyed, the contract conveys a free and unencumbered right and title in and to the waters of the canal, and carries with it an unqualified right to the extent of the quantity of water conveyed in the appropriation itself and the right to have the water flow through the canal, and the grantor perpetually abandons and foregoes the right to ever thereafter charge, collect, or realize any profit or rental for the use of the water conveyed.—*Nampa etc. Irr. Dist. v. Gess*, 17 Idaho, 552, 106 Pac. 993.

Where a land owner conveys a tract of land lying under his canal and susceptible of irrigation therefrom, and includes in the conveyance a grant of the "free and perpetual use of water" from the grantor's canal sufficient to irrigate the land conveyed, the grant of such free and perpetual water right does not obligate the grantor or his successors or assigns to perpetually bear and pay the expense and cost of maintaining and protecting the canal and the water right and delivering the water to the consumer.—*Nampa etc. Irr. Dist. v. Gess*, 17 Idaho, 552, 106 Pac. 993.

A water right is real estate, and must be conveyed as real estate; and, where one has a valid water permit issued to him by the state engineer, he cannot convey the water right secured thereby by simply handing the permit to a would-be purchaser.—*Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

(D) CONTRACTS.

See *Frauds, Statute of*, VI.

Where the tenants in common of a water ditch agreed in writing with defendant that if he would do certain work in enlarging and improving the ditch he should have an interest therein and the right to use water therefrom, and defendant began to perform his part of the contract, but was stopped without any assigned reason from completion thereof, his use of the water thereafter did not constitute a trespass.—*Bowman v. Ayers*, 2 Idaho, 465, 21 Pac. 405.

Where one contemplating the construction of a ditch or canal for the purpose of conducting water from a creek or river to lands owned by him finds that it is necessary to construct the same over and through the lands of another, and makes an agreement with the owner of said lands that, in consideration of a right of way through the same, such owner shall have an interest in said ditch to the extent of a sufficient amount of water therefrom to irrigate his said lands, such agreement is binding upon both the party making the agreement and

those holding, or claiming to hold, under him.—*Feeney v. Chester*, 7 Idaho, 324, 63 Pac. 192.

Where prior and subsequent locators of the waters of a stream have misunderstandings and differences with reference to the right to divert the waters and convey them to distant points for use, and they reach an agreement and understanding whereby each shall be permitted to construct his diverting works and ditches, and in reliance thereon they do construct such works and expend money thereon, each will thereafter be estopped from denying the right of the other to divert and use the waters in accordance with such agreement or understanding.—*Saunders v. Robison*, 14 Idaho, 770, 95 Pac. 1057.

Where plaintiff entered into an agreement with T., B. & P., whereby he gave an option to purchase certain water rights, and it was provided that T., B. & P. should investigate the water supply and the practicability of such project, and if they should find such project practicable they would pay to plaintiff \$5,000 in cash and a paid-up water right for eighty acres of land, said contract was an option, and T., B. & P. had the absolute right to determine the sufficiency of the water supply and the practicability of the project, and when they did determine that said project was not practicable, and so notified plaintiff, they thus terminated said option agreement.—*Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

(E) REMEDIES OF PARTIES.

A complaint alleged that plaintiff was the owner of and in possession of a certain water right; that defendant in consideration of the surrender thereof agreed with plaintiff to furnish him, in lieu thereof, a perpetual water right to plaintiff's premises described, and agreed with this plaintiff that the defendant would make no charge for the water to be furnished for the year 1892; that pursuant to the contract plaintiff surrendered the use of the water for that year, and defendant took possession thereof, but failed to supply plaintiff with water, to his damage, etc. Copies of the contract were set out in the complaint. Held, not demurrable.—*Bray v. Elmore County Irrigation Co.*, 4 Idaho, 685, 44 Pac. 432.

In an action for damages alleged to have been caused by reason of defendant failing to comply with his contract to sell and deliver upon plaintiff's land a water right and a certain number of inches of water, the measure of damages is the difference between the contract price for the sale and delivery of the water and the price for which such water and water right could be acquired at the time of the breach of the contract, together with whatever sum the purchaser has paid on the purchase price for such water and water right.—*Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965.

In an action for damages alleged to have been caused by reason of defendant failing

to comply with his contract to sell and deliver upon plaintiff's land a water right and a certain number of inches of water, it is error to admit evidence as to the value of buildings and improvements made by the plaintiff upon the lands in order to show the amount of damages sustained by him, unless it appears that no like water right could have been purchased at the time of the breach of the contract or at any time thereafter prior to the trial.—*Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965.

In an action for damages alleged to have been caused by reason of defendant failing to comply with his contract to sell and deliver upon plaintiff's land a water right and a certain number of inches of water, the measure of damages is the difference between the contract price for the sale and delivery of the water and the price for which such water and water right could be acquired at the time of the breach of the contract, together with whatever sum the purchaser has paid on the purchase price for such water and water right.—*Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965.

Plaintiff agreed to pay defendant \$1,650 for one hundred inches of water and a water right delivered on plaintiff's lands and defendant agreed to deliver the same. The contract provided that deferred payments should bear interest from the date of the contract, that the first installment should fall due in one year from the date of the contract, and that in the event defendant furnishes the water from the P. canal, plaintiff should pay \$550 as the first installment and the balance in one year thereafter, but in the event that he furnished it from the A. canal, plaintiff should pay \$200 as the first installment and \$200 annually thereafter. Held, that the contract contemplated the furnishing and delivery of water on plaintiff's land prior to the date of the maturity of the first installment, and that a failure to deliver the water on or before such date constitutes a breach of contract for which damages may be recovered.—*Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965.

In an action for breach of contract in failing to furnish water as contracted, an instruction that if plaintiff was deprived of water to irrigate his crops for the season of 1909, and the same were for said reason a total loss, then you should find for the plaintiff the reasonable value of said crop at maturity, less the reasonable cost of irrigating, caring for and harvesting the same, was correct.—*Rios v. Azcuenaga*, 19 Idaho, 739, 115 Pac. 922.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS AND FLOW-AGE.

See, also, ante, VI, (J), 3.

Abandonment or forfeiture of rights to ditch or canal.

See ante, VI, (L).

Preservation and propagation of fish. See Fish and Game.

Grant of right to use water from canal. See ante, VII, (O).

Contract giving right to use water from ditch. See ante, VII, (D).

For public irrigation enterprises. See post, IX, (B).

For public water supply. See post, IX, (A).

Rights and liabilities of municipal corporations. See Municipal Corporations.

Liens for work on canals or ditches. See Mechanics' Liens.

Reservation of right of way for ditches or canals constructed by United States. See Public Lands, II, (D).

Ditch or canal across public highway constituting nuisance. See Nuisance.

(A) ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS.

Easement for irrigation canal not breach of covenant. See Covenants, III.

Where in a suit for damages for injuring plaintiff's dams and to enjoin further trespass thereon, the evidence shows that, though defendants may have run some water through plaintiff's ditch and channel, plaintiff had never recognized their right and had objected to their doing so, a finding that defendants conducted water through such channel and used it for irrigation of their land is unsupported by the evidence.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

Where the evidence without any conflict shows that plaintiff's ditch was in part artificial and in part a natural slough or channel, a finding that the ditch is not an artificial ditch but a natural water channel is unsupported.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

Where K. builds dams and dikes on his own land and collects surface water from the rains and melting snow and forms a lake on his own lands, which is in no way fed from any natural stream or regular flow of water, the water so accumulated and impounded is the private property of the owner of the land and is not subject to appropriation or diversion by any other person without the consent of the land owner, and the state engineer has no right or authority to grant a permit to any other person to appropriate or divert such private waters.—*King v. Chamberlin*, 20 Idaho, 504, 118 Pac. 1099.

(B) DAMS.

Where the owner of a prior right to the use of water has constructed dams and ditches so as to utilize such right, others have no legal right to interfere therewith.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

Where, in an action for damages for the destruction of plaintiff's dams, the material allegations of the complaint, denied by the answer, were the ownership and use of the ditch and dams described, the cutting or destruction thereof by defendants, the damage and the right to injunction, it was error to admit a decree in a former suit showing the amount of water decreed to the parties herein, since the amount was not in issue.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

An action to recover damages for the destruction of plaintiff's dams and ditch and

to enjoin defendants from further interfering therewith is primarily an action at law and the question of damages is therefore properly submitted to the jury.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

Where, in an action for damages for the destruction of plaintiff's dams, the material allegations of the complaint, denied by the answer, were the ownership and use of the ditch and dams described, the cutting or destruction thereof by defendants, the damage, and the right to injunction, it was not error to reject defendant's testimony as to whether he could divert his water in any other way than through plaintiff's ditch, since such matter was not within the issues.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

In an action to recover damages for the destruction of certain dams belonging to plaintiff and to enjoin further interference therewith, the evidence was uncontradicted that such dams were necessary to properly irrigate plaintiff's land. Held, that a finding that such dams were unnecessary constituted error.—*Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045.

A riparian owner of land abutting upon a stream, whether navigable or non-navigable, has the legal right to place barriers, such as dams and breakwaters, for the protection of his lands and to prevent the overflow or damage by the stream, but in so doing he cannot place such dam or breakwater in the channel or course of the stream as will change the course of the river or divert the course of the water and will result in destroying or overflowing the lands of the owners abutting on said stream either above or below.—*Boise Development Co. v. Idaho Trust etc. Co.*, 24 Idaho, 36, 133 Pac. 916.

A riparian owner may repel the water flowing in a stream and cause it to flow in the channel of the stream which it has left during high water, if by so doing he inflicts no injury to the riparian owner upon the opposite side of the stream.—*Boise Development Co. v. Idaho Trust etc. Co.*, 24 Idaho, 36, 133 Pac. 916.

The law will not permit one riparian proprietor to build structures in the channel or bed of the stream so as to impede or interfere with the flow of the current or render it necessary for another riparian proprietor to build riprapping, cribbing, or breakwater, or other structure in order to protect his land from washing or erosion caused by the additional burden and flow of water cast upon it by reason of the encroachments of such opposite riparian proprietor.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

As a general rule of law applicable to a river or stream of water with well-defined banks and a permanent channel or bed, a riparian owner of lands abutting on such stream has no right to place obstructions out into the stream or channel thereof for the purpose of changing the natural course of the stream or for any other purpose that would be injurious or damaging to the riparian owner on

the opposite side thereof or to the owner of land abutting on the stream either above or below.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

In dealing with streams of the nature and character of the Boise river where it flows through the Boise valley, a court must take into consideration the natural conditions and the peculiarities of the stream and the country and formation through which it flows and its vagrant and changeable character, and also the fact that great reservoirs and lakes have been formed and prepared and are being prepared for the storage of the waste, surplus and overflow of this stream in the high-water period, and that in the near future there will be no high-water season in this stream where it flows through the Boise valley.—*Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910.

Editorial Notes.

Dams, rights and liabilities of owners of: 57 Am. Dec. 684.

Land owners' right to protect themselves from overflows by dams, levees and other means: 97 Am. Dec. 565.

Liability of one constructing dam across watercourse for injuries caused by breaking thereof: Ann. Cas. 1912A, 110.

Liability for damming back water of stream: 59 L. R. A. 817.

(C) FLOWAGE.

Dams and breakwaters. See ante, VIII, (B).

Appealability of order permitting temporary flooding. See Appeal and Error, III, (B).

The lawful possession of land is all that is required to enable a plaintiff to recover damages for building a dam across a watercourse running through his land, whereby the water is thrown back upon his land.—*Norris v. Glenn*, 1 Idaho, 590.

One constructing or maintaining a canal along the line of another's land is liable for any damage resulting from a want of proper care in the management or construction of the canal.—*Arave v. Idaho Canal Co.*, 5 Idaho, 68, 46 Pac. 1024.

In an action for damages from a flood alleged to have been caused by defendant, the following question was incompetent as not being the proper method of showing plaintiff's damages: "What estimate do you place upon the damages that were caused you by being thrown out of a home; that is, apart from the value of your property?"—*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.

Where defendant's wrongful acts contribute with the forces of nature to cause injury to plaintiff by a flood, defendant cannot escape liability on the ground that the flood was the act of God.—*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.

In the winter and early spring months flood waters gather from time to time in several draws or basins above respondent's lands and

flow down across appellant's canal, and over and upon the lands of the respondent, in large volumes. The irrigation district, in order to prevent these flood waters washing out the banks of its canal and breaking down the canal, built a spillway sixteen feet wide in the bank of the canal on the lower side, and, when the flood waters come, opens the spillway and allows the entire volume of water to run through and upon the lands of respondent. It appears that in the natural flow of water down these draws and drainage basins, it runs in several channels and spreads out over the lands of the respondent. Held, that the irrigation district cannot collect the waters and pour them out through the spillway in one volume onto the lands of the respondent so as to increase the damage done to his lands, but that, on the contrary, the district must, if it desires to collect the waters and turn them through spillways, so distribute the waters as to allow them to flow over the respondent's land in as nearly the same manner and proportion as they would in their natural state, and in such manner as to do no greater damage than they would inflict on respondent in their usual and ordinary flow.—*Tetter v. Nampa etc. Irr. Dist.*, 19 Idaho, 355, 114 Pac. 8.

Where an application is made by a riparian owner for a permanent injunction, restraining a riparian owner upon the opposite side of the stream from constructing and maintaining a dam or breakwater, upon the ground that the construction of such dam or obstruction will cause the water to overflow the land of the riparian owner who applies for such injunction, the petitioner should be required to show reasonable grounds for apprehending an actual injury or a reasonable probability of injury before the court adjudges a permanent injunction.—*Boise Development Co. v. Idaho Trust etc. Co.*, 24 Idaho, 36, 133 Pac. 916.

If the injury to a riparian owner on the opposite side of the stream from the place where the breakwater or dam is located will as certainly occur without the embankment, because of the natural overflow, the party seeking an injunction must prove that the additional water cast upon the land will in fact damage him.—*Boise Development Co. v. Idaho Trust etc. Co.*, 24 Idaho, 36, 133 Pac. 916.

In an action to restrain the completion of a certain dam in Boise river and from filling in a portion of the river channel behind said dam and from maintaining the same when completed and to compel defendants to remove the portions so constructed, held that the evidence and findings are not sufficient to justify the issuance of a permanent injunction.—*Boise Development Co. v. Idaho Trust etc. Co.*, 24 Idaho, 36, 133 Pac. 916.

A complaint for damages caused by seepage and percolating waters alleged the ownership of the canal to be in one company for a portion of the time covered by the flowage and in another company for the remainder of the time. Both companies were joined as defend-

ants. Held, demurrable as improperly uniting two causes of action.—*Brose v. Twin Falls Land etc. Co.*, 24 Idaho, 266, 133 Pac. 673; *Partridge v. Twin Falls Land etc. Co.*, 24 Idaho, 275, 133 Pac. 677.

Editorial Notes.

Flowage, right of and liability for injuring property by: 57 Am. Dec. 684.

Riparian proprietor's right to use and detain water and to the natural flow of the stream: 79 Am. Dec. 638.

Right of one land owner to accelerate or diminish flow of water to or from the lands of another: 85 Am. St. Rep. 707.

Measure of prescriptive right to flow lands by maintenance of dam: 18 Ann. Cas. 217.

Right to flow of surface water: 21 L. R. A. 593.

IX. PUBLIC WATER SUPPLY.

(A) DOMESTIC AND MUNICIPAL PURPOSES.

Liability of municipality for personal injuries in construction of works. See *Municipal Corporations*, XII, (A).

1. Nature and Extent of Right to Water.

Under Const., article 15, section 3, a municipality cannot take water for domestic use which has been previously appropriated for other beneficial uses, without fully compensating the owner, and in this case, it clearly appearing that the respondent appropriated the water of Montpelier creek and applies the same to a beneficial use prior in time to the appropriation of appellant, the appellant has no right to interfere with such appropriation, to the injury of the respondent, without full compensation.—*Montpelier Mill. Co. v. City of Montpelier*, 19 Idaho, 212, 113 Pac. 741.

2. Constitutional and Statutory Provisions.

Fixing of water rates by commissioners, constitutionality of the law. See *Constitutional Law*, VI, VII, XI, XII.

R. S. 2710, 2711, 2712, governing contracts by corporations for supplying cities and towns with water, do not apply to individuals or natural persons making such contracts.—*Jack v. Grangeville*, 9 Idaho, 291, 74 Pac. 969.

R. S. 2230, subdivision 12, providing that the board of village trustees shall have power to provide cisterns, hydrants or waterworks, or to purchase water for fire purposes, is not repealed by Laws 1893, page 97, which provides, *inter alia*, that cities and villages shall have power to establish, make and regulate public wells, cisterns, windmills, aqueducts and reservoirs of water.—*Jack v. Grangeville*, 9 Idaho, 291, 74 Pac. 969.

3. Establishment or Acquisition of Works by Public Authorities.

Statutory provisions. See *ante*, IX, (A), 2.

4. Water or Waterworks Companies.

Mains, pipes and taps. See post, IX, (A), 6.

Water rents. See post, IX, (A), 10.

Supply to private consumers. See post, IX, (A), 9.

Supply to municipalities. See post, IX, (A), 8.

Liability to individual for failure to furnish sufficient supply. See post, IX, (A), 11.

5. Acquisition of Water Sources and Rights Incident Thereto or Arising Therefrom.

By appropriation. See ante, VI.

6. Reservoirs, Mains, Pipes, Taps and Laterals.

Ditch or canal across public highway constituting nuisance. See Nuisance.

Where a water company obtains a franchise to lay its mains and pipes along the streets and alleys of a city for the purpose of supplying the city and its inhabitants with water, it may reserve to itself the exclusive right to make all taps of its mains and pipes.—Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518.

Where a water company obtains a franchise to lay its mains and pipes along the streets and alleys of a city for the purpose of supplying the city and its inhabitants with water, it must furnish at its own expense all taps and pipes used in conveying the water from the tap to the franchise limit of the street or alley, which taps and pipes then become a part of its system.—Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518.

Where a water company obtains a franchise to lay its mains and pipes along the streets and alleys of a city for the purpose of supplying the city and its inhabitants with water, it is obliged to lay its pipes in the streets and alleys so as to make the water accessible to the citizens for their private use.—Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518.

Where the franchise for laying pipes in the streets and alleys and maintaining and operating a water system is granted by a municipality to a water company, the main and all laterals, fixtures and connections within the franchise limit belong to the company, and altogether constitute the water system.—Bothwell v. Consumers' Company, 13 Idaho, 568, 24 L. R. A., N. S., 485, 92 Pac. 533.

Where a lot owner constructs a building on his property and places water-pipes and fixtures therein and extends the same to the line between his property and the street containing the water company's main, and tenders the monthly rent fixed by the company, the company must make the tap and connections without charge to the consumer.—Bothwell v. Consumers' Company, 13 Idaho, 568, 24 L. R. A., N. S., 485, 92 Pac. 533.

Under a franchise granted by the city of Coeur d'Alene for the purpose of supplying the city and inhabitants thereof with fresh water, it is the duty of the water company to supply and lay the laterals from its main to the line of a consumer's property abutting on such street, and such laterals are the prop-

erty of the water company.—Hatch v. Consumers' Company, 17 Idaho, 204, 104 Pac. 670.

Editorial Notes.

Duty of water company to lay service pipe without charge to consumer: Ann. Cas. 1912B, 546.

7. Purity of Water and Protection Thereof.

The fact that a municipality uses water from a ditch which crosses the field of another is not ground for an injunction restraining such other from allowing his cattle to feed and graze along the banks of the ditch and to cross or wade in the same, the primary duty of maintaining the waters unpolluted resting on the owner of the easement and not on the owner of the fee.—City of Bellevue v. Daly, 14 Idaho, 545, 125 Am. St. Rep. 179, 15 L. R. A., N. S., 992, 14 Ann. Cas. 1136, 94 Pac. 1036.

Editorial Notes.

Protection from pollution of source of municipal water supply: 11 L. R. A., N. S., 1163.

8. Supply to Municipalities.

Statutory provisions. See ante, IX, (A), 2.

A complaint alleging the organization and operation of a water company under R. S. 2711 and 2712 and praying for a decree compelling said company to furnish water for fire purposes free to the city of its location, must set forth substantially the ordinance or contract with such city permitting such company to furnish water and regulating the manner thereof, if any such ordinance or contract exists.—Boise City v. Artesian etc. Water Co., 4 Idaho, 351, 39 Pac. 562.

R. S. 2711, requiring a water company receiving and accepting the privileges conferred by statute, to furnish the city or town water for fire purposes and other great necessities free of charge does not contravene Const., article 15, section 2, which provides that the right to collect for water supplied to any city, etc., is a franchise and cannot be exercised except by authority of and in the manner prescribed by law; nor does it contravene Const., article 15, section 6, which provides that the legislature shall provide by law the manner in which reasonable maximum rates may be established for water sold. Boise City v. Artesian etc. Water Co., 4 Idaho, 351, 39 Pac. 562.

Under R. S. 2710, providing that no contract must be made with a corporation for supplying water for a term exceeding fifty years, a contract for a water supply made by a board of trustees with an individual for a period of thirty years is not void as being for too long a time.—Jack v. Grangeville, 9 Idaho, 291, 74 Pac. 969.

Where express power is given to construct a system of waterworks or light plant, a municipality may contract with others to supply the municipality and inhabitants thereof

with water and light.—*Jack v. Grangeville*, 9 Idaho, 291, 74 Pac. 969.

R. S. 2230, subdivision 12, provides that the board of village trustees shall have power to provide cisterns, hydrants or waterworks or to purchase water for fire purposes. Laws 1893, page 97, provides that cities and villages shall have power to establish, make and regulate public wells, cisterns, etc. Held, that an ordinance and contract by which the board of village trustees entered into a contract as to the rate to be charged the village for water was not in conflict with such statutory provisions.—*Jack v. Grangeville*, 9 Idaho, 291, 74 Pac. 969.

Editorial Notes.

Establishment and regulation of municipal water supply: 61 L. R. A. 34.

9. Supply to Private Consumers.

A corporation receiving a franchise from a municipality in this state authorizing it to supply the inhabitants with water by accepting such franchise and attempting to operate thereunder enters into an implied contract to serve all the inhabitants of such municipality without distinction or discrimination upon such persons paying it the established rates, and complying with the reasonable rules and regulations of such company.—*Hatch v. Consumers' Company*, 17 Idaho, 204, 104 Pac. 670.

Under the terms of a franchise ordinance, wherein it is provided that the company receiving the franchise shall not be required to extend its water mains along any ungraded street or alley, where the company has, in fact, extended its main along such ungraded street, it cannot refuse to supply consumers along such street on the theory that it was not compelled to build along such street in the first place.—*Hatch v. Consumers' Company*, 17 Idaho, 204, 104 Pac. 670.

Editorial Notes.

Water companies, liability of to citizens for nonperformance of contracts with municipalities: 18 Am. St. Rep. 380.

10. Water Rents and Other Charges.

Fixing of water rates by commissioners, constitutionality of law. See *Constitutional Law*, VI, VII, XI, XII.

Tolls and other charges for use of water for irrigation purposes. See post, IX, (B), 12.

Plea of other action pending when insufficient in action to compel appointment of commissioners to fix rates. See *Abatement and Revival*.

Const., article 15, section 6, provides that the legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose. R. S. 2711 prescribes the manner of fixing water rates between cities or villages and water companies. Held, that the rates fixed by a contract between an individual and a village for the furnishing of water to the village would not

be disturbed in the absence of any legislative provision providing a method of fixing such rates.—*Jack v. Grangeville*, 9 Idaho, 291, 74 Pac. 969.

Where a water company supplying water to a city and its inhabitants has fixed the rates for which it will supply consumers with water for domestic purposes, but no rate has been fixed in the manner prescribed by statute, and a consumer tenders the company the monthly rate fixed by it and demands that he be supplied with water, the company will not be allowed to defend on the ground that no rate has been fixed in the manner prescribed by R. S. 2711, as amended by Laws 1905, page 192, as the primary duty of causing the rate to be established under the statute rests on the company.—*Bothwell v. Consumers' Company*, 13 Idaho, 568, 24 L. R. A., N. S., 485, 92 Pac. 533.

A water company cannot enforce a rule requiring a consumer to pay an old or disputed bill for water furnished him at some previous time, or some other and independent use, or at some other place or residence, or for a separate or distinct transaction from that for which he is claiming and demanding a water supply, as a condition precedent to supplying him with water, where he tenders payment of the established water rate in advance for the service he is demanding.—*Hatch v. Consumers' Company*, 17 Idaho, 204, 104 Pac. 670.

Under R. C. 2839 and the general rule of law applicable in such cases, a water company may make and enforce such reasonable rules and regulations as are in harmony with law and consonant with justice for the conduct of its business, the protection and preservation of its property, and the collection of its water rentals, and in so doing may require the consumer to pay reasonable water rentals in advance, or, in default thereof, shut off the water supply, or may require a month's rent to be paid at the end of the month, or, in default thereof, shut off the water until such time as the rent due is paid.—*Hatch v. Consumers' Company*, 17 Idaho, 204, 104 Pac. 670.

Ordinance No. 86 of the city of Pocatello, adopted on June 1, 1901, which prescribed a schedule of rates which the Pocatello Water Company might charge for supplying water to the inhabitants of the city for a fixed period of time, and which also provided the method and manner of thereafter appointing a commission to establish rates at the expiration of such period, must be read and construed in the light of the provisions of the constitution, article 15, sections 1, 2 and 6, and was subject to the operation of the constitution and the power of the legislature to prescribe the manner in which reasonable maximum rates might thereafter be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose.—*City of Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812.

A water rate, sufficiently high to pay all running expenses and improvements and repairs of the system and six per cent on the

entire value of the plant and the purchase price therefor, in the period of twenty years, would be unreasonable, and it would be beyond the power and authority of the city to contract in advance to maintain water rentals at such a rate.—*Feil v. City of Coeur d'Alene*, 23 Idaho, 32, 129 Pac. 643.

When a city acquires its own water system, and engages in selling and distributing water to its inhabitants and charging rates therefor, it becomes subject to the same duties and obligations and responsibilities of an individual or private corporation, running and operating a like business, and is subject to have the rates charged, regulated and fixed in the same manner prescribed by law for the fixing of water rates generally.—*Feil v. City of Coeur d'Alene*, 23 Idaho, 32, 129 Pac. 643.

Where W. and M. are appointed commissioners under the provisions of R. C. 2839, and the question arises as to whether or not such persons are taxpayers, and it is shown that such persons own certain real property jointly, each owning a one-half interest, and it is also shown that such property was assessed in the name of M., and the taxes are paid upon said property by W. and M., each paying one-half of the total amount, W. and M. are each "taxpayers" under the statute.—*City of Pocatello v. Murray*, 23 Idaho, 447, 130 Pac. 383.

Under R. C. 2839, providing that commissioners selected under the provisions of such act are to be taxpayers of such town or city, "taxpayer" of such town or city, as used in this statute, means one who owns property within the municipality and who pays a tax, or is subject to or liable for a tax.—*City of Pocatello v. Murray*, 23 Idaho, 447, 130 Pac. 383.

The fact that commissioners appointed by a person, company or corporation supplying water to towns and cities under R. C. 2839, have been, and are, employees of the person, company or corporation and that one of such commissioners was the general manager of such person, company or corporation, and as such manager contested and opposed the fixing of the rate to be charged for the use of water furnished by the person, company or corporation in previous negotiations between the city and such person, company or corporation in order to agree upon a rate, does not necessarily disqualify such persons from acting as commissioners if appointed under the provisions of such section.—*City of Pocatello v. Murray*, 23 Idaho, 447, 130 Pac. 383.

Editorial Notes.

Meaning of "domestic purposes" as used in water rating act: Ann. Cas. 1912B, 619.

Right of water company to discriminate between consumers as to rates: 20 Ann. Cas. 952.

Control of rates of water company: 61 L. R. A. 99.

11. Injuries Incident to Supply or Use.

Under a contract between a city and a water company by which the latter agrees to supply the city with water sufficient for fire purposes, a resident of the city whose property has been destroyed by fire through the alleged neglect of the water company in complying with the terms of such contract has no right of action against the company, since there is no privity of contract between him and the water company.—*Bush v. Artesian etc. Water Co.*, 4 Idaho, 618, 95 Am. St. Rep. 161, 43 Pac. 69.

A complaint alleging that plaintiff was in possession of certain real estate and a water-works system supplying a city with water for public use, with a right of way to its reservoirs and for its pipe lines; that such rights were acquired from the government of the United States; that it had constructed a road to its reservoirs, and for more than ten years past, except when interrupted by defendant, had been in full possession and use of the pipe lines, reservoirs and roads; that defendant had planted posts and strung wires from the right of way obstructing the same, and threatens to continue so to do, claiming some right to the land over which the right of way was constructed; and that defendant is a nonresident and insolvent and asked for an injunction—held to state a cause of action. *Murry v. Nixon*, 10 Idaho, 608, 79 Pac. 643.

Editorial Notes.

Liability of water company, under contract with municipality, for fire loss sustained by private citizen: Ann. Cas. 1913D, 461; 2 Ann. Cas. 479; 9 Ann. Cas. 1070.

(B) IRRIGATION AND OTHER AGRICULTURAL PURPOSES.

1. Nature and Extent of Right to Water in General.

Acquisition of water and rights incident thereto. See post, IX, (B), 5.

Under Const., article 15, sections 1, 4, all waters appropriated for sale, rental or distribution are a public use, and are exclusively dedicated to such use.—*Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 134.

Where public waters have been appropriated for sale, rental or distribution, the public and the individuals composing the public, who are in a condition to use such waters, have a constitutional right to the use thereof, under such reasonable rules and regulations, and upon such payment, as may be prescribed, which payments and regulations must at all times be reasonable.—*Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 134.

Under Const., article 15, section 4, securing to everyone who has rented water from the owner of a canal for irrigation purposes the right to rent from year to year, and making the act of such rental a dedication, the right of a person to water for each year depends

on his compliance with the statute as to the payment of compensation or the tender of security therefor.—*Bardsly v. Boise Irr. etc. Co.* (on rehearing), 8 Idaho, 155, 67 Pac. 428.

A water company or corporation may appropriate and divert the waters of a stream for the purpose of sale, rental or distribution, for any beneficial use or purpose, and in such case the appropriation belongs to the ditch company with a perpetual right of use vested in the users and consumers to whom the water has once been delivered, and such perpetual right so vested in the user or consumer can only be defeated by failure to pay the annual water rents and comply with lawful requirements in relation to the use.—*Farmers' etc. Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho, 450, 94 Pac. 761; *Farmers' etc. Ditch Co. v. Riverside Irr. Co.*, 14 Idaho, 462, 94 Pac. 765; *Farmers' etc. Ditch Co. v. Riverside Irr. Co.*, 14 Idaho, 463, 94 Pac. 764; *Farmers' etc. Ditch Co. v. Riverside Irr. Co.*, 14 Idaho, 464, 94 Pac. 764.

A clear distinction exists and should be drawn between the rights that a party acquires by contract with a canal company, whereby he purchases a water right and privileges sufficient for the irrigation of his land upon the payment of a fixed and specified annual rental, and the rights acquired, on the other hand, under Const., article 15, section 4, whereby arises and attaches a perpetual dedication of waters to the lands upon which they have been once applied on payment of the annual rental charges therefor, as the same may be fixed in accordance with law.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81.

Although a water right purchaser by a land owner from a canal company should be condemned by the district, such condemnation would not interfere with or interrupt the dedication already effected under the provisions of Const., article 15, section 4, but in the latter event the land owner would be required to pay such charges as might be established in conformity with law.—*Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81.

It is the policy of the law of this state to prevent the wasting of water.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

Under R. C. 3293, the users of water are prohibited from using more than good husbandry requires for the proper production of the crop or crops that they produce.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

Editorial Notes.

Appropriation of water for irrigation purposes, right of: 98 Am. Dec. 542.

2. Constitutional and Statutory Provisions.

Laws 1903, page 150, entitled "An act relating to irrigation districts," etc., is not repugnant to any of the provisions of the state constitution.—*Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 474, 83 Pac. 499.

R. S. 2713, requiring every water or canal company to construct and keep in repair certain bridges therein specified, was intended to apply to water corporations furnishing water to cities and towns, and not to corporations furnishing water for irrigation purposes. *MacCammelly v. Pioneer Irr. Dist.*, 17 Idaho, 415, 105 Pac. 1076.

R. C. 931, providing that whenever highways are laid out to cross railroads on public lands, the railroad must so prepare the road that the public may cross without danger or delay, does not apply to highways crossing irrigation canals and ditches.—*MacCammelly v. Pioneer Irr. Dist.*, 17 Idaho, 415, 105 Pac. 1076.

Laws 1911, page 461, section 2, violates the provisions of Const., article 6, section 1, guaranteeing secrecy of the ballot, in that it provides that each voter may vote and have his ballot marked according to acreage of land owned by him, and according to the number of inches of water used by him within the district.—*Pioneer Irr. Dist. v. Walker*, 20 Idaho, 605, 119 Pac. 304.

Const., article 6, section 1, which provides for a secret ballot, is applicable to elections held in an irrigation district under the laws of the state.—*Pioneer Irr. Dist. v. Walker*, 20 Idaho, 605, 119 Pac. 304.

Laws 1911, page 461, section 2, wherein it is provided that a holder of land within the district who is a resident of the state is a qualified voter at an election held in the irrigation district, violates the provisions of Const., article 6, section 2.—*Pioneer Irr. Ditch Co. v. Walker*, 20 Idaho, 605, 119 Pac. 304.

Laws 1911, page 461, section 2, in prescribing residence within the state as sufficient to qualify a voter at an election within the district, is in violation of Const., article 6, section 2.—*Pioneer Irr. Dist. v. Walker*, 20 Idaho, 605, 119 Pac. 304.

Laws 1911, page 461, having been held unconstitutional and void, could not work a repeal of R. C. 2375, 2376 and 2379, which that act sought to amend, and those sections are still in force and effect.—*Bissett v. Pioneer Irr. Dist.*, 21 Idaho, 98, 120 Pac. 461.

Under Const., article 1, section 20, the legislature has the power and authority to prescribe a property qualification for any person to vote at an election creating an indebtedness; but the legislature, by the adoption of R. C. 2396, has not provided such a qualification for voting at an election to be held for the purpose of voting a bond issue in an irrigation district, and no such qualification has been required by the legislature.—*Bissett v. Pioneer Irr. Dist.*, 21 Idaho, 98, 120 Pac. 461.

Until the question of priority has been determined by the courts, the legislature may prescribe the method of distribution of water among the users.—*Brose v. Board of Directors etc. Irr. Dist.*, 24 Idaho, 116, 132 Pac. 799.

R. C. 3287, requiring ditch and canal owners to classify lands reclaimed under their system, is not repugnant to Const., article 15,

sections 3 and 5, providing that priorities of appropriation shall give the better right as between those using the water.—*Brose v. Board of Directors etc. Irr. Dist.*, 24 Idaho, 116, 132 Pac. 799.

3. Irrigation Districts.

(a) Nature, Creation and Incidents in General.

Under Laws 1903, page 150, an act relating to irrigating districts, owners of lands properly included in an irrigation district may waive their rights to obtain water from the general district plan, and obtain water from another source and by means of a different plan, where it is clearly shown that no one residing in the district is in any manner prejudiced or injured thereby.—*Nampa etc. Irr. Co. v. Brose*, 11 Idaho, 474, 83 Pac. 499.

Under the provisions of Laws 1899, page 408, relating to the formation of irrigation districts, personal service need not be made on the land owners within the district in order to give the court jurisdiction to render a judgment of confirmation valid and binding on them upon all questions involved in such proceedings.—*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Idaho, 235, 101 Pac. 87.

An irrigation district is a public quasi-corporation organized to conduct business for the private benefit of the owners of lands within its limits, and holds its property in a proprietary rather than in a governmental capacity, so that it must assume and bear the burdens of proprietary ownership.—*City of Nampa v. Nampa etc. Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979.

Irrigation districts organized under the laws of the state are quasi-municipal corporations, and are governed by the general election laws of the state; and the qualifications prescribed by the constitution for voters at elections apply to an election held in an irrigation district.—*Pioneer Irr. Dist. v. Walker*, 20 Idaho, 605, 119 Pac. 304.

An irrigation district is a quasi-municipal corporation, organized for the specific purpose of providing ways and means of irrigating lands within the district and maintaining an irrigation system for that purpose.—*Colburn v. Wilson*, 23 Idaho, 337, 130 Pac. 381.

An irrigation district, when once created in accordance with the statute, becomes a quasi-municipal or public corporation.—*Little Willow Irr. Dist. v. Haynes*, 24 Idaho, 317, 133 Pac. 905; *Payette Heights Irr. Dist. v. Haynes*, 24 Idaho, 321, 133 Pac. 907.

Under the Reclamation Act (chapter 1093, 32 Stat. 388 [U. S. Comp. Stats. Supp. 1911, p. 662]), and the act of Congress of February 21, 1911, c. 141, 36 Stat. 925 (U. S. Comp. Stats. 1911, p. 681), known as the Warren act, the Secretary of the Interior is authorized and has the power to contract with an irrigation district for supplying water to such district or partially supplying it with water for the irrigation of the lands therein and for the

drainage of other lands within such district.—*Pioneer Irr. Dist. v. Stone*, 23 Idaho, 344, 130 Pac. 382; *Hillcrest Irr. Dist. v. Brose*, 24 Idaho, 378, 133 Pac. 663.

Under the Carey act (Act Aug. 18, 1894, c. 301, sec. 4, 28 Stat. 422 [U. S. Comp. Stats. 1901, p. 1554], 6 Fed. Stats. Ann., p. 397) and amendment thereto (Act June 11, 1896, c. 420, sec. 1, 29 Stat. 435 [U. S. Comp. Stats. 1901, p. 1556], 6 Fed. Stats. Ann., p. 398), the government issues its patent to the state for the segregated lands when it is shown that provision has been made for supplying sufficient water for their irrigation and reclamation, and the state holds such title in trust for the settlers and purchasers who settle upon, cultivate and improve the land in conformity with the Carey act and the state statutes in relation thereto.—*Bothwell v. Bingham County*, 24 Idaho, 125, 132 Pac. 972.

(b) Proceedings for Organization.

Statutory provisions as to voting and elections. See ante, IX, (B), 2.

Under Laws 1903, page 150, section 17, providing that notice of the filing of a petition for the organization of an irrigation district and of the hearing thereof shall be given and published as are notices of special elections under said act, notices of hearing may be given by posting and publishing, and personal service need not be made.—*Nampa etc. Irr. Co. v. Brose*, 11 Idaho, 474, 83 Pac. 499.

Under Laws 1903, page 150, section 15, a proceeding for the purpose of obtaining judicial confirmation of the organization of an irrigation district and the confirmation of proceedings relating to the issue and sale of bonds thereof, may be commenced before the issuance of any bonds.—*Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 474, 83 Pac. 499.

Under the provisions of Laws 1903, page 150, "an act relating to irrigation districts," held that the provisions of the act had been substantially complied with in the formation of the Nampa and Meridian Irrigation District and that said district was legally organized.—*Nampa etc. Irr. District v. Brose*, 11 Idaho, 474, 83 Pac. 499.

The organization of an irrigation district under Laws 1899, page 408, and all proceedings connected therewith, the voting of bonds and other matters, including the decree of confirmation by the district court, are proceedings in rem.—*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Idaho, 235, 101 Pac. 87.

Constructive service of the notices required by the irrigation district act, Laws 1899, page 408, is sufficient to give to every person interested in the organization of such a district his day in court, and to give the court jurisdiction of the person and subject matter.—*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Idaho, 235, 101 Pac. 87.

Where the board of directors of an irrigation district, in preparing a list of the lands against which benefits are laid, designates

upon such list the legal subdivisions across which the right of way of a railroad company passes and designates the rate per acre apportioned to each legal subdivision, the list thus prepared is notice to the railway company of the benefits assessed against each legal subdivision, of which its right of way is a part; and where the list has been thus prepared, and no objection is made by the company on account of a defective description or want of description at the time of the hearing of the confirmation of said district, the owner of such property is concluded in a collateral attack by the judgment.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

Laws 1901, page 191, providing for the organization of irrigation districts, does not require that the notice given of the presentation of the petition or the notice of the time when the same will be heard, contain a description of the different tracts or legal subdivisions within the boundaries of the proposed district.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

Laws 1901, page 191, section 2, requires the petition for the organization of an irrigation district to describe the boundaries of such district, but does not require the petition to contain a specific and accurate description of each tract or legal subdivision of land within the district.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

"The holders of title or evidence of title," or entrymen "on lands under any law of the United States or of this state," who have received receipts or other evidence of their rights as such entrymen, are competent and proper persons to sign a petition for the organization of an irrigation district under R. C. 2372, and such petitioners may be counted in computing the requisite number of signers or holders of title or evidence of title to lands susceptible of irrigation under a common system of irrigation.—Gem Irr. Dist. v. Johnson, 18 Idaho, 386, 109 Pac. 845.

The filing of a petition for reconfirmation of proceedings for the organization of an irrigation district does not waive R. C. 2377, limiting the time to commence actions or maintain defenses affecting the validity of the organization of such district.—Progressive Irr. Dist. v. Anderson, 19 Idaho, 504, 114 Pac. 16.

Where confirmation proceedings were had of the organization of the district and thereafter assessment of benefits was made, and a proceeding brought for the confirmation of such assessment, and a reconfirmation of all the proceedings in connection with said district, the application for a reconfirmation did not waive any benefits secured to the district by the confirmation.—Progressive Irr. Dist. v. Anderson, 19 Idaho, 504, 114 Pac. 16.

An attorney in fact, duly appointed in writing in the name, place and stead of the principal, to sign a petition to the county commissioners for the organization of an irrigation district, has the power and authority

to sign such petition for his principal, and the signing of such petition by said attorney in fact will bind the principal as fully and to all intents and purposes as if he had personally signed the same.—Black Canyon Irr. Dist. v. Marple, 19 Idaho, 176, 112 Pac. 766.

Under R. C. 2377, providing, "No action shall be commenced or maintained, or defense made affecting the validity of such organization after two years from and after making and entering said order" (the order referred to being the one made by the board of county commissioners declaring the due organization of an irrigation district)—the time is limited to two years in which any action may be commenced or maintained, or defense made, affecting the validity of the organization of such district.—Progressive Irr. Dist. v. Anderson, 19 Idaho, 504, 114 Pac. 16.

If the district officers do not move to have the proceedings for the organization of an irrigation district confirmed within two years, anyone interested may by proper action have the question as to the legality of the organization of such district determined by the district court.—Progressive Irr. Dist. v. Anderson, 19 Idaho, 504, 114 Pac. 16.

The fact that the board of county commissioners did not declare the district duly organized on the day that they canvassed the vote cast for the organization of the district does not affect the order declaring the organization of the district.—Progressive Irr. Dist. v. Anderson, 19 Idaho, 504, 114 Pac. 16.

Record held to show that the Hillcrest Irrigation District was duly and regularly organized.—Hillcrest Irr. Dist. v. Brose, 24 Idaho, 376, 133 Pac. 663.

(c) Territorial Extent and Annexation or Inclusion of Land.

Where lands in towns or villages within a proposed irrigation district will be benefited by irrigation under the system proposed, an order including such lands in such district is not void.—Nampa etc. Irr. Dist. v. Brose, 11 Idaho, 474, 83 Pac. 499.

Where a railroad corporation owns right of way and station grounds within the boundaries of a proposed irrigation district, and quietly sits by and makes no objection or protest to the organization of such district, or the confirmation of the same, such railroad company is concluded by the action of the board of county commissioners in including such right of way and station grounds within the district, and the judgment of the district court confirming such district, and cannot attack the jurisdiction of the district to assess such lands, on the ground that the same were not benefited, in a collateral proceeding.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

Where it appears that an irrigation district has attempted to change the boundaries of such district so as to include other territory, but has failed to give the notice required by the statute of the intention of

such district to change such boundaries, and the owners of land attempted to be taken into such district have no notice of the change in boundaries and the inclusion of such land within the district, such owners are not prevented from challenging the legality of the change in the boundaries of such district until they have had their day in court.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

Whether the right of way and station grounds of a railroad company will be benefited by a system of irrigation works within an irrigation district is committed to the judgment of the board of county commissioners; and when such board has determined that such land will be benefited and includes such land within the boundaries of such district, the action of such board is final and conclusive against a collateral attack.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

The statute of this state authorizes the board of county commissioners to include within the boundaries of an irrigation district all lands which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system; and this is true regardless of the question as to what particular use is being made of any particular tract or piece of land at the time the district is organized.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

The mere fact that the railroad company for the time being is using its lands for right of way and depot purposes is not a reason why such lands will not be benefited by a system of irrigation works controlled by an irrigation district, as the question of benefits is to be determined with reference to the natural state and condition of the land, and not with reference to the use being made of such land.—Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

In determining whether lands will be benefited by a system of irrigation works, the board of county commissioners are not limited to lands which will be used for agricultural purposes or upon which water will be beneficially used or to lands devoted to any particular use; but the board is empowered and given jurisdiction to determine whether all lands within the district will be benefited without reference to the use to which the same will be put.—Oregon etc. Co. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904.

Where it appears to the court in the proceedings for confirmation that said district contains some lands not benefited, the court has jurisdiction to exclude such lands.—Progressive Irr. Dist. v. Anderson, 19 Idaho, 504, 114 Pac. 16.

(d) District Officers.

The district court has jurisdiction to hear and determine a contest of the election of a director of an irrigation district.—Hertle v. Ball, 9 Idaho, 193, 72 Pac. 953.

Laws 1899, section 1, states that the provisions of the election law shall govern all elections for officers provided for by the constitution or state laws at either general or special elections, except school district elections. Section 119 permits the contest of the election of any person to any public office. Section 135 provides that the election of any person declared elected to any office other than executive, state officers and members of the legislature, may be contested by any elector of the state, judicial district, county, township, precinct, city or incorporated village in and for which the person is declared elected. Laws 1899, pages 412, 413, provides that the general election law shall govern irrigation district elections as far as applicable. Held, that directors of an irrigation district are within the meaning of section 119, supra, and that therefore the right of such a director to hold office may be contested.—Hertle v. Ball, 9 Idaho, 193, 72 Pac. 953.

R. C. 3278, providing that a water-master has no authority to begin his work until he has been called upon by two or more owners or managers of ditches, by application in writing stating that there is a necessity for the use of water, is mandatory and the water-master cannot recover for his services unless the services were rendered after such written application.—Walker v. Elmore County, 16 Idaho, 696, 102 Pac. 389.

Where a water-master begins work without the written application required by R. C. 3278, users of water are not estopped by remaining silent to contest payment to the water-master for his services.—Walker v. Elmore County, 16 Idaho, 696, 102 Pac. 389.

(e) Powers and Proceedings in General.

Fixing boundaries of district. See ante, IX, (B), 3, (c).

Sale of water and supply and use for irrigation. See post, IX, (B), 10.

Issuance of bonds. See post, IX, (B), 3, (f).

A contract entered into by the board of directors of an irrigation district, giving to a stranger the management and control of the reservoir, dam and main canal, and taking that management and control out of the district would be ultra vires and void.—Colburn v. Wilson, 23 Idaho, 337, 130 Pac. 381.

Under the laws of this state, an irrigation district may provide for the drainage and reclamation of lands within the district which have been flooded or water-logged by reason of overflow, percolation, or seepage from its irrigation works, and the accomplishment of such purpose is one of the necessarily implied duties of the district equally as incumbent on the district as the irrigation of its dry and arid lands.—Bissett v. Pioneer Irr. Dist., 21 Idaho, 98, 120 Pac. 461; Pioneer Irr. Dist. v. Stone, 23 Idaho, 344, 130 Pac. 382.

R. C. 2397 and 2398 authorize the board of directors of an irrigation district to contract with the United States for the construction of necessary works for the supply of water

and irrigation of lands within the district, and the provisions of those sections have been complied with in this case, and the action of the district has been regular and legal.—*Pioneer Irr. Dist. v. Stone*, 23 Idaho, 344, 130 Pac. 382.

The Boise-Payette Water Users' Association has the power, under its articles of incorporation and the state statute, to sign and execute a contract with the Secretary of the Interior for supplying water to the district for the irrigation of its lands and the drainage of overflowed lands within the district.—*Pioneer Irr. Dist. v. Stone*, 23 Idaho, 344, 130 Pac. 382.

(f) Bonds and Other Securities.

Where an irrigation district has been organized and all the maps, plans, surveys and estimates required by Laws 1903, page 150, have been made, and the receipts from the original bond issue have been exhausted before completion of the work, it is unnecessary to make additional plans, maps, etc., as a prerequisite to an additional bond issue under section 15 for the completion of the work.—*Pioneer Irr. Dist. v. Campbell*, 10 Idaho, 159, 77 Pac. 328.

Where an irrigation district has been organized pursuant to the state irrigation laws, and has voted to issue bonds for the construction or purchase of a canal system, the fact that said system will supply and water lands outside the district does not affect the organization of the district or the legality of the proposed issue of bonds.—*Settlers' Irr. Dist. v. Settlers' Canal Co.*, 14 Idaho, 504, 94 Pac. 829.

A petition filed in the district court by the board of directors of an irrigation district, under R. C. 2401, which sets forth in a series of special allegations the various steps taken in the issuance of its bonds, but omits to allege generally that "due and lawful proceedings were taken to issue bonds," is sufficient, where the allegations of fact are such as to support the finding of the court that such proceedings had been duly and regularly taken.—*Emmett Irr. Dist. v. Shane*, 19 Idaho, 332, 113 Pac. 444.

Under the facts of this case, held, that the directors of the Gem Irrigation District adopted general plans and specifications for the construction of the irrigation works of the district, and made estimates of the cost of the construction of such works prior to calling the election for the purpose of voting bonds for the construction of said works.—*Gem Irr. Dist. v. Johnson*, 20 Idaho, 29, 115 Pac. 924.

Under R. C. 2386, an irrigation district has the power and authority to issue bonds for the purpose of collecting drainage, waste, and seepage water, and storing the same for the irrigation of land within such district.—*Bissett v. Pioneer Irrigation Dist.*, 21 Idaho, 98, 120 Pac. 461.

In proceedings under R. C. 2401, 2402 and 2403 for the purpose of having the district court examine, approve and confirm the proceedings of an irrigation district in authorizing the issuance of bonds of said district, where an answer is filed to the petition for confirmation, denying the material allegations of the complaint, the trial court should find on all of the material issues made by the pleadings, and upon which evidence is introduced.—*Black Canyon Irr. Dist. v. Fallon*, 21 Idaho, 537, 122 Pac. 850.

In proceedings under R. C. 2401 et seq. to determine and confirm the proceedings authorizing bond issues for irrigation districts, where no answer is filed and no issue joined upon the material allegations of the petition, a general finding that the different provisions of the statute have been fully and completely complied with, and that all things had been done required by the statute, and that all the allegations in the petition were true, is sufficient to support a judgment of confirmation.—*Black Canyon Irr. Dist. v. Fallon*, 21 Idaho, 537, 122 Pac. 850.

When an irrigation district is duly and regularly organized under the laws of this state and becomes a quasi-municipal or public corporation, from that time henceforward all persons owning lands within the district and subject to the jurisdiction thereof have notice that such lands are within the jurisdiction and taxing power of the district, and a notice for the confirmation of the bonds of the district is notice to every property owner within the district that all property therein is affected thereby, and the naming of the district by its corporate name is sufficient description and notice that all the property in the district will be affected by the proceeding.—*Little Willow Irr. Dist. v. Haynes*, 24 Idaho, 317, 133 Pac. 905; *Payette Heights Irr. Dist. v. Haynes*, 24 Idaho, 321, 133 Pac. 907.

Under R. C. 2401 and 2402, a notice of hearing on petition for the approval and confirmation of a bond issue of an irrigation district need not describe the lands within the district, but it is sufficient where it recites that "notice is hereby given that the petition of the board of directors of the Little Willow Irrigation District has been filed, praying that the proceedings for the issuing of bonds of the district be examined, approved and confirmed," and the notice states the time and place for the hearing and states that "the prayer of said petition is that each and all of the proceedings taken for the authorization of the bonds of said district may be examined, approved and confirmed by this court."—*Little Willow Irr. Dist. v. Haynes*, 24 Idaho, 317, 133 Pac. 905; *Payette Heights Irr. Dist. v. Haynes*, 24 Idaho, 321, 133 Pac. 907.

Record held to show that the necessary steps required by statute were taken to authorize the issuance of the Hillcrest Irrigation District bonds.—*Hillcrest Irr. Dist. v. Brose*, 24 Idaho, 376, 133 Pac. 663.

(g) Assessments and Lien and Enforcement Thereof.

Right of grantee to maintain action to recover unlawful assessments made against the land of grantor and retained by grantor. See *Parties, I*.

An irrigation district organized under Laws 1899, page 408, has power and jurisdiction to levy and collect assessments against land within the district according to the benefits received whether the owners of said land already owned a water right in connection therewith or not.—*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Idaho, 235, 101 Pac. 87.

Under R. C. 2407-2415, requiring the specific property on which an assessment is levied for irrigation district assessments to be advertised and sold for nonpayment of assessments, only such portion of a railroad company's property as is situated within an irrigation district can be sold for the nonpayment of the assessments in such district.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.* (on rehearing), 16 Idaho, 578, 102 Pac. 904.

Where territory has not been included within the boundaries of an irrigation district in accordance with the laws governing the taking of territory into an irrigation district, the district has no power or jurisdiction to assess the property so included.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

Laws 1901, page 191, section 11, requiring the board of directors of irrigation districts to examine all tracts and legal subdivisions within the boundaries of the district and apportion the benefits according to their judgment, does not require the board, in designating the benefits, to particularly and specifically describe each tract or fractional part of such legal subdivision according to the separate ownership thereof, where the benefits accruing to all parts of such legal subdivision are the same, but such description and designation must be made where the board determines that any part or tract less than a legal subdivision is different from the remainder.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

The benefits fixed by the board of directors of an irrigation district are laid against the land, and the proceeding is a proceeding in rem and the benefits have reference to the land; and where the board, in preparing a list of the lands against which benefits are laid, designate upon such list the legal subdivisions across which the right of way of a railroad company passes and designate the rate per acre apportioned to each legal subdivision, it is a substantial compliance with the statute, and is not void because the right of way is not particularly and separately described.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

The fact that the board of directors of an irrigation district, in assessing benefits to lands within an irrigation district, fail to list the lands according to each separate

ownership, but do list the same according to each legal subdivision, does not show that the board did not intend to assess benefits to all the lands within the legal subdivision. *Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

Laws 1901, page 191, requires the board of directors of an irrigation district to assess benefits against each legal subdivision or tract within the district; and where less than a legal subdivision is benefited in a different degree or amount than the remainder of the legal subdivision or tract, then the board is required to fix and determine the benefits accruing to such particular tract; but where the entire legal subdivision or tract is benefited equally, then the board may lay the assessment against the legal subdivision, and thus include the smaller or fractional parts thereof.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

The fact that the officials of an irrigation district neglect to assess the right of way and station grounds of a railroad company for certain years is not a reason why such right of way and station grounds are not subject to assessment by said district; and the company cannot defeat a future assessment by reason of the fact that its property was not assessed for any particular year or years prior to the assessment made.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

Where the record shows that the board of directors of an irrigation district, in levying an assessment for maintenance and to pay the bonded indebtedness of an irrigation district, substantially complied with the statute, and the assessment-roll is made up in substantial compliance with the statute, the assessment thus levied will be upheld if the description of the property is sufficient to give the land owner notice that such property is burdened with such assessment.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

In all collateral proceedings against assessments, the benefits assessed are conclusively presumed to be received and the assessment is not open to revival or review.—*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Idaho, 235, 101 Pac. 87.

The board of directors of an irrigation district has jurisdiction to determine whether land included therein will be benefited by the organization of the district, and the fact that the board assessed certain property therein when it should not have done so, or assessed it in excess of the actual benefits received, cannot be questioned in a collateral proceeding.—*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Idaho, 235, 101 Pac. 87.

The above statement was intended to refer to the action of the county commissioners in organizing the irrigation district and not to the action of the board of directors.—*Oregon etc. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

Where all the acts in regard to the organization of an irrigation district under Laws 1899, page 408, have been confirmed by a judgment of the district court, and no appeal has been taken therefrom, an action by a land owner within said district to recover assessments paid by him is a collateral attack on said judgment and the regularity of such proceedings where such land owner or his predecessor in interest did not object thereto is *res adjudicata*.—*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Idaho, 235, 101 Pac. 87.

Under R. C. 2419, which authorizes the directors of irrigation districts to fix rates of tolls and charges for water against persons using its canals, or to levy assessments for the purpose of defraying expenses of the operation, "repair and improvement" of such portion of its canal and works as are complete and in use, the laying of a pipe line necessitated by the lawful removal of a ditch by municipal authorities is a repair or improvement, the funds for defraying which may be included in a maintenance assessment or in increased toll rates charged for the delivery of water, and is not "new construction" which must be defrayed by a special assessment under R. C. 2391, or bond issue under R. C. 2396, which requires the assent of the voters of the district.—*City of Nampa v. Nampa etc. Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979.

Where an irrigation district has proceeded in conformity with the statute to issue irrigation district bonds, and has procured an adjudication and confirmation of the proceedings in conformity with the statute and of the assessment of benefits against the several tracts of land within the district, the same becomes *res adjudicata* against both the land owners and the district in all subsequent proceedings, in so far as the same may involve the assessment of benefits against the several tracts of land.—*Russell v. Irish*, 20 Idaho, 194, 118 Pac. 501.

"Benefits," as used in R. C. 2407, in connection with assessments for maintenance, mean such benefits as contribute to promote the prosperity of the district, and add value to the property of the respective owners of the entire district, and that such improvement of land in any portion of the district adds to and increases the value of the lands of the entire district, as the water is applied and devoted to a beneficial use by the owners through said system.—*Colburn v. Wilson*, 24 Idaho, 94, 132 Pac. 579.

Under R. C., title 14, which includes R. C. 2407, and provides for the organization and government of irrigation district, it was the intention of the legislature that the lands irrigable under the system within the district should be considered as a whole, and that such lands must be assessed for the maintenance and operation of the water system, at the same rate, where the benefits, that is the water needed and received, are the same.—*Colburn v. Wilson*, 24 Idaho, 94, 132 Pac. 579.

4. Irrigation or Ditch Companies.

Appointment of receiver for irrigation company. See *Corporations*, VIII.

Estoppel of stockholder to enjoin execution of note and mortgage by corporation. See *Corporations*, V, (A).

Where a corporation organized to furnish water for irrigation purposes, for a period of eight years, levied assessments on the stock and collected the same in accordance with the statute relating to such assessments, which action was acquiesced in by the shareholders and was absolutely necessary to carry on the corporate business, the corporation will be deemed to have adopted the provisions of R. S., title 4, though it has not filed the certificate required by R. S. 2650, indicating its intention to do so.—*Hall v. Eagle Rock etc. Water Co.*, 5 Idaho, 551, 51 Pac. 110.

The articles of incorporation of a company organized to furnish water for irrigation purposes provided that the shares should be nonassessable, unless otherwise voted by a three-fourths vote of all the stockholders. The by-laws and the certificates of stock entitled the stockholders to five inches of water for each share of stock owned by them. Held, that the shares of stock were assessable by a three-fourths vote of the stockholders.—*Hall v. Eagle Rock etc. Water Co.*, 5 Idaho, 551, 51 Pac. 110.

Shares of stock in an irrigation company are not appurtenant to the land owned by the owner of such shares, even though such land be irrigated by water from a canal owned by such corporation and therefore do not pass with such lands under an execution sale.—*Wells v. Price*, 6 Idaho, 490, 56 Pac. 266.

A mortgage executed by the Twin Falls Canal Company, in conformity with its articles of incorporation and the state statute upon all the property of the corporation, would cover the entire canal system and water appropriations, easements, and franchises, and, in the event of a foreclosure of such mortgage and sale of the property, the purchaser would acquire such property, but that under Const., article 15, section 4, the water would still be appurtenant to the lands to which it had once been applied upon payment by the land owner of reasonable rates established in conformity with law.—*Hobbs v. Twin Falls Canal Co.*, 24 Idaho, 380, 133 Pac. 899.

The Twin Falls Canal Company, having by its articles of incorporation expressly recited that it was organized under the general incorporation laws of the state and that it should own, operate, etc., the canal system, is not governed by R. C. 3011 to 3026, which relate to and govern "religious, social and benevolent corporations," even though such corporation is not organized for profit.—*Hobbs v. Twin Falls Canal Co.*, 24 Idaho, 380, 133 Pac. 899.

The Twin Falls Canal Company was organized under the general incorporation laws dealing with private corporations, the articles reciting that the corporation shall acquire, own, hold and operate the canal system,

dams, and reservoirs and do all things necessary to be done in "conducting the business of supplying to its stockholders water for irrigation and domestic purposes." The Twin Falls Land and Water Company transferred to the canal company in fee the entire irrigation system, including dams, easements, water rights, etc. Held, that a land owner who purchased a water right became a stockholder in the canal company, having a voice in the corporation equivalent to the number of shares of stock he held, the same as a stockholder in any business corporation.—*Hobbs v. Twin Falls Canal Co.*, 24 Idaho, 380, 133 Pac. 899.

The Twin Falls Canal Company was organized under the general incorporation laws of the state, its articles authorizing it to execute notes and mortgages and incur indebtedness. R. C. 2769, as amended by Laws 1909, page 163, authorizes such a corporation to mortgage and convey any of its real or personal property. Held, that the directors of the corporation had the power to borrow money and execute a mortgage therefor without submitting the question to the stockholders.—*Hobbs v. Twin Falls Canal Co.*, 24 Idaho, 380, 133 Pac. 899.

5. Acquisition of Water Rights, and Rights Incident Thereto.

R. C. 3292 was intended to apply to such water rights as are described in Const., article 15, section 4, that is, a water right only where there has been an actual application of the water to the land for a beneficial use. *Hewitt v. Great Western etc. Sugar Co.*, 20 Idaho, 235, 118 Pac. 296.

Whenever a water right, as defined by the constitution, is acquired under R. C. 3292, the owner of the tract of land where the water is applied, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon or as may from time to time be imposed by laws; and the payment for such water right shall be a release of any bond or mortgage upon the property of the company from whom such water right is acquired, or their successors or assigns, to the amount of the water right purchased and paid for; and it is the duty of the company from whom the water right is purchased to furnish the purchaser, or his assigns, a release from said mortgage, so far as the same affects said water right. By the transfer provided by the statute, the water right became attached to the particular tract of land upon which it is used.—*Hewitt v. Great Western etc. Sugar Co.*, 20 Idaho, 235, 118 Pac. 296.

In R. C. 1615, providing that a proposal to construct irrigation works shall state the price at which perpetual water rights will be sold to the settlers, such rights to embrace a proportionate interest in the canal or other waterworks together with the rights and franchises attached thereto, the term "rights and franchises" means water rights as well as all other rights, including dams, ca-

nals, ditches, laterals, etc.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

R. C. 1615, providing that a proposal to construct irrigation works shall state the terms on which perpetual water rights will be sold, such rights to embrace a proportionate interest in the canal or other irrigation works, contemplates that each owner of a water right has a proportionate interest in the entire irrigation works.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

6. Right of Way and Other Interests in Land.

The destruction of an irrigation ditch by a city in lawfully changing the grade of its streets is not a destruction of the ditch owner's easement or right of way in the streets.—*City of Nampa v. Nampa etc. Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979.

An irrigation district organized under Laws 1903, page 150, which is authorized to include within its corporate limits lands and lots lying within a town or village, has the implied power conferred upon it by the legislature to enter the streets and alleys of such town or village, or of that portion of the town or village included within the district, for the purpose of constructing ditches, canals, and laterals, in order to carry out the purpose of its creation and deliver water to the consumers therein.—*City of Nampa et al. v. Nampa etc. Irr. Dist.*, 23 Idaho, 422, 131 Pac. 8.

The power conferred upon irrigation districts to enter the streets and alleys of towns and villages included within the boundaries of such district for the construction of its ditches, canals, and laterals, in order to deliver water to consumers, does not repeal or in any way interfere with the power and authority of such towns and villages to exercise control of their streets and alleys, and to regulate the manner and method of their use, and to direct the manner and method in which such irrigation district shall construct and maintain its ditches, canals, and laterals within such municipality.—*City of Nampa v. Nampa etc. Irr. Dist.*, 23 Idaho, 422, 131 Pac. 8.

U. S. Rev. Stats. 2339 (U. S. Comp. Stats. 1901, p. 1437) was intended to protect persons in their rights to the use of water and was not enacted for the purpose of enabling contractors who construct ditches for an agreed compensation to procure title to rights of way for such ditches.—*Crane Falls etc. Irr. Co. v. Snake River Irr. Co.* (on rehearing), 24 Idaho, 63, 133 Pac. 655.

The owner of an irrigation ditch, constructed over public lands, does not acquire title in fee to such right of way but a conditional easement which will be defeated by his failure to use it for the purpose for which it was obtained.—*Crane Falls etc. Irr. Co. v. Snake River Irr. Co.* (on rehearing), 24 Idaho, 63, 133 Pac. 655.

The provisions of U. S. Rev. Stats. 2339 (U. S. Comp. Stats. 1901, p. 1437) refer to

the right of way for such ditches as are used in connection with vested water rights, and unless one has a vested and accrued water right, he is not entitled to an easement over any public lands for the construction of ditches.—Crane Falls etc. Irr. Co. v. Snake River Irr. Co. (on rehearing), 24 Idaho, 63, 133 Pac. 655.

Contracts examined and held to show that under the "application and agreement for the purchase of stock" made by the settlers and the contract between the Apple Cove Association and the Crane Falls Power & Irrigation Company, that it was not the intention of the parties to furnish the Crane Falls Company with title to a right of way for the construction of ditches for the irrigation of the lands of the settlers.—Crane Falls etc. Irr. Co. v. Snake River Irr. Co. (on rehearing), 24 Idaho, 63, 133 Pac. 655.

Under the facts of this case, held that the appellant corporation was a construction company and as a construction company is not entitled to a title to a right of way for ditches under U. S. Rev. Stats. 2339 (U. S. Comp. Stats. 1901, p. 1437).—Crane Falls etc. Irr. Co. v. Snake River Irr. Co. (on rehearing), 24 Idaho, 63, 133 Pac. 655.

Under U. S. Rev. Stats. 2339 (U. S. Comp. Stats. 1901, p. 1437), one does not obtain title to the right of way for segments of canals merely because he has constructed them, and such title as the provisions of said section give does not vest until the completion of the ditch, and unreasonable delay in its completion forfeits any claim to the right of way.—Crane Falls etc. Irr. Co. v. Snake River Irr. Co. (on rehearing), 24 Idaho, 63, 133 Pac. 655.

7. Canals, Ditches, Flumes, and Conduits.

See, also, ante, VI, (J), 3.

Canal or ditch across public highway constituting nuisance. See Nuisance.

Statutory provisions as to bridges and crossings.

See ante, IX, (B), 2.

Where a private person or a corporation constructs a ditch or canal across a public highway, such person or corporation thereby acquires no right to destroy it as a thoroughfare; but they are bound both by the common law and by the statute to restore or unite the highway at their own expense, by some reasonably safe and convenient means of passage and to keep the same in good repair, whether the canal or ditch cuts the highway within or without the limits of a city or village.—City of Lewiston v. Booth, 3 Idaho, 692, 34 Pac. 809.

In an action for damages for interference with plaintiff's water rights and for a perpetual injunction, the supreme court on appeal held that the ownership of a ditch may be separate from any water right, and that one may adopt as part of his ditch a depression, slough or high-water channel, and that his right to the possession and use thereof will be protected the same as if such

ditch were wholly artificial. After the case had been remanded the trial court found that plaintiff's ditch was one channel of C. creek and that defendants had the right to run water through it, which finding was supported by the evidence. Held, that such finding did not conflict with the rule stated by the supreme court and that the doctrine of stare decisis has no application.—Parke v. Boulware, 9 Idaho, 225, 73 Pac. 19.

Under R. C. 3310, it is the duty of the county to construct bridges that are required to complete all roads intersecting ditches or canals laid out after the construction of such ditches or canals; but, when ditches or canals are constructed across an existing road or highway, one established by prescription or duly located by the county commissioners, then it is the duty of the owner to construct a proper bridge across such ditch or canal.—MacCammelly v. Pioneer Irr. Dist., 17 Idaho, 415, 105 Pac. 1076.

R. C. 951, providing that persons constructing water ditches across any public road, street or highway, must build a bridge thereover, applies to ditches which are extended across public streets and highways, and not to ditches that were constructed prior to the location of such highways.—MacCammelly v. Pioneer Irr. Dist., 17 Idaho, 415, 105 Pac. 1076.

Where a canal has been constructed and operated in accordance with law, it is not a nuisance, and can only become a nuisance by reason of the manner in which it is maintained or the method of its operation; and the mere fact that a municipality subsequently extends a street across a canal which has been lawfully constructed and operated does not convert the canal into a nuisance at the place where the street crosses the canal. Boise City v. Boise City Canal Co., 19 Idaho, 717, 115 Pac. 505.

Where a canal was constructed over the public domain and through what is now the site of Boise City, prior to the issuance by the government of a patent for the townsite of Boise City, and the canal was being operated and maintained through the townsite at the time and prior to the issuance of patent from the government, the city has no power or authority to compel the owner of the canal to build bridges across such canal, where streets have been extended across the canal subsequent to the building of the canal. Boise City v. Boise City Canal Co., 19 Idaho, 717, 115 Pac. 505.

A grant to a canal company of a right of way or easement for its ditches in the streets of a city is subject to the right of the city to thereafter regulate the manner of the exercise of such easement, or to change the grade of the streets in such a way as to require a corresponding change in the conduit for the delivery of water; and in exercising its right to grade its streets, the city may, if it becomes necessary so to do, remove such ditches and require the reconstruction of the

company's system by a pipe line beneath the surface.—*City of Nampa v. Nampa etc. Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979.

Plaintiff company contracted with a corporation, formed by the settlers on an arid tract, to construct an adequate pumping and irrigation system for the irrigation of such tract, such system, when completed, to be the property of the settlers' corporation and the plaintiff to receive the capital stock of such corporation and to sell the same to the settlers. The settlers' company agreed to furnish without expense to plaintiff free sites for pumping plants and rights of way for the construction of the system. Plaintiff was to build a power plant costing \$500,000, also a pumping plant, pipe-lines and ditches which would cost fully \$100,000. The system was to be completed May 1, 1910. Plaintiff ceased work in April, 1910, at which time it had expended from \$15,000 to \$17,000 in the construction of canals or ditches on the tract. Defendant company thereafter contracted with the settlers to furnish water, took possession of said partially constructed ditches and repaired the same and also expended considerable money in preparing to furnish such water, which it expected to be able to furnish in May, 1912. Plaintiff sued to enjoin defendant from using such ditches and canals, the action being begun in March, 1912. Held, that an injunction was properly denied.—*Crane Falls etc. Irr. Co. v. Snake River Irr. Co.*, 24 Idaho, 63, 133 Pac. 655.

8. Actions to Establish and Protect Water Rights and Other Rights of Property.

Actions to determine and protect rights acquired by appropriation. See ante, VI, (O).

Appointment of receiver for irrigation company. See Corporations, VIII.

Actions on contracts to furnish water. See ante, VII, (E).

Action for failure to supply water whether on contract or in tort. See Action, II.

(a) Right of Action and Defenses.

Any classification made by an irrigation company under R. C. 3287 can in no way affect or control the question of priorities between users, and in no way prohibits or limits any user of water in having the question of priority between users settled and adjudicated in the proper court of the state.—*Brose v. Board of Directors etc. Irr. Dist.*, 20 Idaho, 281, 118 Pac. 504.

(b) Injunction.

Plaintiffs alleged that defendants had wrongfully diverted water from a canal and thus deprived them of water necessary for the irrigation of their crops. A writ of injunction was issued on the complaint restraining defendants from maintaining any obstruction which would prevent water flowing on plaintiff's land from the canal. Defendant's answer denied plaintiff's title or right to the use of water. It was conceded by the parties that the removal of the check-gate, as required by the mandatory injunction, would

inflict great damage on the defendants. Held, that in the absence of a showing that the trial court abused its discretion, a modified injunction commanding defendants to refrain from maintaining check-gates above a certain height, would not be disturbed.—*Wilson v. Eagleson*, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613.

A decree provided that defendants and each of them, their servants, agents, employees and lessees, be perpetually enjoined and restrained from in any wise maintaining any artificial obstruction, and particularly the check-gate mentioned in the complaint, in any way or to any extent that may or can interfere with the waters of the plaintiffs flowing in said P. canal, as turned into said lateral to them, and each of them, by the canal company and it is further ordered, adjudged and decreed that the permanent injunction of this court issue herein, directed to such defendants, etc., requiring them and each of them, to perpetually refrain from having or maintaining any artificial obstruction, and particularly the said check-gate, in any way or to any extent, that may or can interfere with the waters of the plaintiffs, flowing in said lateral, etc. Held, that the decree was sufficiently definite and certain so as to be susceptible of enforcement, so far as the granting of a perpetual injunction was concerned.—*Wilson v. Eagleson*, 10 Idaho, 767, 81 Pac. 434.

(c) Mandamus.

A complaint showed that plaintiff was entitled to the use of water appropriated by defendant for the sale, rental and distribution thereof; that plaintiff tendered defendant the sum of \$60, being one dollar and fifty cents per acre for forty acres of land, and demanded water therefor; that defendant refused the demand and proposed to furnish plaintiff water for said land on condition that plaintiff pay defendant \$10 per acre for a perpetual water right and \$1 per annum per acre thereafter. No agreement was arrived at as to what would be a reasonable charge. Plaintiff alleged the sum tendered to be a reasonable charge. Held, that plaintiff had a speedy and adequate remedy at law by a proceeding to have such reasonable charge fixed and therefore mandamus would not lie.—*Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 134.

Where an applicant for the use of water has complied with Laws 1899, page 380, and the canal company has sufficient water to supply the same without depriving prior users of their rights and refuse to do so, a writ of mandate will be issued to compel the delivery of such water.—*Bardsly v. Boise Irr. etc. Co.*, 8 Idaho, 155, 67 Pac. 428.

In a proceeding for a writ of mandate to compel a canal company to deliver water, defendant alleged that all the water carried by its canal had been applied for by owners of land under said canal, and had been delivered to such land owners and by them used for irrigation purposes; that all of said water had been applied to a beneficial use by prior

users of water, and that none of said users of water have been made parties hereto, though they have continued and still use said water, and the whole thereof. Held, sufficient to raise an issue on the question whether all the water the canal will carry has been appropriated and applied to a beneficial use by prior users.—*Gerber v. Nampa etc. Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80.

In an action to compel a canal company to furnish water to an applicant therefor, if the application be for lands which have not previously been irrigated, then it is incumbent upon the applicant to allege and prove that the canal company has water flowing in its canal to which prior appropriators are not entitled.—*Gerber v. Nampa etc. Irr. Co.* (on rehearing), 16 Idaho, 22, 100 Pac. 80.

An irrigation company may be compelled by writ of mandate to make the classification required by R. C. 3287.—*Brose v. Board of Directors etc. Irr. Dist.*, 20 Idaho, 281, 118 Pac. 504.

Under R. C. 4977, a writ of mandate will issue to compel a canal company to deliver shares of stock and water rights in a case where it is its plain public duty to do so under the provisions of the contract and law pursuant to which the company was organized.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

(d) Parties and Pleading.

In an action concerning water rights, where it does not appear from the complaint that the subject of the litigation is within any water district or that there is any water-master in charge of the water in question, a demurrer on the ground of nonjoinder of the water-master is not well taken.—*Boulware v. Parke*, 4 Idaho, 692, 43 Pac. 680.

Under Laws 1899, page 380, requiring the owners or controllers of canals or irrigation works for the distribution of water under a sale or rental thereof to furnish water for irrigation or domestic purposes on proper demand and the giving of reasonable security for payment thereof, a complaint alleging that plaintiff offered to secure the payment of the same, but not alleging that he is ready and willing to pay a reasonable compensation for the water or that he is ready and willing to give reasonable security for the payment of the same, is demurrable.—*Bardsly v. Boise Irr. etc. Co.*, 8 Idaho, 155, 87 Pac. 428.

A complaint in an action to restrain the maintenance of a check-gate in a community irrigating ditch or lateral alleged that plaintiffs were entitled to the use of a certain quantity of water to be delivered to them through the lateral in question, their lands lying below the lands of defendants and along the lateral, and that said water could not be so delivered if defendants were permitted to maintain the check-gates in controversy. Held, not demurrable.—*Wilson v. Eagleson*, 10 Idaho, 755, 81 Pac. 434.

Where several land owners agree to unite in interest and construct their own ditch or lateral, and then make a joint application to a ditch company for sufficient water for all their land as one applicant, they may join as plaintiffs in an action to compel the ditch company to deliver the quantity of water applied for at their headgate.—*Helphery v. Perrault*, 12 Idaho, 451, 86 Pac. 417.

In an action by fourteen plaintiffs to compel a water company to deliver them sufficient water to irrigate their lands, the complaint showed that each plaintiff held his land separately under separate written contracts and deeds, wherein the company agreed to furnish the grantee all the water that was necessary to irrigate the land therein described. Held, that a demurrer on the ground of misjoinder of parties plaintiff and causes of action should be sustained.—*Creer v. Bancroft Land etc. Co.*, 13 Idaho, 407, 90 Pac. 228.

(e) Evidence.

Where water has been once dedicated to land under a sale or rental, and the canal company cuts off such supply and declines to furnish the same, plaintiff in an action against the company makes a prima facie case by showing the previous use and the offer to pay or secure the charge made therefor, and the offer to comply with all reasonable rules and regulations of the company; and the burden is upon the company to show why the water is cut off or not furnished, or, if the dedication be less than a continuous, perpetual use, the company must show the same.—*Gerber v. Nampa etc. Irr. Dist.* (on rehearing), 16 Idaho, 22, 100 Pac. 88.

Evidence held to show sufficient facts and circumstances to support the findings and judgment of the court to the effect that certain holders of water contracts had abandoned their water rights and ceased to use the same or claim or assert any right under them for more than five years.—*Jackson v. Indian Creek etc. Irr. Co.*, 18 Idaho, 513, 110 Pac. 251.

Evidence showing the capacity of a canal, the loss by seepage and evaporation, and the acreage irrigated therefrom, is insufficient to show whether or not the waters of the canal have been fully dedicated, in the absence of any proof of the duty of water, or of the aggregate number of inches of water to which consumers who have acquired a prior right are entitled.—*Gerber v. Nampa etc. Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104.

Evidence showing the delivery of water directly from a canal for the express purpose of irrigating a certain tract of land establishes a prima facie dedication of water to such tract.—*Gerber v. Nampa etc. Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104.

In an action to compel defendant company to deliver water to plaintiffs, held, that the findings of fact are supported by the

evidence.—*Perry v. Farmers' Union Ditch Co.*, 24 Idaho, 156, 132 Pac. 1156.

(f) Trial.

In an action for forfeiture of an option to purchase a water right, or for damages, an instruction that, if one of the holders of the option transferred to a corporation water rights appropriated in his own name, to be used in the irrigation of lands embraced in the project involved in the agreement in question, and that the holders of the option found the project referred to in the option practicable, the verdict should be for plaintiff, though defendants notified plaintiff that they deemed the project impracticable, was erroneous.—*Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497.

(g) Judgment or Decree and Review.

Where, on an application for a writ of mandate to compel the delivery of water, the evidence establishes a dedication inferior to that of prior consumers, a judgment awarding the plaintiff the same right as prior consumers is erroneous, and should be modified so as to make such right subordinate to that of the prior consumers.—*Gerber v. Nampa etc. Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104.

Where the evidence shows the average duty of water under a canal to be five-sevenths of an inch to the acre, a judgment awarding over seven-eighths of an inch is erroneous, in the absence of any testimony establishing a lower duty of water on that particular tract.—*Gerber v. Nampa etc. Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104.

9. Right to Supply of Water.

See, ante, IX, (B), 1. See, also, post, IX, (B), 10.

10. Sale of Water and Supply and Use for Irrigation.

See, also, ante, IX, (B), 1.

Water legally appropriated may be sold by the owner for other useful purposes when it appears that no more was appropriated than the owner could put to a beneficial use.—*Drake v. Earhart*, 2 Idaho, 750, 23 Pac. 541.

Where several land owners agree among themselves to unite in interest and jointly apply as one applicant for water for irrigation purposes and to use and apply the water in rotation, the fact of joinder and rotation in the use of the water are not valid and sufficient grounds on which the water company may refuse to furnish water to them at their common headgate.—*Helphery v. Perrault*, 12 Idaho, 451, 86 Pac. 417.

The times and order of use and application of water by several land owners under the same lateral to their respective tracts do not concern the water company, where the general users by mutual agreement distribute and use the water at the times and in the manner agreeable to them, and the

company has no duty except to furnish the requisite flow of water through the headgate into the consumer's ditch.—*Helphery v. Perrault*, 12 Idaho, 451, 86 Pac. 417.

Plaintiff company contracted with the state of Idaho to build an irrigation system under the Carey act, the contract containing the clause "all of the water dedicated to his land shall be delivered free of all charges during the first irrigating season that water is delivered to said purchaser." Defendant thereafter contracted with plaintiff company for the purchase of water, his contract providing "no such charge or assessment shall be levied or assessed against the purchaser during the first irrigating season after water is delivered under this contract." Held, that "irrigating season" meant the entire irrigating period embraced in one year's time from the date on which water was first delivered to the purchaser, and not merely for any particular crop or for the period from April 1st to November 1st, mentioned in Laws 1899, page 382.—*Twin Falls Land & W. Co. v. Lind*, 14 Idaho, 348, 94 Pac. 164.

Under Const., article 15, section 4, providing for the sale, rental and distribution of water and that such sale, rental or distribution, when once made, shall be deemed an exclusive dedication to such use, a canal company with sufficient customers to use the waters of the canal to its full capacity cannot be compelled by writ of mandate to perpetually furnish water to persons who had received temporary deliveries of water therefrom at times when the company's regular customers were not using the full quantity of water.—*Gerber v. Nampa etc. Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80.

One desiring to use the waters of a canal cannot compel the canal company to sell water beyond the capacity of the canal.—*Gerber v. Nampa etc. Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80.

Under Laws 1899, page 380, section 19, a canal company is prohibited from contracting to deliver more water than its canal will carry.—*Gerber v. Nampa etc. Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80.

In an action to compel a canal company to deliver water, plaintiff must plead and prove that the canal company has sufficient water to supply him with the desired amount and that its canal has sufficient capacity to carry it.—*Gerber v. Nampa etc. Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80.

Where the capacity of a canal is only sufficient to carry the water due to prior users, no act of the agents or officers of the canal company, by letting others have some of the water, could estop the company from setting up as a defense in an action to compel the delivery of water the fact that the canal could not carry any more water than prior users were entitled to receive.—*Gerber v. Nampa etc. Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80.

In an action against a canal company to compel the delivery of water, the evidence showed that no part of the purchase price

of the canal system had been charged to plaintiff's lands, but provision was made for the assessment of "old water" to farm lands that had already used the water, and the amount of the benefit to such lands was fixed at a certain price per inch. The list of the apportionment of benefits classified the benefits under "old water" and "new water," the former referring to existing water rights, the latter to rights yet to be acquired. Plaintiff's land was not apportioned with nor assessed for any "old water." No enlargement was made of the canal system and until that is done no "new water" rights can be acquired. Held, that until such enlargement occurs or it is made to appear that the canal company has water sufficient to supply plaintiff without interfering with the rights of prior users, he cannot acquire a perpetual water right by the temporary use of water from said canal at times when prior users were not demanding their full quota of water. *Gerber v. Nampa etc. Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80.

Const., article 15, section 4, providing that water appropriated or used for agricultural purposes, under a sale or rental, shall be deemed an exclusive dedication to such use; and when once sold or rented to a person settling upon or improving land for agricultural purposes with a view of receiving the benefit of such water under such dedication, such person shall not thereafter, without his consent, be deprived of the annual use of the same when needed, upon payment therefor and compliance with equitable terms, deals with unappropriated and undedicated water and does not mean that water, which is temporarily being used, shall thereby be dedicated to a perpetual use to the exclusion of those who are entitled to the same by a prior right.—*Gerber v. Nampa etc. Irr. Co.* (on rehearing), 16 Idaho, 22, 100 Pac. 88.

The dedication of water to a beneficial use upon land under the constitution does not extend beyond the character of the water so dedicated, and where all the waters of a canal have been appropriated and applied to a beneficial use under a sale or rental, and when not needed by the appropriators thereof, are furnished under a sale and rental to a subsequent applicant, the dedication of the latter extends only to the right to use such water when not required or needed by the prior appropriator.—*Gerber v. Nampa etc. Irr. Co.* (on rehearing), 16 Idaho, 22, 100 Pac. 88.

It is the policy of the law to prevent the waste of water, and when prior appropriators of a canal are not using all of the water to which they are entitled, the canal company may supply such water to any other applicant therefor, but by doing so such applicant does not become vested with a right which can in any manner interfere with the right of the prior appropriator.—*Gerber v. Nampa etc. Irr. Co.* (on rehearing), 16 Idaho, 22, 100 Pac. 88.

Where waste water only is furnished by a canal company to an applicant, under a sale

or rental therefor, the same becomes a dedication only of such waste water; and the user thereof can only maintain an action against the canal company compelling the company to furnish the user with such waste water, if any, and cannot compel the canal company to furnish a perpetual supply of water such as is required to be furnished to an original appropriator.—*Gerber v. Nampa etc. Irr. Co.* (on rehearing), 16 Idaho, 22, 100 Pac. 88.

Where a canal company furnishes an applicant with waste water from a drain ditch, supplied wholly with water wasting from other lands, the user thereof cannot compel the canal company to maintain such waste water, even though a rental is charged therefor when used, for the rights of the user depend wholly upon the water wasted into the drain ditch and his right thereto.—*Gerber v. Nampa etc. Irr. Co.* (on rehearing), 16 Idaho, 22, 100 Pac. 88.

Where water has been delivered to lands under a rental and distribution, and has been used and applied by the land owner under such rental for the purpose of raising crops, the right to such use becomes a dedication within the meaning of Const., article 15, section 4, and the user and consumer is entitled to the continued use thereafter on payment of the rental rates established in conformity with law.—*Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254.

It is the duty of a canal company to turn the water for the consumer out of its main canal or lateral at such place as will be most convenient for the consumer, and will cause least waste by seepage and evaporation.—*Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254.

The fact that a canal company has furnished and delivered water to a consumer for the purpose of raising crops so as to amount to a dedication of the use within contemplation of Const., article 15, section 4, raises the prima facie presumption that the company so furnishing and delivering water had that quantity of water over and above the amount required and previously appropriated and dedicated to other users and consumers from the same canal.—*Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254.

Where waters received and used and applied by a subsequent settler and claimant were a part of the waters included within the appropriation of prior claimants and were merely waters which such prior claimants were temporarily not claiming or using, then the dedication and right to the subsequent use thereof would only go to such waters and would constitute a claim merely for the use of such waters as are not needed or applied by prior consumers at any given time during any subsequent season.—*Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254.

A dedication within the purview of the constitution is commensurate only with the character and kind of the waters dedicated and the use and regularity of the use to which they are applied.—*Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254.

It is the duty of canal and water companies to keep their ditches and canals in repair, so as to carry the water to the several consumers along the lines thereof.—*Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254.

Where the right to the use of waters from a canal has attached within the purview of Const., article 15, section 4, and the water user pays or tenders the established water rental therefor, the question of the expense of delivery or the amount of waste by seepage, percolation and evaporation cannot be charged to the water user and consumer, but the burden and responsibility thereof rests upon the canal company.—*Niday v. Barker*, 16 Idaho, 73, 101 Pac. 254.

Where a person is entitled to water from a ditch company and does all that the laws of the state require him to do in order to get that water, the company is bound to deliver the water, and cannot legally require the person making the application to sign a special contract binding him to do things which the law does not require him to do.—*Green v. Byers*, 16 Idaho, 178, 101 Pac. 79.

A contract for the sale of a water right by an irrigation company, containing, as one of the conditions of such sale, a provision that in case of any casual, unforeseen or unavoidable accident which shall cut off or diminish the supply of water, or if the volume of water proves insufficient from drouth or from any other cause beyond the control of the company, the second party shall be content with his pro rata share of water which the company may have; and the company shall not be liable for the shortage or deficiency, and shall have a right to distribute such water as may flow through the canal or from the reservoir to the holders of such water rights pro rata, places all persons holding such contracts upon an equality as to the right to water when there is a shortage, and denies to any of such persons a prior or superior right over any other person holding a like contract; and, therefore, it was error for the court to decree to a user of water under such contract a prior right over the users under similar contracts.—*Jackson v. Indian Creek etc. Irr. Co.*, 16 Idaho, 430, 101 Pac. 814.

In an action brought by a user of water against an irrigation company, based upon a contract made between such company and such user, in which such user seeks to have his rights to the use of water determined in accordance with said contract, it is error for the trial court to render a decree in favor of such user, as an appropriator and user of water, not based upon such contract.—*Jackson v. Indian Creek etc. Irr. Co.*, 16 Idaho, 430, 101 Pac. 814.

Where contracts made between an irrigation company and users of water from such system provide that in case of shortage the persons holding such contracts should receive only their pro rata share of such water, in a controversy between the company and a user under such contract, the court should de-

cree to such user, in case there is a shortage, only his pro rata share of such water.—*Jackson v. Indian Creek etc. Irr. Co.*, 16 Idaho, 430, 101 Pac. 814.

A purchase of a perpetual water right from an irrigation company with the right to receive the water so purchased from the company's canal carries with it such a right in the appropriation itself and such an easement or servitude in the canal system as to authorize and enable the purchaser himself to go upon the property and protect the appropriation and maintain the diversion, and repair the canal, and carry the water through the canal system to the extent of the purchaser's water right, in the event the company fails, neglects or refuses to do so.—*Idaho Fruit Land Co. v. Great Western etc. Sugar Co.*, 18 Idaho, 1, 107 Pac. 989.

Under the facts and circumstances of this case, held, that the equities are with the respondent, and that the judgment of the trial court should be affirmed.—*Jackson v. Indian Creek etc. Irr. Co.*, 18 Idaho, 513, 110 Pac. 251.

There is a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream, and the rights of later applicants for water are subordinate to those of prior consumers, which, when exercised in full, exhaust the carrying capacity of the canal.—*Gerber v. Nampa etc. Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104.

Evidence showing the use of drain or waste water, or water primarily belonging to a prior consumer under a canal system, does not establish a dedication of water direct from the canal to the lands of such user.—*Gerber v. Nampa etc. Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104.

The Twin Falls L. & W. Co. was a Utah corporation organized to handle a Carey act project known as the Twin Falls South Side project. The state land board contracted with the corporation for the construction of a system of irrigation works for the reclamation of the land included in said project. In accordance with said contract, the Twin Falls Canal Company was organized under the laws of Idaho to take over the canal system and water rights of the Utah corporation, and to operate and hold the same in trust for the settlers and land owners within said project. Under the contract, the Utah corporation agreed to sell water for the reclamation of lands owned by the state and embraced within the project. Pursuant to its contract with the state, the Utah company transferred all its holdings and water rights to the Idaho company, and also 42,174.51 shares of stock, representing unsold water rights, there remaining at that time unsold an amount of land sufficient to utilize said water and shares of stock. A purchaser of state land included in the project applied to the canal company for a water right and shares of stock proportionate to the amount of land he owned. The company refused to deliver the water or shares of stock on the ground that

all the water rights had been sold and that there remained no water or water rights available which could be sold to such purchaser. Held, that the canal company should be compelled by mandate to issue to such purchaser the water rights applied for.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

Under the provisions of the contract between the Twin Falls Land and Water Company and the Twin Falls Canal Company, held, that each owner of land in the Twin Falls South Side Project is not entitled to a constant flow of one-eightieth of a second-foot of water per acre, but that the distribution of water from said system was intended to be by "rotation," if necessary.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

Where an irrigation company enters into a contract with the state to construct an irrigation system under the Carey act of Congress (Act Aug. 18, 1894, c. 301, 28 Stat. 372-411) and the laws of the state, and procures the state to place certain land included within said irrigation system on the market, and a person makes a contract with the state for forty acres of such land, and also makes a contract with the irrigation company for water for said land, and makes a payment thereon, and thereafter the irrigation company changes its canals, so that it is unable to furnish water for said tract of land, the correct measure of damages includes such damages as the purchaser has sustained by reason of expenses incurred, labor performed, or any outlay of time which he has made under the contracts after the execution thereof, and which he has suffered by reason of the failure of the company to comply with the terms of the contract, and in addition thereto all payments on the land and water right with interest thereon, but such damages are special and if not pleaded, recovery will be allowed only for the payments made with interest.—*Sommerville v. Idaho Irr. Co.*, 21 Idaho, 546, 123 Pac. 302.

In the operation of a canal under the Carey act and the furnishing of water, held, that the construction company was a quasi public service corporation, and, under the state contract, the construction company was bound to construct its works in accordance with said contract, and damages resulting from a failure to do so may be recovered by the person injured, and if its system was constructed, and it had water, and had notified the settler that it was ready to deliver it, and the settler was thereafter damaged by failure to get it, he may recover his damages.—*Hanes v. Idaho Irr. Co.*, 21 Idaho, 512, 122 Pac. 859.

Although there is no statutory provision providing for rotation in the use of water, contracts providing for rotation will be enforced by the courts.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

A provision of a contract between a construction company and the state that the construction company will sell to persons filing on lands not described therein, but susceptible of irrigation, a water right or share in the

irrigation canal for every acre filed upon, is a specific promise to sell water for state lands included in the irrigation project.—*State v. Twin Falls Canal Co.*, 21 Idaho, 410, 121 Pac. 1039.

Where a canal company mortgages its system, a sale at foreclosure could not deprive the land owner, who has once used and applied the water to his lands, of his constitutional right under Const., article 15, section 4, to continue to receive the water for his land upon payment of reasonable rates and compliance with such equitable terms and conditions as might be imposed.—*Hobbs v. Twin Falls Canal Co.*, 24 Idaho, 380, 133 Pac. 899.

Editorial Notes.

Irrigation, riparian proprietor's right to use for: 20 Am. St. Rep. 225.

11. Regulation of Supply and Use.

Under R. C. 3287, requiring the classification of lands in irrigation districts, it is intended that the irrigation company shall make such classification upon such information as it may be able to obtain, and in fairness, and in accordance with the terms of the statute.—*Brose v. Board of Directors etc. Irr. Dist.*, 20 Idaho, 281, 118 Pac. 504.

The adjustment of land into classes, as required by R. C. 3287, is not a permanent classification unless the water users decide to allow it to remain so.—*Brose v. Board of Directors etc. Irr. Dist.*, 24 Idaho, 116, 132 Pac. 799.

Under R. C. 3287, the canal company is not given the right to ultimately decide the question of priority as between water users. That power remains with the court.—*Brose v. Board of Directors etc. Irr. Dist.*, 24 Idaho, 116, 132 Pac. 799.

Priority in time gives superiority in right to the use of such water in the numerical order of settlements or improvements, and if a dozen or more have water from the same appropriation, and if the ditch owner has the water, as he is presumed to have, there would be no difficulty in this manner of distribution.—*Brose v. Board of Directors etc. Irr. Dist.*, 24 Idaho, 116, 132 Pac. 799.

Although there may be difficulty in the board's classifying the land as required by R. C. 3287, it must classify the land the best it can under such evidence as it has or may be able to obtain.—*Brose v. Board of Directors etc. Irr. Dist.*, 24 Idaho, 116, 132 Pac. 799.

Editorial Notes.

Priority of right to use of water of irrigation company: Ann. Cas. 1913D, 625.

12. Tolls and Other Charges for Water.

Fixing of water rates by commissioners, constitutionality of the law. See Constitutional Law, VI, VII, XI, XII.

Water rents and other charges for use of water for domestic and municipal uses. See ante, IX, (A), 10.

Under the constitution and statutes of the state, relating to waters and water rights,

the district court is authorized to say, upon proper hearing, what are reasonable terms and what is a reasonable compensation to be paid for water appropriated and taken out to or above the land of the person desiring to use it.—*Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 134.

Const., article 15, section 6, provides that the legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful purpose. Laws 1897, page 52, provides that it shall be unlawful to charge a higher price than sixty-two dollars and fifty cents per cubic foot per second, continuous flow, for water for any irrigating season. Held, that the legislature was impliedly prohibited from fixing reasonable maximum rates and therefore Laws 1897, page 52, is unconstitutional.—*Wilson v. Perrault*, 6 Idaho, 178, 54 Pac. 617.

R. S. 3203 provides that the water-master of an irrigation district may make a fair pro rata assessment of labor and materials against the inhabitants of the district claiming the use of such water, for repairs, etc.; and in case of refusal such pro rata may be recovered in cash with costs, in an action by the water-master. Laws 1899, page 382, provides that any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof shall furnish water for irrigation purposes upon proper demand and reasonable security being given for the payment thereof. Held, that a canal or ditch company had a proper remedy under the statute for the recovery of arrears by an action at law, and that it could not enforce payment of arrearages for a previous year by a rule that it would not supply water until arrearages for the previous year were paid.—*Shelby v. Farmers' etc. Ditch Co.*, 10 Idaho, 723, 80 Pac. 222.

Laws 1899, page 382, requiring canal or ditch company to furnish water for irrigation purposes on proper demand and on security being given for the payment of the water, does not repeal R. S. 3203, allowing the water-master to recover the pro rata expense of maintenance and repair by action at law.—*Shelby v. Farmers' etc. Ditch Co.*, 10 Idaho, 723, 80 Pac. 222.

R. C. 3288 authorizes parties to contract with reference to the delivery of water from a reservoir or canal and to fix and determine the amount to be charged as an annual maintenance fee therefor.—*Jackson v. Indian Creek etc. Irr. Co.*, 16 Idaho, 430, 101 Pac. 814.

Const., article 15, section 6, authorizing the legislature to provide by law the manner in which reasonable maximum rates may be established for the use of water, clearly authorizes R. C. 3288, which provides that the annual maintenance charge for the use of the water sold, rented or distributed may be fixed by contract.—*Jackson v. Indian Creek etc. Irr. Co.*, 16 Idaho, 430, 101 Pac. 814.

Lot owners in a city who have become entitled to the use of water from an irrigation system cannot be compelled to pay for the company's system, nor can they be denied water for the reason that its delivery has been made more expensive or more burdensome to the company.—*City of Nampa v. Nampa etc. Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979.

The giving of the notice prescribed by R. C. 1628, requiring Carey act irrigating companies to notify the settler when water is ready for delivery under the contract and law serves to fix the time within which the settler must cultivate and reclaim his land, and also fixes the time, if water is furnished, when interest shall begin on deferred payments on his water contract, and it was the duty of the construction company to furnish the water after it had given the notice.—*Hanes v. Idaho Irr. Co.*, 21 Idaho, 512, 122 Pac. 859.

That provision of the state contract which authorizes the irrigation company to charge and assess the purchasers of water rights in said system not to exceed thirty-five cents per acre per season for each acre of land for which a water right has been purchased for maintenance purposes does not require the purchaser of a water right to pay such maintenance fee or charge until the same has been fixed by the company.—*Hanes v. Idaho Irr. Co.*, 21 Idaho, 512, 122 Pac. 859.

Under R. C. 3297, a water rate established by the board of county commissioners cannot be changed within one year from the time when such rate was fixed; and under R. C. 3294, at any time after the expiration of one year from the time rates were established by the board of commissioners, any party or parties interested in either furnishing or delivering water for compensation, or any consumer, may petition the board of commissioners to fix a new maximum rate of compensation for water thereafter delivered from any given ditch, canal or conduit within the county.—*Green v. Jones*, 22 Idaho, 560, 126 Pac. 1051.

A water rate was duly and regularly fixed by a board of commissioners for the year 1901, and after being attacked by the canal company upon the ground that the rate was too low, the order of the board of commissioners fixing such rate was subsequently affirmed and approved by the court. In 1903 the company petitioned the board to establish a new rate, and the board of commissioners after a hearing established the same rate that had been established in 1901, and upon application of the canal company such rate was vacated and set aside by the court as being too low. No further action was taken by the board of commissioners, and the matter was not further called to the attention of the board by the canal company. Held, that the old rate established in 1901 remained in force and effect until a new rate was established, and that the canal company could not charge and collect from water consumers an additional water rate established and exacted by such company which was in excess

of the rate established by order of the board of commissioners in 1901.—*Green v. Jones*, 22 Idaho, 560, 126 Pac. 1051.

Where a water rate has once been fixed by a board of county commissioners in conformity with the statute, and the means is provided by the statute whereby the water or canal company may apply to have a new rate established at any time they deem the old rate insufficient, the canal or water company is relegated to such remedy, and, after having a new rate fixed by the board set aside on the ground that it is too low and unreasonable, it may not establish its own water rate to be charged consumers, but must go to the board of commissioners to have its petition again considered and a reasonable rate established.—*Green v. Jones*, 22 Utah, 560, 126 Pac. 1051.

Editorial Notes.

State regulation of rates of irrigation company: 12 L. R. A., N. S., 711.

13. Injuries Incident to Supply or Use.

In cases of supply for domestic or municipal purposes. See ante, IX, (A), 11.

A person owning a ditch from which water escapes upon the premises of the adjoining owner, allowing such water to continue to escape from his ditch after notice, without any effort to prevent the same, cannot escape liability for damages done thereby on the ground that the adjoining land owner might, at a slight expense, have prevented any damage by digging a ditch on his land that would have conducted said water off his premises.—*McCarty v. Boise City Canal Co.*, 2 Idaho, 245, 10 Pac. 623.

In an action to recover damages occasioned by the negligent and unworkmanlike manner in which a ditch was constructed and managed, it was error to strike or reject testimony showing as part of the mismanagement the voluntary opening of a waste-gate to turn off the water from said ditch in order to relieve breaks therein.—*Stuart v. Noble Ditch Co.*, 9 Idaho, 765, 76 Pac. 255.

Under a complaint claiming damages because of the negligent construction and management of a ditch, evidence to show that a ditch-walker of defendant voluntarily opened a waste-gate to relieve the ditch, thereby causing the damage complained of, should not be rejected on the ground that such act was willful and without authority.—*Stuart v. Noble Ditch Co.*, 9 Idaho, 765, 76 Pac. 255.

A ditch company is liable for damages resulting from the opening of a waste-gate to relieve the ditch by one of its ditch-walkers. *Stuart v. Noble Ditch Co.*, 9 Idaho, 765, 76 Pac. 255.

The fact that plaintiff was a director in defendant ditch company will not estop him from claiming damages sustained by the careless management of defendant's ditch, unless it is shown that such careless management was with his consent and knowledge.—

Stuart v. Noble Ditch Co., 9 Idaho, 765, 76 Pac. 255.

A member of the board of directors of a ditch company who participates in and approves of the manner in which its canal is planned, located and constructed is estopped to claim damages for injury resulting from the negligent locating, planning or construction of such ditch.—*Stuart v. Noble Ditch Co.*, 9 Idaho, 765, 76 Pac. 255.

A member of the board of directors of a ditch company who participates in and consents to the location and construction of its ditch is not estopped from recovering damages sustained by seepage therefrom after the company's failure to repair the ditch within a reasonable time after notice that the seepage was injuring his land.—*Stuart v. Noble Ditch Co.*, 9 Idaho, 765, 76 Pac. 255.

Under the Carey land act of Congress (Act Aug. 18, 1894, c. 301, sec. 4, 28 Stat. 372-422 [U. S. Comp. Stats. 1901, p. 1554]) and the statutes of the state in regard thereto, a plan or scheme is provided for the reclamation of desert lands; and where a construction company has entered into a contract with the state to construct an irrigation system for the reclamation of certain lands, and has agreed to organize an operating company to which said system and the water connected therewith shall be transferred, to be held for the settlers upon the lands included within said system, and has also reserved the right to furnish water to settlers prior to the time that said system is transferred to the operating company, and the construction company notifies the settler that it will furnish water for an irrigation season beginning on the first of April and the settler prepares his land and purchases fruit trees and sets them out on said land, and the company fails to furnish water in accordance with its contract, it is liable for the damages sustained by the settler.—*Hanes v. Idaho Irr. Co.*, 21 Idaho, 512, 122 Pac. 859.

The measure of damages for the destruction of apple trees for want of water, which have been planted and in a condition to grow, is what such destroyed trees were worth on the premises in their growing state at the time of the destruction, and in determining that question there may be taken into consideration the difference in the value of the land immediately before the trees were planted, and the value of the land after the trees were planted, which increased value results wholly by reason of the planting of the trees in a growing condition, and not an increase in the value of the land occasioned by anything else.—*Hanes v. Idaho Irr. Co.*, 21 Idaho, 512, 122 Pac. 859.

14. Injuries to Canals, Ditches or Other Works or Appliances.

Where, in an action to restrain interference with plaintiff's water ditch and for damages, the court fails to find the capacity of the ditch, or its cost, or the interest of each

party therein, or as to the waste alleged, the findings are not responsive and are insufficient to sustain a judgment.—*Bowman v. Ayres*, 2 Idaho, 305, 13 Pac. 346.

Editorial Notes.

Right of user of water to damages for injury to or obstruction of irrigation ditch: *Ann. Cas.* 1913E, 106.

(C) MINING, MECHANICAL AND MANUFACTURING PURPOSES.

Pollution of stream and deposit of poisonous waste from mines on lands of riparian owner. See ante, II, (A). See, also, ante, VI, (O), 2.

In an action for damages for an alleged injury by defendants to the ditch and dam of plaintiffs, the court properly found as a conclusion of law that "the plaintiffs have the right to convey said water over the mining ground of defendants, by ditch and flume, to their mining ground below; subject, however, to the right of defendants to work their mining ground over which said ditch runs, doing no unnecessary damage; subject, also, to the defendants' right to recover damages for such easement, if any occurred."—*Riborado v. Quang Pang Min. Co.*, 2 Idaho, 144, 6 Pac. 125.

X. ICE.

(No paragraphs.)

WEAPONS.

See Homicide.

Assault with deadly weapon. See Assault and Battery.

Necessity that gun be loaded to constitute assault. See Assault and Battery.

For a person to arm himself with dangerous weapons and carry them to the place of the robbery with which he is charged, with intent to kill if resisted, is the "use of dangerous weapons" and an indictment so charging is sufficient.—*United States v. Mays*, 1 Idaho, 763.

Laws 1889, page 27, prohibiting the carrying of deadly weapons within any city, town or village but not specifying concealed weapons, is in conflict with the second amendment of the federal constitution and with Idaho Const., article 1, section 11, giving the right to the people to bear arms for their security and defense.—*In re Brickey*, 8 Idaho, 597, 101 Am. St. Rep. 215, 1 *Ann. Cas.* 55, 70 Pac. 609.

Editorial Notes.

Arms, prohibitions against keeping certain weapons, when valid: 14 Am. Rep. 380.

Arms, validity of statute against carrying concealed weapons: 25 Am. Rep. 561.

Arms, constitutional right to keep and bear: 115 Am. St. Rep. 199.

Right to bear arms: *Ann. Cas.* 1913B, 333.

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What are weapons within offense of carrying concealed weapons: 34 L. R. A., N. S., 1174.

WEIGHTS AND MEASURES.

Form of verdict in criminal prosecution. See Criminal Law, XII, (K).

WHARVES.

Rights and liability of riparian owners. See Navigable Waters.

WILLS.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

II. TESTAMENTARY CAPACITY.

III. CONTRACTS TO DEVISE OR BEQUEATH.

IV. REQUISITES AND VALIDITY.

V. PROBATE, ESTABLISHMENT AND ANNULMENT.

VI. CONSTRUCTION.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

See Descent and Distribution; Executors and Administrators.

Inheritance tax. See Taxation.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

Right of homestead entryman to devise so as to cut off adult heirs. See Public Lands, II, (M).

II. TESTAMENTARY CAPACITY.

Under the statutes of this state, a married woman is not empowered to make a holographic will.—*Scott v. Harkness*, 6 Idaho, 736, 59 Pac. 556.

Editorial Notes.

Married women, power of to make will: 57 Am. Dec. 340.

Right of wife under statute removing disabilities of married women to devise property held by her husband and herself as joint tenants: 7 L. R. A., N. S., 701.

III. CONTRACTS TO DEVISE OR BEQUEATH.

(No paragraphs.)

IV. REQUISITES AND VALIDITY.

Where a widower made a will and subsequently remarried, such marriage operated as a revocation of the will, since a new moral and testamentary duty thereby arose in favor of the wife, she having no dower under our statutes.—*Morgan v. Ireland*, 1 Idaho, 786.

Where a testator has willed his property to his wife, no presumption of the exercise of undue influence arises by reason of the relation existing between the testator and his wife or that the wife had opportunity to exer-

cise such influence.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

The declarations of a testator made after the execution of a will, showing his dissatisfaction therewith and his feelings toward his wife and children, are not admissible to show that the will was executed under undue influence.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

A will cannot be impeached by any subsequent oral declarations of the testator.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

Evidence in a will contest held to show that the signature attached to exhibit 1 was the genuine signature of testator.—Head v. Nixon, 22 Idaho, 765, 128 Pac. 557.

The evidence held to show that will exhibit A was executed on January 16th in the forenoon, and codicil attached thereto was executed on the 17th about 11 or 12 o'clock, and that will exhibit 1 was executed on the 17th about 1:20 o'clock in the afternoon, and the later will contained a revocation of all former wills, and that such exhibit 1 was the last will and testament of the testator, and such will exhibit 1 is shown to have been executed in due form, and the testator was in sound mind and capable of making a will, and that undue influence was not used, or fraud shown in procuring the signature in such execution, and the later will revokes the provisions of the first will and the codicil attached thereto.—Head v. Nixon, 22 Idaho, 765, 128 Pac. 557.

Editorial Notes.

Declarations of testators, admissibility of in controversies respecting wills: 3 Am. Dec. 395; 107 Am. St. Rep. 459.

Revocation of wills by implication: 15 Am. Dec. 659.

Undue influence which will invalidate wills: 16 Am. Dec. 257.

Declarations of testator to impeach or invalidate will: 52 Am. Dec. 167; 62 Am. Dec. 80.

Codicils to wills, what are and construction and effect of: 55 Am. Dec. 126.

Revocation of wills by marriage: 80 Am. Dec. 516; 5 L. R. A. 346; 7 L. R. A. 488.

Revocation of wills by marriage of a woman: 49 Am. Rep. 329; Ann. Cas. 1913A, 218.

Revocation of wills: 28 Am. St. Rep. 344.

Revocation of will by marriage and birth of issue: 7 Ann. Cas. 786.

Form of will: 41 L. R. A., N. S., 39.

Undue influence of draftsman or person active in procuring execution of will: 28 L. R. A., N. S., 270.

V. PROBATE, ESTABLISHMENT AND ANNULMENT.

Appointment of guardian ad litem for infant in will contest. See Infants.

Necessity of demand for jury on appeal in will contest. See Jury, II.

Right of guardian to charge costs and expenses of appeal against estate of ward. See Guardian and Ward.

The opinion of a subscribing witness to a will as to testator's competency, based on what such witness had heard subsequent to the execution of the will, should not be admitted in evidence in a suit contesting the will.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

In a suit to contest a will, a special finding of the jury that the testator was competent is in conflict with findings that the testator was laboring under an insane delusion and was not of sound and disposing mind.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

A finding that a will was made under duress and under influence presupposes testamentary capacity and a sound and disposing mind.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

Where an attesting witness attempts to impeach a will, his evidence will be received with suspicion and with the utmost caution.—Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295.

The evidence in a will contest being substantially conflicting as to testator's competency to make a will, the judgment of the trial court will not be disturbed on appeal.—Pine v. Callahan, 8 Idaho, 684, 71 Pac. 473.

Where a will appears to be legal and fair upon its face, and by the terms of the will the testator has named a guardian for his minor children, it is within the scope of the guardian's power and authority to pursue reasonable methods for the proof and probate of that instrument, and to incur necessary expenses therein.—In re Brady, 10 Idaho, 366, 79 Pac. 75.

Under R. S. 4831, an order of the probate court refusing to admit a will to probate is an appealable order.—In re Paige, 12 Idaho, 410, 86 Pac. 273.

An application to amend an undertaking on appeal to the district court must be made before a motion to dismiss the appeal has been granted.—In re Paige, 12 Idaho, 410, 86 Pac. 273.

Where a motion to dismiss an appeal from the probate court on the ground of defects in the undertaking does not specify the particular defects complained of but is presented and argued by counsel as if sufficient, the question of the sufficiency of the specification cannot be raised for the first time on appeal to the supreme court.—In re Paige, 12 Idaho, 410, 86 Pac. 273.

Under Laws 1903, page 372, an undertaking on appeal from the probate court to the district court providing that the appellant will pay all damages and costs which may be awarded against him "on a dismissal thereof," is insufficient.—In re Paige, 12 Idaho, 410, 86 Pac. 273.

Where the evidence introduced upon the probate of a will shows that R. C. 5727 has been complied with, such proof is sufficient to show due execution of the will, and entitles such will to be probated as the last will of the testator in the absence of a contest or a showing to the contrary.—*Head v. Nixon*, 22 Idaho, 765, 128 Pac. 557.

Where a petition for probate of a will and a contest are tried at the same time, the proponent should first present his preliminary proof in support of his petition, on which he has the burden of proof; and, when other evidence is also introduced in favor of the contestant, the burden of proof then shifts to the contestant.—*Head v. Nixon*, 22 Idaho, 765, 128 Pac. 557.

Where a contest is filed in the probate court in opposition to the probate of a will presented for probate, and upon the hearing proof is offered by the proponent of the will showing a due execution of such will, the burden of proof is upon the contestant to disprove the prima facie case made by the proponent, in order to defeat the probate of the will presented for probate.—*Head v. Nixon*, 22 Idaho, 765, 128 Pac. 557.

Where it appears that the order admitting a will to probate was filed and entered on the twenty-third day of April, 1910, and the petition to revoke said will is filed on April 22, 1911, the petition to revoke is filed in accordance with R. C. 5318, requiring such petition to be filed within one year from probate of the will.—*Hagan v. Sullivan*, 24 Idaho, 19, 132 Pac. 106.

Editorial Notes.

Burden of proof in contests of probate of wills: 31 Am. St. Rep. 681.

Appealable judgments or orders in probate or administration proceedings: Ann. Cas. 1913C, 850.

VI. CONSTRUCTION.

Where a contingency named in a will upon which an absolute estate may vest in one devisee as against another is unlimited as to time, and is such a contingency as may never occur either prior or subsequent to the death of the testator, and may also occur at any time, the contingency should not be limited by construction to the period prior to the death of the testator, so as to exclude therefrom the possibility of that contingency happening during the period subsequent to the death of the testator and prior to the death of the devisee.—*Wilson v. Linder*, 18 Idaho, 438, 138 Am. St. Rep. 213, 110 Pac. 274.

A testator provided by a will as follows: "My son Jesse shall have the home place. (Here follows a description of the property.) . . . But should my son Jesse die without any wife or children, the property herein conveyed to him shall be equally divided between my other four children, or their heirs, share and share alike." Held, that the devisee, Jesse, took a limited estate only, sub-

ject to the vesting of an absolute and fee-simple title on his leaving surviving him at the time of his death a wife or child, and that the remaindermen had only an expectancy, which might be vested in them as an absolute estate upon the contingency of Jesse dying without either wife or child.—*Wilson v. Linder*, 18 Idaho, 438, 138 Am. St. Rep. 213, 110 Pac. 274.

Where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away, or diminished by any subsequent vague or general expressions in the will.—*Wilson v. Linder*, 18 Idaho, 438, 138 Am. St. Rep. 213, 110 Pac. 274.

The cardinal rule of construction of a will is to ascertain the testator's intent; and such intent is to be ascertained from a full view of everything within the instrument.—*Jones v. Broadbent*, 21 Idaho, 555, 123 Pac. 476.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

Where a will gave testator's wife a life estate in all his real and personal property, with remainder to his son and to his heirs and assigns forever, the son could transfer to his mother all the property and rights to be acquired by him under the will.—*Coats v. Harris*, 9 Idaho, 458, 75 Pac. 243.

WITNESSES.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS AND COMPENSATION.

II. COMPETENCY.

- (A) Capacity and Qualifications in General.
- (B) Parties and Persons Interested in Event.
- (C) Testimony of Parties or Persons Interested, for or Against Representatives, Survivors or Successors in Title or Interest of Persons Deceased or Incompetent.
- (D) Confidential Relations and Privileged Communications.

III. EXAMINATION.

- (A) Taking Testimony in General.
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IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION AND CORROBORATION.

- (A) In General.
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- (D) Inconsistent Statements by Witness.
- (E) Contradiction and Corroboration of Witness.

See Depositions; Evidence.

Absence as ground for continuance. See Continuance.

Presumption arising from causing witness to be absent. See Evidence, II.

Power of probate court to punish witness for contempt in refusing to answer questions on deposition. See Contempt.

Right of parties to explain admissions. See Evidence, VII.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS AND COMPENSATION.

Fees of physician testifying at coroner's inquest. See Coroners.

Taxation as fees and mileage. See Costs, V, VI.

Under R. S. 6139, prescribing the fees of witnesses in the district court, the fact that two of the witnesses for plaintiff were related to him as wife and mother respectively does not prevent their fees from being taxed in the cost bill.—Griffith v. Montandon, 4 Idaho, 75, 35 Pac. 704.

Where a trial lasts for more than one day and a witness is subpoenaed to be present at the trial, and makes arrangements to be called when needed, and is not in actual attendance on the trial except on the day he testifies, such witness is entitled to per diem compensation for one day only.—Griffith v. Montandon, 4 Idaho, 75, 35 Pac. 704.

A sheriff has no right to serve a subpoena in another county at the expense of his own county, the proper procedure being to send the subpoena for service by the sheriff of the county in which the witness is.—Clyne v. Bingham County, 7 Idaho, 75, 60 Pac. 76.

A subpoena duces tecum is the usual method of requiring the production of a paper on the trial of a case.—Murphy v. Russell & Co., 8 Idaho, 133, 67 Pac. 421.

The wife of a litigant is entitled to mileage and per diem as a witness the same as any other witness.—Anderson v. Ferguson-Bach Sheep Co., 12 Idaho, 418, 10 Ann. Cas. 395, 86 Pac. 41.

Under R. S. 6039, a witness who resides in an adjoining county, and more than thirty miles from the place of trial, is not obliged to attend in response to a subpoena, but if such witness does attend and testify, he is entitled to his mileage within the state.—Anderson v. Ferguson-Bach Sheep Co., 12 Idaho, 418, 10 Ann. Cas. 395, 86 Pac. 41.

An objection to the allowance of witness' fees and mileage for the distance traveled within the state based on the ground that the witness resided in another state and that his deposition could have been taken at small expense and that the cost made was unnecessary, was properly overruled.—State v. Baird, 13 Idaho, 126, 89 Pac. 298.

Editorial Notes.

Right of witness detained in custody for future appearance to recover fees for period of detention: Ann. Cas. 1912C, 809.

Right of nonresident witness to mileage and per diem from residence to place of trial: 7 Ann. Cas. 163; 10 Ann. Cas. 397.

Right of state to require service of witness without compensation: 39 L. R. A. 116.

II. COMPETENCY.

Competency and examination of experts. See Evidence, XII.

(A) CAPACITY AND QUALIFICATIONS IN GENERAL.

Attorneys should offer themselves as witnesses for their clients only in case of extreme necessity.—Sebree v. Smith, 2 Idaho, 359, 16 Pac. 915.

Where, in a criminal case, a witness, alleged to be incompetent on the ground of insanity, is found to be sane by the probate court on the testimony of four examining physicians, it is not error to permit such witness to testify in behalf of the state.—State v. Gilbert, 8 Idaho, 346, 1 Ann. Cas. 280, 69 Pac. 62.

The fact that an information for rape charges defendant with having had carnal knowledge of a female who was at the time of unsound mind and incapable of giving consent does not per se establish the incompetency of such female to testify against the accused.—State v. Simes, 12 Idaho, 310, 9 Ann. Cas. 1216, 85 Pac. 914.

Under R. S. 5957, providing that persons "of unsound mind at the time of their production" cannot be witnesses, a person who can apprehend the obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent to testify, though he may be afflicted with some form of insanity.—State v. Simes, 12 Idaho, 310, 9 Ann. Cas. 1216, 85 Pac. 914.

Where objection is made to a witness testifying on the grounds of incompetency, it is the duty of the court to make such examination as will satisfy the court on the question of the competency of the witness and thereupon rule on the objection.—State v. Simes, 12 Idaho, 310, 9 Ann. Cas. 1216, 85 Pac. 914.

The examination of a person offered as a witness for the purpose of testing his competency should be made with special reference to the scope of inquiry and subject matter about which the witness is to testify.—State v. Simes, 12 Idaho, 310, 9 Ann. Cas. 1216, 85 Pac. 914.

A witness who has seen a person write on several occasions is competent to testify as to his handwriting.—State v. Bond, 12 Idaho, 424, 86 Pac. 43.

A witness who testifies as to the value of an animal need not show himself to be an expert as to the value of animals.—McKissick v. Oregon etc. Ry. Co., 13 Idaho, 195, 89 Pac. 629.

Editorial Notes.

Incompetency of witnesses through insanity, intoxication or absence of memory: 35 Am. Rep. 291.

Competency of insane person as witness: Ann. Cas. 1913E, 323; 37 L. R. A. 423; 39 L. R. A. 265.

Competency and propriety as witness of attorney trying his own case: Ann. Cas. 1913B, 711.

(B) PARTIES AND PERSONS INTERESTED IN EVENT.

Competency to testify as to transactions with persons since deceased. See post, II, (C).

(C) TESTIMONY OF PARTIES OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.

A telegram from P. to M., whom P. had employed to perform certain services, containing these words, "I will leave in about a week direct for the mine," is admissible in an action by M. against the administrator of P. for the value of such services, as tending to prove that the relations of employer and employee existed at the date of the telegram.—*Meinert v. Snow*, 3 Idaho, 112, 27 Pac. 677.

Under R. S. 5957, subdivision 3, providing that parties in an action against an executor or administrator, on a claim or demand against the estate of a deceased person, are incompetent to testify as to any matter of fact occurring before the death of such deceased person, the plaintiff in an action to establish a resulting trust in lands of a deceased person, is incompetent to testify as to an alleged contract made with deceased regarding the land in controversy.—*Nasholds v. McDonnell*, 6 Idaho, 377, 55 Pac. 894; overruled by *Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290.

Where money is received on deposit in a bank in the name of the daughter of the depositor, with the agreement that the depositor may draw such deposit on checks signed by him, in an action by the daughter for the money so drawn out, the cashier may testify to the terms of the deposit agreement, though the person with whom it was made is dead, since the suit is not one against the estate of a deceased person.—*Greene v. Bank of Camas Prairie*, 7 Idaho, 576, 64 Pac. 888.

R. S. 5957, subdivision 3, makes incompetent as witnesses "parties or assignors of parties to any action or proceeding or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." Held, that in proceedings for the distribution of his mother's estate, a son cannot testify as to a trust agreement between himself and his mother as to property conveyed to her by him.—*Coats v. Harris*, 9 Idaho, 458, 75 Pac. 243.

In an action of claim and delivery for a band of sheep, the record showed that plain-

tiff had leased certain sheep to D., since deceased; that D. had recognized plaintiff's ownership and paid the yearly rentals under the lease; that D. had executed mortgages on certain sheep, claimed by plaintiff, and that after D.'s death, defendant took possession of the sheep as assignees of the mortgagees. Held, that declarations of D. while in possession of the sheep, that he was the owner thereof were admissible for defendants as a part of the *res gestae*.—*Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228.

In an action of claim and delivery for a band of sheep, the record showed that plaintiff had leased certain sheep to D., since deceased; that D. had recognized plaintiff's ownership and paid the yearly rentals under the lease; that D. had executed mortgages on certain sheep and that after D.'s death, defendants took possession of the sheep as assignees of the mortgagees. D.'s administrator was made a party to the action and denied that the sheep belonged to plaintiff. Held, that plaintiff was not precluded from testifying under R. S. 5975, subdivision 3, which provides that the following persons cannot be witnesses, to wit: Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against an executor or administrator, as to any matter of fact occurring before the death of such deceased person.—*Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228.

Editorial Notes.

Competency of coparty of decedent's representative to testify as to transaction with decedent: 17 Ann. Cas. 216.

Competency of interested witness to testify as to transactions with deceased in which he did not participate: 29 L. R. A., N. S., 1179; 42 L. R. A., N. S., 320.

(D) CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS.

R. S. 5958 provides that a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent. Held, in an action against two defendants for conspiracy to defraud, that the wife of one of the defendants might be examined as a witness on the part of the plaintiff, under instructions by the court that her testimony was only to be considered as against the codefendant of her husband.—*Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405.

The acts of an attorney, when relevant to the issue, do not come within the doctrine of privileged communications, though such acts are induced by communications of the client to his attorney.—*State v. Perry*, 4 Idaho, 224, 38 Pac. 655.

Confidential communications between attorney and client are privileged, and neither client nor his attorney can be compelled to

reveal them, but such communications being overheard by a third party, either by accident or design, such third party can be compelled to testify to them.—*State v. Perry*, 4 Idaho, 224, 38 Pac. 655.

Communication between a conveyancer or friendly adviser and the grantor or grantee are not privileged communications under R. S. 5958, subdivision 2, relating to privileged communication between attorney and client. *Later v. Haywood*, 12 Idaho, 78, 85 Pac. 494.

Where, in an application for a life insurance policy, the applicant stipulates and agrees that he waives all provisions of law preventing a physician from testifying as to any information acquired by him as his physician as prescribed in R. S. 5958, such waiver is valid, and entitles the beneficiary named in the policy, as well as the insurer, in an action on a policy issued on such application, to call and examine the physician who attended the insured during his last sickness and have him answer questions which, but for such waiver, would be regarded as privileged communications under such statute. *Trull v. Modern Woodmen of America*, 12 Idaho, 318, 85 Pac. 1081.

Communications received by an attorney in the course of his legal employment by his client, and for the purpose of giving him legal advice thereon, or using the same in connection with his legal engagement with the client, are privileged, but before an attorney can be excused from producing the same under this claim of privilege, he must show that the communication falls within the rule of the statute.—*In re Niday*, 15 Idaho, 559, 98 Pac. 845.

Where an attorney declines to answer a question or produce letters or documents on the ground that the same are privileged, the burden is on him to show sufficient facts and circumstances to establish the privileged character of the communications or documents.—*In re Niday*, 15 Idaho, 559, 98 Pac. 845.

Petitioner, adjudged guilty of contempt, was general attorney for S., and while acting as such attorney received letters from a third person, which letters had been written by S. to such third person concerning business involved in subsequent litigation. It did not appear that petitioner was employed through the agency of such third person or that such third person had been directed to submit the letters to petitioner for his information and advice or for his legal opinion thereon or for use in litigation, or upon which to render an opinion or legal advice to S.; nor did it appear that such third person was the agent of S. either for the purpose of employing an attorney or procuring legal advice for S., or concerning the latter's business. Held, that petitioner had not made a sufficient showing to entitle him to refuse to produce the letters or to claim them as privileged communications.—*In re Niday*, 15 Idaho, 559, 98 Pac. 845.

The plaintiff may, under R. C. 5958, subdivision 4, waive her right to secrecy in re-

spect to one of her physicians; but such waiver does not operate as a waiver of her right to object to the testimony of another of her physicians called by the defendant.—*Jones v. City of Caldwell*, 20 Idaho, 5, 116 Pac. 110.

Where the attending physician deems a surgical operation necessary upon his patient, and another physician or surgeon is called to assist in the performance of the operation, and actually performs the operation or assists therein, upon a trial which brings in issue the facts and circumstances which led up to and rendered necessary the operation, any information acquired by the attending physicians at the operation or subsequently acquired by examination of the parts removed by the operation is privileged information under R. C. 5958, and cannot be given in evidence without the consent of the patient.—*Jones v. City of Caldwell*, 23 Idaho, 467, 130 Pac. 995.

The fact that certain information was gathered from examination and inspection of the injured or diseased parts removed by the operation a considerable time after the operation had been performed, and the physician had acted and prescribed for the patient, does not change the privileged character of the information and permit the physician to testify concerning the same.—*Jones v. City of Caldwell*, 23 Idaho, 467, 130 Pac. 995.

Editorial Notes.

Husband and wife, when may be permitted to testify as to matters criminalizing each other: 27 Am. Dec. 377; 106 Am. St. Rep. 763; 2 L. R. A., N. S., 862; 22 L. R. A., N. S., 240; 41 L. R. A., N. S., 1213.

Husband and wife, when may testify against each other: 24 Am. St. Rep. 663.

Privileged communications, attorneys, what may not testify to: 36 Am. Rep. 631; 66 Am. St. Rep. 213.

Physicians, when may not testify: 17 Am. St. Rep. 565.

Rule of privileged communications as applicable to physician performing autopsy: Ann. Cas. 1913C, 689.

Necessity that communication to attorney, to be privileged, be in regard to subject matter of employment: 4 Ann. Cas. 531.

Competency at common law of one spouse to testify for or against codefendant of other spouse: 4 Ann. Cas. 17.

III. EXAMINATION.

Expert evidence as to custom, limitation of rebuttal evidence. See *Banks and Banking*, III, (C).

(A) TAKING TESTIMONY IN GENERAL.

The court has discretion to permit leading questions, and its action therein will not be disturbed unless an abuse of such discretion is shown.—*McLean v. Lewiston*, 8 Idaho, 472, 69 Pac. 478; *McClain v. Lewiston etc. Racing*

WITNES

Assn., 17 Idaho, 63, 25 L. R. A., N. S., 69
20 Ann. Cas. 60, 104 Pac. 1015.

It is within the discretion of the trial court to allow the prosecution to recall certain witnesses in regard to matters claimed not to be strictly rebuttal.—State v. Ellington, 4 Idaho 529, 43 Pac. 60.

It is not error to permit a witness to explain a portion of his testimony or to correct any mistake he may have made.—Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545.

Under R. S. 6081, providing that after the examinations on both sides are concluded, the witness cannot be recalled without leave of court, and leave is granted or withheld in the sound discretion of the court, the court may, upon a proper showing, permit a defendant to be recalled by the state for further cross-examination after both the prosecution and defense have rested.—State v. Anthony, 6 Idaho, 383, 55 Pac. 884.

It is not error to permit a leading question to a witness called on impeachment, and then confine the cross-examination to the particular conversation.—State v. Lyons, 7 Idaho, 530, 64 Pac. 236.

It is not error to permit a witness to show on what part of the body of deceased a wound was inflicted by pointing out the corresponding part of his own body.—State v. McGann, 8 Idaho, 40, 66 Pac. 823.

A leading question is one which suggests the answer desired. R. S. 6077.—Idaho Mercantile Co. v. Kalanquin, 8 Idaho, 101, 66 Pac. 933.

In a prosecution for murder a witness for the state, called to testify as to the character of the deceased for peace and quietude, was asked: "What, if any, relation existed between him and you as a miner as to employment?" Held, that such question was not proper on direct examination.—State v. Crea, 10 Idaho, 88, 76 Pac. 1013.

The allowance of leading questions is within the discretion of the court, and there is no abuse of such discretion in permitting leading questions to a witness of weak or unsound mind.—State v. Simes, 12 Idaho, 310, 9 Ann. Cas. 1216, 85 Pac. 914.

Where witnesses are Indians, who understand but very little English, and whose testimony must be taken through an interpreter, greater latitude must be allowed in their examination than in ordinary cases.—State v. Fowler, 13 Idaho, 317, 89 Pac. 757.

Under R. C. 6078, a witness may refresh his recollection by reading evidence given by him upon a former trial, and then testify, if he has an independent recollection of the transaction, to the truth of the transaction or to any fact upon which such reference may refresh his recollection and enable him to speak the truth.—State v. Marren, 17 Idaho, 766, 107 Pac. 993.

A witness has the right to examine and read papers presented to him for identifica-

testified to on his examination in chief, or are intimately connected with something about which he has testified in chief.—*Kroetch v. Empire Mill. Co.*, 9 Idaho, 277, 74 Pac. 868.

On cross-examination in a criminal case, it was proper to ask a witness whether he had not stated shortly after the crime that defendant "was a good fellow and we must fix this thing up for him," for the purpose of testing the credibility of the witness and the interest he was taking in defendant.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

A wide latitude should be allowed in the cross-examination of parties to the suit, but the action of the trial court in sustaining objections to immaterial questions is not prejudicial error.—*Just v. Idaho Canal etc. Co.*, 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Under the Const., article 1, section 13, and R. C. 7357, no person can be compelled in a criminal action to become a witness against himself, and the court should instruct the jury in a proper case that no presumption can be raised against the defendant by reason of his refusal to testify; but, where the defendant voluntarily submits himself as a witness in his own behalf, he may be cross-examined by the state, subject to the same rules and regulations governing cross-examination that apply to other witnesses.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

Where the defendant testified to going to a specified place or city with another, and to spending the night with such person, and gave no further testimony as to his movements, or when he left such place, it was not error to permit the prosecuting attorney on cross-examination to ask the defendant when he left the place to which he and the other party had gone.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

Where a defendant became a witness in his own behalf and testified concerning his early life, and as to his acquaintance with a third party, and concerning a trip taken by him and a party who was afterward murdered, and made no reference to any property owned by the deceased, and no mention of a transaction in which certain property claimed to have belonged to the deceased was pawned, it was error for the court to allow the prosecuting attorney to ask the defendant on cross-examination if he gave a pawn ticket to a third party for certain of the deceased's property.—*State v. Gruber*, 19 Idaho, 692, 115 Pac. 1.

In an action upon a promissory note, where the plaintiff testifies in chief and in support of his complaint that he purchased the note before maturity and paid therefor a consideration, and that the plaintiff was well acquainted with the payee of the note and had been for many years, and that the note purchased was one of a number of the same kind, it is proper on cross-examination to interrogate the plaintiff fully as to all facts connected with the transaction involved in the purchase of said note in order to aid the jury

in determining whether the note was in fact purchased in good faith before maturity and for value.—*Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52.

Where, in an action against a physician for malpractice, defendant is called by plaintiff for cross-examination under Laws 1909, page 334, authorizing same, he may be cross-examined subject to the rules applicable to other witnesses, but plaintiff cannot make out his case in chief by expert opinion evidence secured from defendant on such cross-examination.—*Osborn v. Carey*, 24 Idaho, 158, 132 Pac. 967.

Under Laws 1909, page 334, section 1, providing that the adverse party and certain agents, etc., may be examined as if under cross-examination, a locomotive engineer is not within the meaning of the statute in an action against the railroad company.—*Burrow v. Idaho & W. N. R.*, 24 Idaho, 652, 135 Pac. 838.

Editorial Notes.

Cross-examination of the accused in criminal prosecutions: 38 Am. St. Rep. 895; 15 L. R. A. 669; 30 L. R. A., N. S., 846.

Limiting cross-examination of witness to scope of direct examination: 17 Ann. Cas. 4.

(C) PRIVILEGE OF WITNESS.

The defendant cannot be compelled to testify, but if he voluntarily testifies in his own behalf, he may be cross-examined as to any matters connected with his testimony.—*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.

Where a defendant goes upon the witness-stand in a criminal action, he occupies the same position as any other witness, and therefore it is error to instruct the jury that "It is proper for you to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position in interest may not affect his credibility or color his testimony."—*State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

It is not error to give an instruction in the words of R. S. 8143, "A defendant in a criminal action or proceeding to which he is a party is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding."—*State v. Levy*, 9 Idaho, 483, 75 Pac. 227.

Where two persons are separately charged with a felony, and upon the preliminary examination of one the other is called as a witness on behalf of the prosecution, he may refuse to answer any questions which would tend to incriminate him.—*State v. Bond*, 12 Idaho, 424, 86 Pac. 43.

Editorial Notes.

Privilege of witnesses as to incriminating testimony: 21 Am. Dec. 55; 75 Am. St. Rep. 318.

Privilege of witnesses, waiver of by voluntarily testifying in their own behalf: 19 Am. Rep. 348.

Crimination, cross-examination involving: 27 Am. Rep. 140.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION AND CORROBORATION.

Instruction as to expert testimony. See *Deeds*, IV. No foundation necessary to impeach parties. See *Evidence*, VII.

(A) IN GENERAL.

The rule for the introduction of evidence to contradict a witness is that if the fact to which the contradiction applies is material to the issue, he may be contradicted; but when it is immaterial, and not within the issue, contradictory evidence cannot be introduced.—*People v. Stock*, 1 Idaho, 218.

Impeaching questions should not be permitted unless a proper foundation is laid therefor.—*Whitney v. Cleveland*, 13 Idaho, 558, 91 Pac. 176.

Editorial Notes.

Impeachment of witnesses: 15 Am. Dec. 96, 17 Am. Dec. 76.

Impeachment of witnesses by party calling: 60 Am. Dec. 749; 21 L. R. A. 418.

Collateral and irrelevant matters, inquiry on for the purpose of discrediting witnesses: 88 Am. Dec. 321; 6 Ann. Cas. 715.

(B) CHARACTER AND CONDUCT OF WITNESS.

For the purpose of impeaching the credit of witnesses, the examination must be confined to general reputation and is not permitted as to particular facts.—*People v. Barnes*, 2 Idaho, 161, 9 Pac. 532.

In a criminal prosecution, the question, "You may state if you know whether the prosecuting witness is a truthful girl," was properly refused as being an invasion of the province of the jury.—*People v. Barnes*, 2 Idaho, 161, 9 Pac. 532.

Code of Civil Procedure, section 897, providing that "the credibility of witnesses may be drawn in question by evidence affecting their character for truth, honesty and integrity," is simply declaratory of the common law and establishes no new rule for the impeachment of witnesses.—*People v. Barnes*, 2 Idaho, 161, 9 Pac. 532.

Evidence of the reputation of a witness for peace and quietude is not ordinarily admissible in a prosecution of a defendant charged with homicide.—*State v. McGann*, 8 Idaho, 40, 66 Pac. 823.

Editorial Notes.

Impeaching witnesses by proving want of chastity: 53 Am. St. Rep. 479.

(C) INTEREST AND BIAS OF WITNESS.

It is not competent for the defense in a criminal case to ask an adverse witness if his

employer intends to claim damages against the county for the acts constituting or connected with the offense for which defendant is being prosecuted, as such question does not tend to show the state of mind of the witness toward the defendant.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

It was error to reject evidence showing bias of the witness either for or against defendant.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

On direct examination of a witness called to testify as to the reputation of deceased as to peace, it is not proper to inquire into the relation existing between the witness and deceased.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

It is not error to permit a witness to testify as to his financial interest or lack thereof in the result of the action.—*Steve v. Bonners Ferry Lumber Co.* (on rehearing), 13 Idaho, 384, 92 Pac. 363.

Where a witness was called by the condemnor in condemnation proceedings, and testified to what he considered to be the value of the property sought to be condemned, and that he had advised the owner of the property to settle with the company, it was not prejudicial error to allow the land owner on cross-examination to ask the witness if he had not sold to the plaintiff company his residence which was situated between the center of the city and the property being condemned, and if he had not received the sum of \$25,000 for such property, where it appeared that such was in fact the case. Such evidence was admitted on the theory that it tended to show the prejudice and bias of the witness in favor of the condemning company.—*Idaho-Western Ry. Co. v. Columbia etc. Synod*, 20 Idaho, 568, 119 Pac. 60.

Editorial Notes.

Bias or credibility, evidence admissible to show: 82 Am. St. Rep. 25.

(D) INCONSISTENT STATEMENTS BY WITNESS.

Where a letter written by a witness is introduced for the purpose of discrediting him, it is error to refuse to permit the witness to explain discrepancies between the statements in the letter and his testimony.—*Douglas v. Douglas*, 4 Idaho, 293, 38 Pac. 934.

Under R. S. 6080, providing that the party producing a witness is not allowed to impeach his credit by evidence of bad character, but may contradict him by other evidence or show that he has made statements at other times inconsistent with his present testimony, the evidence given by a witness at a coroner's inquest may be introduced by the prosecution when such evidence is inconsistent with that given on the trial by such witness.—*State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

Questions to the son of defendant, on cross-examination, if he had not stated that he suspected his father of having committed similar

offenses, are improper cross-examination, and should not be allowed under the guise of impeaching questions.—*State v. Irwin*, 9 Idaho, 35, 60 L. R. A. 716, 71 Pac. 608.

Under R. S. 6083, providing that a witness may be impeached by evidence that he has made at other times statements inconsistent with his present testimony, the statement which it is intended to contradict must involve facts in evidence and not the former opinion of the witness relative to the matter in issue.—*State v. Crea*, 10 Idaho, 88, 76 Pac. 1013.

Where a witness is asked if he did not write a certain letter containing certain matter, and objection is made to such question without such witness being shown such letter or given an opportunity to identify the same, it is error for the court to overrule such objection.—*Keane v. Pittsburg Lead Mining Co.*, 17 Idaho, 179, 105 Pac. 60.

A witness can only be impeached by proof of contradictory statements with reference to some fact which becomes material in the case. *Hilbert v. Spokane Int. Ry. Co.*, 20 Idaho, 54, 116 Pac. 1116.

A witness may be impeached by showing that he has made at other times statements inconsistent with his present testimony, but before such contradictory statements may be shown, the proper foundation must be laid therefor in compliance with R. C. 6083.—*Hilbert v. Spokane Int. Ry. Co.*, 20 Idaho, 54, 116 Pac. 1116.

If it be charged that the testimony of a witness is a recent fabrication, and impeaching testimony is admitted for the purpose of showing statements contradictory to those given as a witness, the party calling such wit-

ness against whom such contradictory statements were proved may show by further testimony, other than the witness testifying, that such witness had made statements consistent with those given as a witness if such were made prior to the time fixed when it is claimed the testimony was fabricated.—*State v. Moon*, 20 Idaho, 202, Ann. Cas. 1913A, 724, 117 Pac. 757.

Where a witness on cross-examination is examined as to prior inconsistent statements which are in writing, the writing must first be exhibited to the witness before he is required to answer.—*Osborn v. Carey*, 24 Idaho, 158, 132 Pac. 967.

Editorial Notes.

Impeaching by prior contradictory statements: 73 Am. Dec. 762.

Contradicting party's own witness by proving he has made statements differing from his present testimony: 74 Am. Dec. 398; 21 L. R. A. 418.

(E) CONTRADICTION AND CORROBORATION OF WITNESS.

Where, in a prosecution for violation of the local option statute the defendant had testified on cross-examination that he had received but one shipment of whisky by railroad, it was not error for the court to permit the state to show in rebuttal that he had received other shipments.—*State v. Silva*, 21 Idaho, 247, 120 Pac. 835.

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